The Australian Competition

&

Consumer Commission

Pre-determination conference - minutes

National Electricity Code change authorisation
Dispute resolution arrangements
(Authorisation numbers A90792-4)

17 January 2002
470 Northbourne Avenue
Dickson ACT 2602

Commissioner present:	Rod Shogren
Commission staff present:	Kaye Johnston
	Matthew McQuarrie

Interested parties present:

Country Energy	Peter Cunningham
EnerTrade	Jodi Buckle
Eraring Energy	Alistair Webb
Ergon Energy	Darren Barlow
Hazelwood Power	Ken Secomb
NECA	David Swift
NEMMCO	Brett Hausler
NEMMCO	David Bryson
Resolve Advisors	Shirli Kirschner
Tarong Energy	Greg Hesse
Transgrid	Erik Beerden
Yallourn Energy	Andrew Bonwick

Agenda Item:

1. **Participant registration 9:00 a.m.**

2. **Conference opening and procedures.**
   Commissioner Rod Shogren opened the conference also describing the procedures that would be followed throughout the conference.

3. **Transitional Arrangements**

Ken Secomb (KS): Hazelwood supports the proposal, that, where a dispute is substantially under way at the transition time it can remain under the existing rules, this is believed to minimise delay and costs. Hazelwood believes the drafting fails to deal with the full range of circumstances that may apply for different disputes that are at an equivalent stage of progress.

Hazelwood believes drafting deals explicitly with the case where a dispute has been referred to a Dispute Resolution Panel (DRP), but fails to deal with the case of a referral to a body other than a DRP.

Hazelwood proposed that the conditions under 8.2.14(f) of the proposal should apply where there has been a referral by the adviser for a decision to any person or group, including a DRP.

Jodi Buckle (JB): EnerTrade is basically in support of Hazelwood Power's proposal. EnerTrade believes that participants in a relatively advanced stage of dispute should be permitted to choose whether their dispute would be governed by the existing or new rules. To provide otherwise would reduce procedural fairness for and discriminate against such participants because they:

- relied on existing rules when framing their dispute; and
- obtained expensive legal advice tailored to the existing rules.

EnerTrade agrees that the proposed new rules should apply to disputes that are in Stage 1 when the new rules commence. By that time, disputants arguably would have had ample opportunity to accelerate into a later stage, thereby precluding the operation of the new rules if they so elect.

However, Enertrade believes that parties to any dispute that has either been referred to the Adviser or Stage 2, by the time the new rules commence, should have the option to continue resolving the dispute under the existing rules.

Enertrade also strongly supports the Commission's decision to impose Condition C4.1 upon authorisation. This condition requires an amendment to the code to ensure that when a disputant in Stage 2 requires the existing rules to apply, that proposed 8.2.14(g) will not prevent this. Enertrade agrees that a disputant in Stage 2 on the date the new rules commence should not be able to frustrate, by asking for a new DRP, another disputant's election to apply the existing rules. The same protection should be extended to parties to disputes referred to the Adviser by the time the new rules commence.

Rod Shogren (RS): Is this option to continue under the old disputes an issue because of the time and resources wasted if forced to change to the proposed code?

JB: Yes because all disputes are framed around the current rules and an existing dispute can be undermined by a change to the rules. The key difference between the existing and proposed code change is that under the latter3rd parties can join an existing dispute.

Brett Hausler (BH): Overall NEMMCO supports the draft determination. Disputes in stage 1 can languish and NEMMCO supports the arrangements to move stage 1 disputes from existing to the proposed code on the change date. However compulsory transition in stage 2 could cause problems.

Shirli Kirschner (SK): The issues that arise out of a current dispute are:

- the need to ensure that an alternative panel or group constituted by the adviser under his existing powers (not only a DRP) has the power to continue and make a binding decision; and
- the need to have any dispute in the adviser's hands referred to a DRP or an alternative prior to the code changes taking affect so that the transitional arrangements will apply to that dispute. Allowing three business days to for the adviser to make a referral should be plenty of time.

SK: If the existing stage 2 code is grandfathered and the adviser is given time to send everything to stage 2 prior to the new changes taking effect, then the existing disputes can be crystallised to meet Hazelwood Power's and EnerTrade's concerns before the proposed code is authorised.

Andrew Bonwick (AB): Yallourn supports Hazelwood's proposal.

SK: What about the ability of the alternative panel (which is not a DRP as defined in the code) to make a binding decision?

BH: NEMMCO believes the powers of the group are not well defined, however any decision made is binding on all parties. NEMMCO stated the proposed code does not allow for an existing alternative panel's (not DRP) decision to be binding. Therefore Hazelwood's proposal should resolve this issue, to the extent that the existing code provisions work.

KS: Hazelwood believes if an existing disputant, in an alternative panel (not DRP) dispute, opts to use the proposed code, then proposed code will not allow the alternative panel's (not DRP) decision to be binding. The proposed code does not give any power to the alternative panel (not DRP).

SK: As a practical matter, if a group was set up which was not a DRP and a disputant did want to use the new code, the alternative panel (not DRP) may be required to reform as a DRP. It would be good to check that they can do this as it would overcome this issue.

Darren Barlow (DB): Adding a right for any party to the dispute to veto any move to the new arrangements would allow the existing code to prevail.

4. Timing

Erik Beerden (EB): Transgrid believes that allowing 70-business days for resolving multi-party disputes is unnecessarily long. Transgrid noted that under the code the 30/70-business-day period can be extended in circumstances where:

- the parties agree;
- where NECA consents; or
- where mediation has been utilised.

Transgrid consequently believes there is already adequate protection in case of the unusual circumstances of a particularly difficult dispute, which requires more than the 70-business days to resolve.

Transgrid believes the 70-business days is a too generous period because:

- 70-business days is 3½ calender months;
- the decision making in the DRP stage is not made in isolation. That is to get to the DRP stage the disputing parties will have to do the following:

(i) have correspondence or discussions which resulted in the disputed decisions in the first place;

(ii) disputants will have been obliged to meet with other co-participants to determine matters as to further conduct of the matter; and

(iii) the disputants may have been involved in mediation.

In other words, by the time the dispute has got to the DRP stage for the determination, the issues should be well understood by all concerned. And;

- 70-business days is inconsistent with time limits imposed upon code participants in relation to their own decision making activities. For example, in relation to responses to connection enquiries. NSPs are required to provide information within two weeks of receipt of the relevant connection enquiry, including the preliminary programs for connection and access activities etc, and in four weeks written advice of all further information that the connection applicant must prepare and obtain for the purposes of an application to connect.

  Trangrid's point was that code participants are given comparatively short periods of time within which to respond to matters, which can give rise to disputes. Yet the DRP process as to a dispute in relation to such a matter need only be considered within 70-business days, in the case of a multi party dispute.

Transgrid was concerned that a disputing party could not be assured of resolution in less than 108 business days. Transgrid calculated the 108 business days, or 5 calender months, can only be achieved under the assumption that a disputing party moves to the next stage of dispute process on the first business day following the relevant time limits and the 70-business days was not extended by NECA.

Therefore, Transgrid believes the five calender month period can be seen, not as a practical limit, but rather the bare minimum in which a disputing party can be guaranteed resolution, with a realistic time frame being somewhat more than the minimum five months.

RS: What do you suggest the time limit should be?

EB: Reduced from 70-business days.

BH: The 70-business day time limit is quicker than other methods of dispute resolution such as court procedures. The 70-business day time limit, if anything, may be a little tight and NEMMCO supports not reducing the 70-business day time limit.

RS: Assuming quicker the resolution the better, is it practical to reduce this time limit?

EB: Transgrid believes this time limit can be practically reduced.

SK: The 70-business day limit has been reduced from the initial draft of the report. Commercial cycles are much shorter but the relevant benchmark used was dispute resolution timetables in other arbitrations, courts and tribunals. In an international

comparison the shortest comparable time limit available is 90 days, in the New York equivalent of the Commission.

AB: Commercial requirements are not usually disputable and Yallourn supports the 70-business day time limit.

5. Power of the DRP

KS: Hazelwood believes the current code leaves the form of relief granted to be determined by the DRP and the proposed code specifies that the DRP:

- may require a party to take action;
- refrain from taking specific action; and/or
- pay a monetary amount to another party.

Hazelwood believe that the power of the DRP to grant relief has not been found nor argued to be too wide, and hence should not be narrowed. Hazelwood further argue that the:

- current wide scope for the remedies is consistent with an appropriate level of accountability by NEMMCO; and
- inclusion in the current code of the words "without limitation" indicates that this current wide scope was deliberate, not accidental.

Hazelwood proposed that the code be modified so that:

- the list includes "set aside any determination or decision"; and
- the list applies explicitly "without limitation".

BH: Is the issue to set aside an NEMMCO decision or to replace a NEMMCO decision?

RS: I think there are two issues:

- the DRP's power to set aside a NEMMCO decision; and
- limiting the power of the DRP to specific remedies.

SK: The DRP powers were drafted in consultation with a legal committee representative of the stakeholders and I was of the view that they thought that the effect of the current language was to give it as wide powers as the law would allow. If this is not the case it should be modified.

RS: What do you do when you believe a NEMMCO decision is invalid?

BH: Make an application to court.

AB: The jurisdiction of the DRP would not be extended by inserting the words "without limitation" into the code.

RS: Does it imply to extend the jurisdiction?

DB: Ergon supports NEMMCO in that the question of power should be answered by addressing a court. The current system does not work and we need a system that works in the long run. The gaming of the process with a particular dispute in mind for a short-term gain may not achieve the better result.

JB: Like Hazelwood, Enertrade

- is concerned that the proposed rules narrow the range of relief which a DRP may grant, and
- believes that the new rules should not attempt to exhaustively define these powers.

RS: If the code read "...without limitation on its powers, the DRP can..." would everyone be satisfied? A response from NECA on these issues would be helpful.

6. Legal Representation

BH: NEMMCO believes that excluding legal representation does not reflect the reality of disputes in the NEM as disputes can be worth millions of dollars and be very complicated in nature. NEMMCO believes there is a problem that people do not want to talk without their lawyer's direction.

NEMMCO understands the intention to provide an incentive to talk openly and resolve disputes by negotiation. NEMMCO would suggest that this good intention may be lost if a party, in order to seek some tactical advantage in Stage 2, asserts that another party has not followed Stage 1 procedures in relation to legal representation. Also, the exclusion of legally trained persons from Stage 1 discussions disadvantages some participants who have such staff or officers in their management, and who would therefore have to artificially reconstruct their handling of a dispute to comply with the code."

AB: Yallourn believes a lack of legal representation at a commercial level is not reasonable.

EB: Transgrid believes lawyers can facilitate a readily acceptable outcome.

David Swift (DS): NECA drafted the code to exclude legal representation inline with the code objectives and guiding principles for dispute resolution that the dispute resolution process should "not be legally driven". Additionally, NECA, believes, there are a range of parties involved not just million dollar disputants.

AB: Yallourn believes the disputant will bring those who can help resolve a dispute, why not exclude professional economists?

SK: There were a number of participants who felt that allowing lawyers into stage 1 of the process will shift the focus from commercial problem solving to legal demands. It is this that is reflected in the drafting. There is no easy way to give effect to the notion that the first stage should empower commercial negotiations.

RS: The success of the negotiation of disputes seems to depend on the attitude of the individuals brought in to handle the dispute whether it is a lawyer, economist, etc.

7. Natural justice

EB: Transgrid has proposed that advisers be required to apply the rules of natural justice in carrying out their functions.

Transgrid argues that when an adviser, attempting to resolve a dispute, provides one of those with ample opportunity to state its point without allowing the other disputing parties the same opportunity the adviser would be in breach of natural justice and of little utility to all concerned. Further Transgrid argues it is unlikely to result in the disputing parties agreeing on a resolution to the dispute, which means that the dispute would be likely to go to the next stage of the dispute resolution process. Transgrid believes the result to be all disputing parties would have wasted the opportunity to resolve the dispute as a consequence of the adviser denying natural justice to one of them.

Transgrid notes that the code provides that the dispute resolution regime must observe the rules of natural justice, "to the extent possible". However Transgrid believes it does not itself ensure adequate or equal opportunity and fairness to parties in dispute. Transgrid believes good public policy the rules of natural justice should expressly apply to Advisers at all times in carrying out their functions.

RS: What do the rules of natural justice require of the adviser?

EB: Among other things, procedural fairness and a reasonable hearing of the parties to a dispute.

SK: the intent was to allow the adviser flexibility to meet with parties without being too prescriptive. This means that the rules of fairness do apply but not the stringent and prescriptive set of rules that comprise natural justice.

RS: Having no requirement of natural justice means that mediation can occur more flexibly.

EB: Transgrid argues that the adviser, as the gatekeeper to the DRP, must give parties a reasonable opportunity to be heard and that requiring the adviser to adhere to the rules of natural justice is the best way to ensure this outcome.

8. One-party disputes

EB: Transgrid has suggested that a mechanism for resolving "one-party disputes" be incorporated in the code.

Transgrid recognised that a procedure for resolving one-person disputes may potentially lead to an increase in the number of disputes, however, Transgrid believes that the consequence should be greater clarity as to the meaning and operation of the code with further consequences of ensuring there are fewer multi-person disputes.

Transgrid believes the DRP should have the ability to dismiss any one party disputes which are frivolous or vexatious.

9. Efficacy of dispute resolution arrangements

EB: Transgrid considers the condition of authorisation C4.3 has gone slightly too far, arguing that some delays may be unreasonable. Transgrid suggests the condition C4.3 be modified to:

"...any delay to a dispute process caused by a disagreement regarding the number of members on the DRP should not, of itself, be regarded as an unreasonable delay or otherwise increase the cost of the DRP proceedings for the purposes of clause 8.2.8(b)"

Transgrid also believes that the dispute resolution authorisation should account for some code reference alterations proposed in the Network and Distributed Resources (NDR) code change draft determination.

Further the NDR draft allows disputes to be raised used the code dispute resolution regime, without limiting the power of the DRP in deciding a resolution. Transgrid believes that amendments should be made in the dispute resolution code changes to limit the powers of the DRP in a planning dispute. Transgrid believes the DRP should not have the power to direct a TNSP to make an investment or not to make an investment. As such, clause 8.2.6D(d) should be amended to provide that it does not apply to disputes arising under cl. 5.6.6(h).

10. Other comments

No other comments were made.

11. Concluding comments

Commissioner Rod Shogren closed the conference, reminding all present that submissions close on 31 January 2002.

TRADE PRACTICES ACT 1974

Conference in relation to applications for authorisation

Registration numbers: A90792, A90793, A90794.

Amendments to the National Electricity Code

Dispute Resolution Arrangements

Certificate

I, Rod Shogren, a Member of the Australian Competition & Consumer Commission at the conference in relation to the draft determination in respect of the above mentioned authorisation application(s), *HEREBY CERTIFY*, as required by paragraph 90A(9)(c) of the Trade Practices Act 1974 that the date on which the first notification under sub-section 90A(6) of the said Act was received by the Commission was 19 December 2001 and the day on which the conference terminated was 17 January 2002.

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17 January 2002