IN THE DISPUTE RESOLUTION PANEL AT MELBOURNE
(Constituted for a determination under Rule 8.2 of the National Electricity Rules)

BETWEEN

Origin Energy Electricity Limited (**Origin**)

and

Australian Energy Market Operator Limited (**AEMO**)

and

Lake Bonney Wind Power Pty Ltd, Pacific Hydro Clements Gap Pty Ltd, Snowtown Wind Farm Pty Ltd and Waterloo Wind Farm Pty Ltd (**SA Wind Farm Coalition**)

and

Alinta Energy Retail Sales Pty Ltd (**Alinta**)

and

CS Energy Limited (**CS Energy**)

and

Stanwell Corporation Limited (**Stanwell**)

and others (according to Attachment 1 of the Statement of Agreed Facts)

DETERMINATION

DISPUTE RESOLUTION PANEL:	Peter R D Gray QC, Gregory H Thorpe, and Linda M McMillan
WEMDRA:	Shirli Kirschner Resolve Advisors
DATE OF DETERMINATION:	3 October 2016
HOW OBTAINED:	Adviser referral notice (Stage 2 - dispute resolution process) issued by Origin on 28 April 2016; establishment of, and referral of dispute to, DRP on 15 June 2016; and submissions and material provided by the above named parties under procedural directions no 1 dated 17 June 2016, no 2 dated 15 July 2015, no 3 dated 20 September 2016 and no 4 dated 26 September 2016.

PURSUANT TO CLAUSES 8.2.6D(d)(1) AND 8.2.8(b) OF THE NATIONAL ELECTRICITY RULES, THE DISPUTE RESOLUTION PANEL DETERMINES THAT:

1. *AEMO* is to take the following actions, in the following manner, within the times specified below:

   (a) as soon as is reasonably practicable and in any event within 5 months of this determination, in accordance with the *Rules consultation procedures* set out in rule 8.9 of the National Electricity Rules (***Rules***), *AEMO* is to prepare and make a procedure under clause 3.15.6A(k) of the *Rules*, or to amend the existing procedure it has made under that provision, addressing the circumstances specified in clause 3.15.6A(j)(2) of the *Rules*;

   (b) as soon as is reasonably practicable and in any event within 1 month of making the procedure referred to in paragraph 1(a) of this determination, *AEMO* is to calculate an adjustment of the *settlement amount* in each *settlement statement* issued to a *Market Participant* in respect of a *billing period* which includes the *trading intervals* ended 22:00 and 22:30 on 1 November 2015 where:

      (i) the calculation performed by *AEMO* of any *trading amount* incorporated in the calculation of the *settlement amount* was affected by the allocation of the costs of meeting a *local market ancillary service requirement* for *regulation services* in respect of the South Australia *region* in the *trading interval* ended 22:00 or in the *trading interval* ended 22:30 on 1 November 2015; or

      (ii) if performed by *AEMO* in accordance with the procedure referred to in paragraph 1(a) of this determination, the calculation of any *trading amount* incorporated in the calculation of the *settlement amount* would be affected by the allocation of the costs of meeting a *local market ancillary service requirement* for *regulation services* in respect of the South Australia *region* in the *trading interval* ended 22:00 or in the *trading interval* ended 22:30 on 1 November 2015;

   (c) *AEMO's* actions in calculating the adjustments referred to in paragraph 1(b) are to be performed so that the allocation of the costs of meeting any *local market ancillary service requirement* for *regulation services* in respect

of the South Australia *region* in the *trading intervals* ended 22:00 and 22:30 on 1 November 2015 shall accord with the procedure referred to in paragraph 1(a); and

(d) for the avoidance of doubt, in respect of each adjustment calculated by *AEMO* under paragraphs 1(b) and (c), *AEMO* is then forthwith to follow the requirements of clause 3.15.19 of the *Rules*.

2. The costs of the dispute resolution processes in this dispute (other than legal costs of the parties) are allocated for payment in six equal portions as follows:

(a) one-sixth to Origin;

(b) one-sixth to *AEMO*;

(c) one-sixth to the SA Wind Farm Coalition;

(d) one-sixth to Alinta;

(e) one-sixth to Stanwell; and

(f) one-sixth to CS Energy;

3. There is no order as to the legal costs of the parties.

Date: 3 October 2016

Peter R D Gray QC

liability limited by a scheme approved
under professional standards legislation

Gregory H Thorpe

Linda M McMillan

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SUPPLEMENTARY REASONS FOR DETERMINATION

1. On 2 September 2016 we issued our reasons for determination in this matter, noting in paragraph 202 that before making any determination, we proposed to allow the parties to address us on the proper disposition of the dispute in light of the reasons. On 6 September 2016 we issued corrigenda in relation to our reasons.

2. From about 6 September 2016 to about 19 September 2016 the *Adviser* consulted with the active parties (that is, those named in the heading) on the proper disposition of the dispute including as to costs, and arrangements were made to receive from the active parties any submissions on those issues in writing, by the end of 19 September 2016. On 20 September 2016, those submissions were made available to us. One party then sought an opportunity to make a reply submission, and we directed that submissions in reply from any party wishing to make them be provided by the end of 28 September 2016. We received one such reply submission. We have taken all the submissions into account.

3. The first issue we must decide is the proper form of determination to be made to implement our reasons for determination. As explained in our reasons, and as summarised in paragraph 201 of the reasons:

   (a) save in respect of *trading intervals* 22:00 and 22:30 on 1 November 2015, we have concluded that *AEMO's* calculations did not fail to conform with the requirements of clause 3.15.6A(i) of the *Rules*; and

   (b) in respect of *trading intervals* 22:00 and 22:30 on 1 November 2015, we have concluded that *AEMO* has not performed the requisite calculations in accordance with clause 3.15.6A(i), because for those *trading intervals* in our view *AEMO* was required to apply contribution factors set by *AEMO* in accordance with a procedure made in accordance with clause 3.15.6A(k) and addressing the circumstances specified in clause 3.15.6A(j)(2), and *AEMO* has in our view made no such procedure and has therefore not applied any such contribution factors.

4. In our view, the requirement imposed on AEMO by reference to the definitions of "MPF" in clause 3.15.6A(i)(1) and (2) and by reference to clause 3.15.6A(j) is, in relation to a *trading interval* during which the South Australia *region* operated asynchronously, to perform the calculations required by clause 3.15.6A(i) by reference to contribution factors that have been determined by *AEMO* in accordance with a procedure made under clause 3.15.6A(k) that addresses the circumstances specified in clause 3.15.6A(j)(2).

5. In our view, the *Rules* do not contemplate *AEMO* applying a contribution factor especially calculated in accordance with a determination by a *DRP*, in the absence of a *Rule*-compliant procedure. We do not consider ourselves to have the power to make a determination that would allow or require *AEMO* to depart from the requirement in clause 3.15.6A(j) that the contribution factors to be applied by *AEMO* under clause 3.15.6A(i) must be determined "in accordance with the procedure prepared under paragraph (k)".

6. For these reasons, and in circumstances where the parties have not reached any agreement under clause 8.2.9(a) as to disposition of the dispute, we do not see any alternative save to make a determination to the effect that *AEMO* must prepare a procedure under clause 3.15.6A(k) that addresses the circumstances specified in

clause 3.15.6A(j)(2), and must then apply it in relation to the affected *trading intervals*.

7. Origin and the Coalition positively advocated this approach. None of the active parties who addressed the question of the form of our substantive determination made a feasible alternative suggestion[1]. *AEMO* made no positive submission as to whether or not we could make a determination requiring *AEMO* to make a procedure and then apply it in relation to the disputed *trading intervals*, but submitted at [10] as follows:

> Should the DRP decide that the determination proposed at paragraph 8 is one that is open to it, however, AEMO has a number of practical concerns with the disposition of the dispute in this manner:
>
> a. It effectively places AEMO in the position of decision-maker in relation to this aspect of the dispute.
> b. Since the amended procedure would determine the ultimate settlement of this dispute (affecting both active and non-active parties), this will influence the way in which those parties engage in the consultation process.
> c. Given the difficulties in reconciling clause 3.15.6A(j)(2) with the remaining 'causer pays' Rule provisions, it is possible that the most efficient outcome of the procedure consultation would be to defer making a procedure until after a Rule change consultation, particularly if system changes would be required.
> d. Disposing of the dispute in this way does not result in a simple, quick and inexpensive resolution. It will result in an indefinite further period of uncertainty for all SA Market Participants as to the settlement of these monies.

8. In spite of *AEMO*'s concerns, *AEMO* went on to include as an attachment to its submissions potential options it considered open to it for the preparation of a procedure.

9. We acknowledge that requiring *AEMO* first to make a *Rule*-compliant procedure, and then to apply it, is less than ideal, because in light of the time frames imposed by the *Rules consultation procedures* it will take many months before the final monetary resolution of the dispute occurs.

[1] Alinta submitted that we should merely determine that the contribution factors for the two affected *trading intervals* were non-compliant by reason of the absence of the requisite procedure, and that "[a]ccordingly *AEMO*'s *settlement statements* for those two *trading periods* are not compliant with the *Rules*" without requiring any party to take any specific action. We do not think this would be a satisfactory solution, because it would create uncertainty as to what action should be taken.

10. We agree with *AEMO's* point (d), in the extract from its submissions in paragraph 7 above, that this is not a "simple, quick and inexpensive" outcome, such as would advance the objective specified in clause 8.2.1(e)(2) of the *Rules*.

11. Further, at first appearance, this approach seems somewhat in tension with the spirit of the requirement imposed on us by clause 8.2.6D(b) to determine the dispute "as quickly as possible".

12. Nevertheless, after reflection, we consider this approach to be the most expeditious way available to us to determine the dispute in conformity with the *Rules*.

13. As to point (a) made by *AEMO* in the extract from its submissions in paragraph 7 above, we do not agree that this approach effectively places *AEMO* in the position of decision-maker in relation to this aspect of the dispute. *AEMO* must approach its task of making a procedure that addresses the circumstances specified in clause 3.15.6A(j)(2) in accordance with its obligations imposed by clause 3.15.6A(k). *AEMO*, in its recent submissions, has addressed certain points of construction and application of clause 3.15.6A(k)(3) and (6). Save for two points, mentioned in the next paragraph, we do not wish to comment upon, endorse or dispute, any of the points *AEMO* has made in this regard. It will be open to *AEMO* to choose from a range of permissible options in making a procedure that addresses the circumstances specified in clause 3.15.6A(j)(2), but there will be limits to the choices that can be made. *AEMO's* selection of an approach within the spectrum that is lawfully available to it does not in our view make it the decision-maker of this aspect of the dispute. Even if, in some sense, *AEMO* could be said to have such a role, we do not see any practical alternative that would be compliant with the *Rules*.

14. Further to the construction points made in *AEMO's* most recent submissions:

    (a) *AEMO's* submissions at [4] imply that it is only in respect of the eight *dispatch intervals* during which the South Australia *region* operated asynchronously (the *dispatch intervals* in the period 22:51 to 22:26 on 1 November 2015) that there will be a need for contribution factors to be determined and applied other than those that were ordinarily applicable. In our view, in light of the drafting of clause 3.15.6A(j)(2), it may be permissible for *AEMO* to take that approach, or alternatively to take the approach that for the entirety of any *trading interval* during which the *region* operated asynchronously, *AEMO* may apply a contribution factor adapted

to asynchronous operation, as determined under a procedure addressing the circumstances specified in clause 3.15.6A(j)(2).

(b) *AEMO* points (in Attachment 1) to its practice under clause 5.5.3 of the Causer Pays Procedure when calculating *ex ante* contribution factors of discarding data during times in the sample period when *power system frequency* is outside the normal operating *frequency* band due to a contingency, suggesting that there may be good reasons why data relating to the performance of *generating units* and *loads* during a brief period of asynchronous operation of a *region* cannot meaningfully be used to calculate *ex post* contribution factors.

15. Both matters are, in our view, examples of points on which *AEMO* may choose between lawfully available approaches in preparing the procedure.

16. As to point (b) made by *AEMO* in the extract from its submissions in paragraph 7 above, it is possible that some parties may take a position in the relevant consultation that reflects their perception of their interests in this dispute, but we do not think that this can be avoided.

17. As to point (c) made by *AEMO* in the extract from its submissions in paragraph 7, we do not consider ourselves to have the power to make any determination that would depend on the making of a *Rule* change, so we must discard that suggestion.

18. The next issue we must decide is the allocation of the legal costs of *AEMO* and the allocation of the legal costs of Alinta in making preparations to respond to the Coalition's foreshadowed application to restriction the role of *AEMO* in the proceeding, a foreshadowed application that was to be based on the principles expressed in *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 at 35-36 (***Hardiman* application**). *AEMO* and Alinta seek their legal costs in respect of the *Hardiman* application from the Coalition.

19. The final issue we must decide is the allocation of the other costs associated with the dispute before us, which consist on the one hand of the costs of the dispute resolution processes mentioned in clause 8.2.8(a) (including the costs of the Adviser and of retaining the members of the *DRP*), and on the other of the legal costs of the parties owing to the work performed by their respective legal representatives. On this score:

(a) *AEMO* seeks an allocation of the costs of the dispute resolution processes (other than legal costs) to Origin and the Coalition in a proportion that we are to decide, and no allocation of legal costs (other than the costs of the *Hardiman* application, which *AEMO* seeks from the Coalition).

(b) Alinta seeks an equal allocation of the costs of the dispute resolution process between Origin and the Coalition, including of its remaining legal costs (that is, the portion of those costs left after allocation of its *Hardiman* application costs to the Coalition).

(c) Stanwell and CS Energy seek that both categories of costs, that is, their shares of the dispute resolution costs and their legal costs, be paid by the Coalition and Origin.

(d) Each of *AEMO*, Stanwell and CS Energy emphasise the part played by the arguments advancing the Global Recovery Approach in escalating the dispute. *AEMO* seems to place more emphasis on the role of the Coalition than Origin in this regard, presumably suggesting that we might see fit allocate a higher proportion of costs to the Coalition than Origin. Stanwell and CS Energy point out that the inclusion of the Global Recovery arguments was what affected their interests and brought them into the dispute, in spite of them having no presence in South Australia. Each of *AEMO*, Stanwell and CS Energy contend that by propounding these arguments the Coalition and Origin unreasonably escalated and prolonged the dispute, and that our power to allocate costs under 8.2.8(d) should be exercised against the Coalition and Origin. Alinta points to the failure of the Global Recovery contention advanced by the Coalition and by Origin as a fall-back contention, and to Origin's failure to persuade us of its arguments in support of a Regional Factor approach.

20. Each of *AEMO* and Stanwell adopted the statement of the applicable principles propounded by Alinta in its submissions at [3] and [4] (footnotes included):

> Pursuant to r 8.2.8 of the Rules, the DRP may allocate the costs of the dispute resolution process, including the legal costs of one or more parties, having regard to any relevant matters. Relevant matters include but are not limited to whether the conduct of that party or those parties unreasonably prolonged or escalated the dispute or otherwise increased the costs of the DRP proceedings.
>
> On its proper construction, [scil., under] r 8.2.8 of the Rules the DRP enjoys an ample discretion to order costs against one or other of the parties. That

> discretion can be exercised to award costs against a party having regard to any relevant matters, not only in circumstances where there is an unusual or egregious feature to the conduct of one party.[2] The factors to be taken into account in the exercise of the discretion are confined only by the subject-matter, scope and purpose of the Rules.[3] The express terms of r 8.2.8 - that the DRP 'may' allocate costs adversely to a party, and that regard is to be had to 'relevant matters, *including (but not limited to)'* – disclose that the rule contemplates that the following matters are germane: (a) the fact a party is largely or wholly unsuccessful; (b) that the arguments run by a party have generated substantial costs for other parties in meeting those arguments; (c) the reasonableness of other parties being involved in order to address arguments run by that party which would, had they been successful, have substantially affected the pecuniary interests of those other parties. Any of these matters may warrant the exercise of the discretion adversely to one party and in favour of another or others.

21. Each of *AEMO*, Alinta and CS Energy in effect submit that the outcome was that *AEMO's* approach had been substantially vindicated, and that our finding concerning the *trading intervals* during which the South Australia region operated asynchronously was a minor point in the overall context of the matter. *AEMO* submits that the finding was not a finding "for" any party except perhaps Origin, and then went on to state (at [16]):

> Had Origin limited its claim to the asynchronous period, the dispute may have been resolved in Stage 1, or at least the matters before the DRP would have been confined to those referred to at paragraphs 3 to 10 and in Attachment 1.

22. In our view we cannot place any weight on this statement by *AEMO*. It is not, for example, a claim that something in the nature of an offer without prejudice save as to costs was made and rejected. In the absence of a properly supported claim of that kind, we regard the statement as merely speculative.

23. CS Energy makes a point to the effect that the success of the argument concerning the asynchronous periods did not lend any support for the Global Recovery approach, and was essentially a distinct matter not justifying the expansion of the dispute to beyond South Australia.

24. Stanwell expressly accepts that the Coalition should be treated as one party by reason of their joint representation. *AEMO*, Alinta, CS Energy and Origin do not address this issue. We agree that the Coalition should be treated as one party. In

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[2] [Alinta's footnote] *Cf* the view expressed by the DRP (in that case, M. J. Clarke QC) in the determination of 6 December 2006 [sic] of a dispute between Millmerran Energy Trader Pty Ltd (ACN 084923973) and National Electricity Market Management Company Limited (ACN 072 010 327) & Ors. The DRP gave no analysis or reasoning as to its construction of r 8.2.8 in that case, and in any event, that was a case (unlike the present) where the parties had made a joint written submission that 'there is, at least, sufficient doubt' about the issue in dispute: p.11.

[3] [Alinta's footnote] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40.

our view, we must approach our task under clause 8.2.8(b) with the efficiency principles underlying the *national electricity objective* uppermost in our minds. We consider it to be an efficient practice for the parties constituting the Coalition to have recognised their shared interest in the matter and to have engaged joint representation.

25. In our view, all of these costs applications fall to be determined by the same general principles. We will now turn to those principles.

26. In our view, the starting point is that:

(a) the costs of the dispute resolution processes mentioned in clause 8.2.8(a) are to be borne equally by the parties to the dispute; and

(b) any legal costs of a party are to be borne by that party.

27. However, the DRP has power to allocate both categories of costs to any party or parties. Clause 8.2.8(b) does, as Alinta submitted, confer an ample discretion on us to allocate costs by reference to "relevant" matters. They include, but are not limited to, unreasonable prolongation of a dispute. This express example gives a flavour of the kinds of matters that will be relevant, but does not mark the boundaries of what we may regard as relevant.[4] In determining what is relevant, and giving weight to such matters in exercising our discretion, in our view, we are to be guided by the *national electricity objective*, and by the discernible objectives of the dispute resolution processes in rule 8.2 of the *Rules*. We place reliance in this regard on the objectives listed in clause 8.2.1(e), including the preservation or enhancement of relationships between parties to a dispute. We also note our view that dispute resolution is an integral part of the *Rules*, and for good reason. The *Rules*, although highly technical and prescriptive in various ways, deal with such difficult subject-matter that there are bound to be many grey areas and gaps encountered during their operation. Dispute resolution plays a meaningful role in assisting *Registered Participants* to either surmount difficulties that arise due to ambiguity in the *Rules* encountered in this way by facilitated agreement, or (in some cases) to have such difficulties resolved by formal determination of a *DRP*.

[4] In our view, this is consistent with what was said about the power to allocate costs in the Millmerran Energy Trader Pty Ltd case. We disagree with Alinta's submission that the DRP gave no analysis or reasoning on its construction of clause 8.2.8 in that case. In that case there was a brief interim determination dated 22 December 2006, and subsequently an undated final determination. The discussion as to costs appears on page 11 of the final determination.

28. In these important respects, the functions of a *DRP* are not analogous to civil litigation, and the power conferred by clause 8.2.8(b) is different from the discretion courts have in civil cases to award costs to a winning party. We consider that it would be a serious error for us to apply the usual rule as to costs following the event that applies in civil litigation. That said, as the Coalition pointed out in its submissions, even courts have on occasion declined to make a costs order in favour of a winning party, and the Coalition points to an example of one such case which involved the clarification of ambiguity in an instrument.[5]

29. In our view, as we explained in our reasons for determination dated 2 September 2016, this dispute was a case involving material ambiguity in the *Rules*. Both the arguments propounded in support of a Global Recovery approach, and the arguments for the Regional Factor approach, were reasonably formulated and advanced in an efficient manner.[6] In such circumstances, in our view it would not advance the efficiency objectives that underlie the dispute resolution provisions in rule 8.2 to allocate costs against the proponents of those arguments. Indeed, a costs allocation in such circumstances might act as a disincentive to others raising reasonable arguments concerning ambiguous provisions of the *Rules* in the future. This could perpetuate uncertainty, or even the incorrect application of such provisions, and thereby retard, not promote, the *national electricity objective*.

30. The application by *AEMO* and Alinta for their costs of responding to the Coalition's foreshadowed *Hardiman* application is in a different category, but the same principles apply. In our view, there was no need for Alinta to expend any costs in responding to the *Hardiman* application. This was a matter on which *AEMO* had foreshadowed its opposition, and following the directions hearing we held on 14 July 2016 we directed *AEMO* to respond to the foreshadowed application, if made, with an outline of submissions to be provided by the end of the Friday preceding the hearing. Alinta did not indicate at the directions hearing that it wished to be heard on the issue and in effect Alinta "voluntarily" prepared and furnished an outline of submissions to the *Hardiman* application. In our view, in the circumstances, Alinta's preparation of the outline was not reasonably necessary, and so we decline to allocate their costs of doing so to the Coalition. As to *AEMO*, its application for

[5] *Secretary, Department of Health v DLW Health Services Pty Ltd* [2016] FCAFC 108 at [131].
[6] We are not influenced in this view by comments attributed to any officers of companies involved in the dispute, and give no weight to the Coalition's submission at [16] attributing a statement to an officer of CS Energy. For that matter, we also place no weight on the Coalition's assertion (footnote 4, to [28]) that CS Energy incurred no legal costs, or on the Coalition's contention (at [32]) that the fact that the CS Energy and Stanwell did not retain joint representation militates against allocating costs to be paid by the Coalition or Origin.

costs of responding to the *Hardiman* application is more difficult to decide. *AEMO* prepared and furnished an outline pursuant to the directions we made on 15 July 2016. We are told that the Coalition indicated on the Friday preceding the hearing that it would not press the *Hardiman* application. We acknowledge that there is a cogent argument for allocating *AEMO's* costs of preparation of its outline against the Coalition. In the end, however, the Coalition did not press its application, having presumably formed a view that in the end the Coalition did not need to, or should not, press it. We are unwilling to send a signal that might act as a deterrent against parties making decisions of this kind in future cases. In the end, no hearing time was consumed by the *Hardiman* application, and we doubt whether *AEMO's* costs of preparing the outline would have been a significant amount of its overall costs. For these reasons, we decline to allocate *AEMO's* legal costs of the *Hardiman* application.

31. For the sake of completeness, we note that we have turned our minds also to whether the additional costs occasioned by the costs applications addressed above should be allocated, and have decided not to do so.

32. We consider that the costs of the dispute resolution processes should be shared in equal one-sixth portions by the active parties, on the basis that the Coalition be treated as one party for this purpose.

Date: 3 October 2016

Peter R D Gray QC

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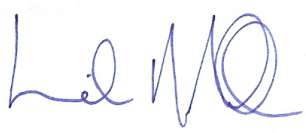
under professional standards legislation

Gregory H Thorpe



Linda M McMillan