

Guidance notes for a dispute management system under the NER
Guidance notes relating to the format and content of an internal
dispute management system and tips for DMS contacts

Contents

1	About this document	2
2	Registered Participants' DMS	3
2.1	User notes on DMS contact	3
2.1.1	Access to DMS contact.....	3
2.1.2	Training of DMS Contact	3
2.1.3	Authority of DMS contact	3
2.2	User notes on information requests:.....	3
2.2.1	Documents for information request.....	4
2.2.2	Skills for DMS contact – information request.....	4
2.2.3	Time period for information request – 5 business days.	4
2.2.4	Dispute on information request.....	4
2.3	Initiating Stage 1 with a Stage 1 - DMS referral notice	5
2.3.1	User notes on Stage 1 - DMS referral notice	5
2.3.2	Due process for sending a Stage 1 - DMS referral notice – Summary.....	5
2.3.3	Protocol for AEMO	6
2.4	The DMS Meeting	6
2.4.1	Aims of DMS meeting	6
2.4.2	Choosing a Facilitator.....	7
2.4.3	Checklist for useful DMS meetings	7
2.4.4	Role of the Adviser in the DMS meeting.....	7
2.5	Format of the organisations' DMS.....	8
2.6	Stage 2 - Adviser referral notice	8
2.6.1	Declared Scheduling Error – compensation claim	8
2.6.2	Disputes not resolved in Stage 1 DMS	8
2.7	Stage 2 Processes.....	9
2.7.1	Adviser process	9
2.7.2	Referral to a DRP for determination.....	10
3	Checklist of Items.....	11
3.1	Sample DMS (Annexure).....	11
4	Document Control Details.....	11

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1 About this document

The National Electricity Market Dispute Resolution Adviser (the 'Adviser') has been appointed by the AER to perform the functions set out in clause 8.2 of the National Electricity Rules (the 'NER'). The Adviser will attend to any matters necessary to ensure the effective operation of the Stage 1 and Stage 2 dispute resolution process.

The Stage 1 process is set out in clause 8.2.4 of the NER. It is designed to empower participants to resolve their own disputes using a range of appropriate dispute resolution processes ("ADR".)

The Adviser is also charged with Stage 2 processes (set out in clauses 8.2.5, 8.2.6A – D). A Stage 2 process can be custom designed by the Adviser to finalise a dispute. It can also be used to case manage a dispute. Additionally, Stage 2 also has a formal Dispute Resolution Panel ('DRP') established by the Adviser to determine the dispute in a manner which is binding on the participants to the dispute.

Under the NER the Adviser may issue guidance notes in relation to the form and content of the dispute management system ('DMS') and the use of Stage 1 dispute resolution processes [*clause 8.2.2(h)*]. This is such a note.

The DMS is designed to be an operational provision inside a company that manages disputes. It is a balance of legal compliance and good commercial efficiency.

There are two separate but related aspects of the DMS:

- An internal process to ensure that the system works within the organisation.
- Explaining and making available the process to the other participants who might want to use it.

Each is dealt with below. Each section of this user note sets out the requirements for a DMS from the NER and provides issues to consider.

Tip: if you and the other participant cannot agree on whose DMS system to use, use the DMS of the participant to which the first [Stage 1 - DMS referral notice](#) is sent.

2 Registered Participants' DMS

Nominate a DMS contact to be the first point of contact for the notification of disputes. [Clause 8.2.3(b) (2)]

2.1 User notes on DMS contact

In identifying the DMS contact, registered participants should think about:

2.1.1 Access to DMS contact

- Identifying a DMS person(s) in the organisation.
- Defining their role and level of authority.
- Making it easy for any participant to contact your DMS contact. This will mean:
 - Notifying the Adviser of any changes to keep the records up-to-date.
 - Ensuring that contracts and other correspondence with other participants refers to the DMS contact and provides a phone, mobile and email contact.

2.1.2 Training of DMS Contact

- Ensuring that the DMS contact is properly trained in resolving disputes. Training in problem solving negotiations, confronting conversations and handling conflict is useful.

Familiarity with mediation and other dispute resolution process and a familiarity with and understanding of dispute resolution under the NER is essential.

2.1.3 Authority of DMS contact

- Ensuring that either the DMS has a high level of authority for the resolution of disputes or has quick and easy access to people with the requisite level of authority to assist at each stage of the process.

2.2 User notes on information requests:

Provide that the Registered Participant must respond to a request for information (being information that is relevant to any of the matters set out in clause 8.2.1(a)) from another Registered Participant within 5 business days of receiving the request. [Clause 8.2.3(b)]

2.2.1 Documents for information request

- Have a document request form in place within your organisation.
- The request form needs to be in plain English, readily available and be easy to use.
- The form should include a question asking what information is needed and the purpose for which it is relevant.
- Include a form of confidentiality agreement to complete when you consider the information requested is confidential.

2.2.2 Skills for DMS contact – information request

The DMS contact needs to have the skills to negotiate with the requesting participant to ensure that:

- The information request can be dealt with sensibly and quickly, particularly if there is no agreement on what is relevant.
- A confidentiality arrangement can be agreed. This includes an agreement to sign and an arrangement on who will have access to the documents and on what basis.

2.2.3 Time period for information request – 5 business days.

- Have a mechanism for recording the date(s) that the request for information is received and the date that the request is answered. This will enable it to be tracked and dealt with within the 5 business days provided in the NER.
- Think about sending out an acknowledgement when the request is received. The acknowledgement:
 - Should flag if there are documents which are likely to be confidential.
 - Attach a confidentiality agreement if appropriate.
 - Provide a date for production of the documents.
 - Identify areas where there is a dispute on the information being requested.

2.2.4 Dispute on information request

- In the event that the information request cannot be answered, in whole or in part, for any reason, the DMS contact should have a range of options available to respond to the requesting participant to identify the problematic aspects of the request and provide options for a solution.
- The DMS contact can contact the Adviser to arrange a mediator or other dispute resolver in the event that it seems that the document request is likely to be contentious.

2.3 Initiating Stage 1 with a [Stage 1 - DMS referral notice](#)

A Registered Participant may activate the dispute resolution mechanisms in clause 8.2.4 by serving a [Stage 1 DMS referral notice](#) on the DMS Contact of one or more registered participants or AEMO.

[Clause 8.2.4(a)]

2.3.1 User notes on [Stage 1 - DMS referral notice](#)

- Ensure that the DMS contact has the most recent version of the [Stage 1 - DMS referral notice](#) which is on the web. This sets time periods running and ensures everyone is aware that there is an issue that may need to progress through Chapter 8.
- Identify the people/position within the company who can authorise the sending of the [Stage 1 - DMS referral notice](#).
- Identify the people/position to be notified if a [Stage 1 - DMS referral notice](#) is received. (Set up an email distribution list in advance.)
- An acknowledgement of receipt should be sent together with a copy of the Registered Participant's DMS process and a document request form (see 2.2.4 above).
- The acknowledgement should include details of the DMS Contact and their contact details.
- Under the NER, the time period for the DMS runs from the date that the disputed decision or conduct could be reasonably have become known to a Registered Participant affected by it. **Do not miss the dates!** The DMS must have a process to check the date of the disputed decision or the occurrence of disputed conduct and record when it occurred. This includes a discussion with the other parties to review whether there is any disagreement about the understanding of the date as this may be relevant (see Clause 8.2.4(b)).

2.3.2 Due process for sending a [Stage 1 - DMS referral notice](#) – Summary

- Identify and brief the person/positions in the organisation with the authority to prepare and sign a [Stage 1 - DMS referral notice](#).
- Identify which people/positions within the company need to be notified if a [Stage 1 - DMS referral notice](#) is received. You may want to set up an email distribution list in advance.
- Identify and brief a person to monitor compliance with the time periods specified under the NER.

With certain exceptions a DMS referral notice must be served no later than 60 business days after the date on which the making of a disputed decision or the occurrence of disputed conduct could reasonably have become known to the registered participant affected by it.

[Clause 8.2.4 (b)]

- It is important that line managers be aware of the timeframe and the consequences of not dealing with disputed conduct as quickly as possible. Not to do so may mean that people are affected by time periods that they don't know about!

2.3.3 Protocol for AEMO

- AEMO is required to inform the Adviser if it either serves a [Stage 1 - DMS referral notice](#), or receives one including all matters set out in clause 8.2.4(g).
- AEMO will inform the Adviser including details of any Participants who have an interest in the dispute. This usually means anyone who may be affected by the outcome of any dispute process.

2.4 The DMS Meeting

Within 5 business days after the service of a DMS referral notice representatives of the Registered Participant that served the notice and every person on whom the notice was served must meet to determine, by agreement, the further conduct of the dispute. [Clause 8.2.4(d)]

2.4.1 Aims of DMS meeting

- The intention behind this provision is to ensure that participants use every endeavour possible to resolve the dispute quickly and, to the extent possible, by commercial means.
- In heated disputes, or disputes which include many parties, it is often useful to have a facilitator to run the DMS meeting. The role of the facilitator is to structure the DMS meeting in a productive way to ensure that the parties gain maximum benefit from the meeting. The facilitator's independence and training may assist to identify gaps, or glean information that casts more light on where there are blockers. Many blockers are strategic and parties will not tell each other but will identify them confidentially to an impartial person. This can assist in finding ways to circumvent those issues without disclosing the strategic information.

2.4.2 Choosing a Facilitator

There needs to be a process for deciding whether to get a facilitator. This is usually difficult once the dispute has arisen and is best covered by the DMS which can:

- Cover who pays.
- Provide how the facilitator is found this can include phoning the Adviser and asking for a recommendation, or using the Adviser.
- If the parties are choosing a facilitator (independently of the Adviser), ensure the facilitator has qualifications in facilitation, dispute resolution, or mediation rather than the subject matter expertise. It is also useful to ensure that you have a contract, the person carries insurance, and stipulate a maximum charge rate. There is now National accreditation for mediators who can generally facilitate as well.
- If proceeding to mediation rather than a facilitated DMS meeting mediation agreement and [notes about mediation](#) can be obtained from the Adviser or from LEADR www.leadr.com.au.

2.4.3 Checklist for useful DMS meetings

- Exchange without prejudice written summaries of the issues in dispute before the meeting to allow the parties to check that they have their facts straight.
- If you cannot resolve the issues, then agree on a process for attempting to resolve the dispute – timeline and process.
- Except where AEMO is a party consider whether to keep confidential the fact that a dispute exists, and/or any information exchanged for the purpose of attempting to resolve the dispute.
- Before escalating the dispute to Stage 2, consider whether some of the planning for the next phase can be done within the DMS process which affords maximum flexibility. Please be sure to consider the comments under clause 2.6.1.

2.4.4 Role of the Adviser in the DMS meeting

The Adviser has no formal role in the DMS meeting. The Adviser can be used on a user pays basis if the parties want to use her.

2.5 Format of the organisations' DMS

Obligation to provide DMS:

- The NER provide that you need to produce your DMS if requested by another participant or by the Adviser.
- Prepare a document that sets out the interfaces with the participants and covers the issues set out in this user note.

2.6 [Stage 2 - Adviser referral notice](#)

A dispute may be referred to the Adviser by serving on the Adviser a [Stage 2 - Adviser referral notice](#) in accordance with clause 8.2.5. [Clause 8.2.5(a)]

You can send a notice to the Adviser by using a [Stage 2 - Adviser referral notice](#). This form differs for scheduling errors.

2.6.1 Declared Scheduling Error – compensation claim

Tip: There is a separate form for the establishment of a DRP for compensation from the Participant Compensation Fund if there is a Scheduling Error (see '[Guidelines and application for compensation for a scheduling error](#)'). Where the error has been declared as such by AEMO and there are no issues in dispute. There is a streamline process that ensures a quicker less expensive DRP process with one member which is more administrative in nature. There are separate user notes for that (see '[Guidance notes and form for request for compensation scheduling errors](#)').

2.6.2 Disputes not resolved in Stage 1 DMS

If a dispute is not finalised in Stage 1 the DMS process it needs to transition out of that stage. There are three options to deal with a matter that is not resolved in DMS:

- The matter may be referred to the Adviser for her to resolve the whole matter using her powers and discretion;
- In cases where the issues in dispute are not clear or the parties are not clear, the Adviser can use Stage 2 to assist the parties assessing the dispute. The Adviser can then deal with the dispute through a customised process if the parties consent (clause 2.7.1) or establish a DRP for a determination of all issues once the issues are defined in more detail (clause 2.7.2); or
- If the issues in dispute are clearly defined and the parties are clearly identified the Adviser can set up a DRP at the nomination of the parties.

2.7 Stage 2 Processes

[The Stage 2 - Adviser referral notice](#) provides for a nomination of an Adviser process, or a DRP. It is important to understand when to use each.

Once a DRP is nominated the NER set in place stringent time frames which cannot be negotiated. It is important for the DMS to provide some guidance on what process to nominate in a [Stage 2 - Adviser referral notice](#). The [Stage 2 - Adviser referral notice](#) itself is also annotated with some user suggestions.

The Adviser process can be used to case manage the DRP to minimise the cost and maximise its fit to the problem. A call to the Adviser prior to submitting the Form 2 is useful to discuss the options and check the way forward.

2.7.1 Adviser process

The Adviser, having regard to the principles set out in clause 8.2.1, considers appropriate:

- Agreeing to the Adviser resolving the dispute can take a number of forms. It may be an unfettered agreement for the Adviser to assess the issue and craft a form of resolution. It may be a more limited agreement where the parties want the Adviser to assist them to determine a timetable and then assess the problem and a way forward based on the information that is received.

2.7.1.1 No resolution from an Adviser process

In the event that the Adviser process, if selected, cannot resolve the dispute the Adviser will discuss the establishment and referral with the DRP. The consultation will cover:

- the constitution of the DRP,
- the exchange of information between the parties,
- provision of information to the DRP,
- confirmation of all the parties to the dispute.

The exchange of information before a DRP is constituted will usually involve:

- The Applicant providing a full statement of issues, facts and contentions in dispute.
(around 5 days)

- The Respondent(s) providing a reply statement of issues, facts and contentions in dispute.
(around 7-10 days)
- The parties, if possible agreeing on a list of documents.
(at the same time as the statements of issues)
- Each party providing an estimate of the number and type of witnesses.

This facilitates clarity of the scope allowing for an estimate of the hearing dates and costs. Having the scope and timing is useful for logistic planning and selecting the appropriate DRP.

2.7.1.2 Implications for a DMS

- Where the parties are not sure how best to proceed, the DMS could provide for the option sending a notice to the Adviser notifying her of the dispute and requesting assistance in the evaluation of options.
- This allows a process to move from the DMS and for there to be further discussion before a process is finalised.
- The types of issues that the parties may find it useful to discuss:
 - Whether it is appropriate to have a mediator appointed and if so what kind.
 - The type of DRP, number of members, skills, costing, jurisdiction.
 - Whether there are preliminary issues that can be determined to assist in commercial resolution / preparation for a hearing.

2.7.2 Referral to a DRP for determination

- The DMS contact will require authority to sign and serve a [Stage 2 - Adviser referral notice](#) and/or a response.
- Once a [Stage 2 - Adviser referral notice](#) is served on the Adviser it is usual for lawyers and counsel to be involved. It is not unusual for the lawyers to handle the legal and procedural matters to prepare for a DRP.
- Ensure the DMS makes provisions for both commercial and legal channels of communication with the Adviser to assist resolving any procedural or other difficulties that may arise.

3 Checklist of Items

- Contact person nominated.
- Contact person details notified.
- Time periods for using the process – when did the event occur, or become obvious.
- Time period for responding to requests for information.
- Confidentiality agreement.
- Authority and communication strategy for sending and receiving a [Stage 1 - DMS referral notice](#).
- Checklist for useful meetings (what is required) in terms of swapping statements, documenting.
- Guideline on when a facilitator will be used for DMS meetings.
- A protocol for choosing a facilitator for DMS meetings.
- Agreement on engagement and payment of facilitator and pro-forma contract.
- Checklist for exiting the DMS process if it gets stuck.
- Authority for sending a [Stage 2 - Adviser referral](#) notice and guidelines on which process to choose.
- Sufficient time in an Adviser process to identify clearly the parties, the issues in dispute and the type of process that is useful before submitting a [Stage 2 - Adviser referral notice](#) to refer the matter to a DRP.
- Check [user notes](#) on declared scheduling errors.
- Guidelines on how to nominate a process when finalising a [Stage 2 - Adviser referral notice](#).

3.1 Sample DMS (Annexure)

- See [Model DMS under the NER](#)

4 Document Control Details

Please direct comments and questions to the Adviser, Shirli Kirschner, by email:
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History of Amendments

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