**MEMO**

**TO: Meredith Mayes**

**FROM: Shirli Kirschner**

**DATE: Monday, 16 September, 2013**

**SUBJECT: AEMC DISPUTE RESOLUTION**

**DRAFT for discussion**

Meredith

I refer to our meeting and subsequent correspondence. We had discussed using the process under Chapter 8 of the National Electricity Rules (NER) for disputes pertaining to connecting embedded generators. Below I have outlined the background and identified some of the similarities and differences between the expert evaluation process proposed in the draft amendment and the chapter 8 process under the NER.

This paper is prepared in my capacity as the National Energy Market Dispute adviser. It reflects my own views (not those of the AER) and does not constitute legal advice.

**1 Background and overview**

The AEMC is currently consulting on a Rule change to cover connecting embedded generators to the distribution networks. The AEMC released a Draft Rule Determination in late June which proposes amongst other things, the introduction of an Expert Appraisal Process for technical disputes around connection. (the ‘expert appraisal process” )

A number of submissions suggested that the process outlined in Chapter 8 of the NER (the ‘Chapter 8 process’) may be appropriate for these disputes.

The connection expert process is a non-binding evaluation by an expert selected by the parties, or if the parties fail to agree, the AER. The terms of the expert brief are determined by the initiating party (see Rule 5.9A(d)(3), (4)).

Chapter 8 process contains a dispute framework which offers a range of processes and a specialist dispute resolution adviser to assist the parties in the selection and running of the appropriate process. This memo consider each process their similarities and differences to assist in assessing the potential suitability of the chapter 8 process for these disputes.

**1.1 The expert evaluation process**

Before considering the Chapter 8 process, it is useful to review the proposed expert process.

The June consultation paper appends a draft National Electricity Amendment (Connecting Embedded Generators) Rule 213. This provides for a non- binding independent expert appraisal at the initiation of a party, on matters that the initiating party considers appropriate. It provides for an appointment of an expert by agreement of the parties, or the AER. The draft Rule provides the procedures for the expert process and vests powers for him/her to hear and evaluate the dispute, as well as offering an indemnity for the services.

The expert appraisal is not binding and is admissible in evidence before any judicial or dispute resolution proceedings under the NER or Rules

Specifically, rule 5.9A sets out provisions for a non- binding expert evaluation of technical disputes. The provisions cover:

* 5.9A.3 Notification of a technical dispute.
* 5.9A.4 Appointment of expert (*within 10 business days of a notice*)
* 5.9A.5 Procedures of the expert.
* 5.9A.6 Power of expert in appraising the technical dispute.
* 5.9A.7 Determination of technical dispute.
* 5.9A.8 Costs of technical dispute.
* 5.9A.9 Admissibility of appraisal.
* 5.9A.10 Miscellaneous (*indemnity for expert and provision to execute a release in indemnity*).

**1.2 Summary of Chapter 8 process.**

The Chapter 8 Process is currently limited to those disputes covered by Clause 8.2.1 which includes the proposed access arrangements or connection agreements of *Intending participant* or a *connection applicant.*

The Chapter 8 Process provides a framework for the use of appropriate dispute resolution (negotiation, mediation or non- binding evaluation) (‘ADR’) in stage one, or the choice in stage 2 of either a binding expert determination by a DRP, or such other process as determined by the dispute resolution adviser.

**1.2.1 First stage**

The first stage of the process (clause 8.2.4) provides for use of a Dispute Management System (‘DMS’) by participants. The DMS offers ADR, either with or without the assistance of the dispute resolution adviser.

**1.2.2 Second stage**

If the matter does not resolve in the first stage, there is provision for either party to refer it to the second stage of the process, (clause 8.2.5).

Stage 2 provides for a dispute to be referred to a dispute resolution adviser by serving appropriate notice. The notice nominates either a process designed by the adviser ( with the consent of the parties), or the establishment of a dispute resolution panel (‘DRP’) comprising of between 1 to 3 members. In the absence of agreement on the number of DRP members, it reverts to a 3 member DRP.

**1.2.2.1 DRP process**

The DRP is an expert panel. Its process and powers are similar to those set out in the expert appraisal process, but results in a **binding** determination **not an evaluation.** Appeals are limited.

The process is also used for scheduling errors. Rule 3.8.24 of the National Electricity Rules defines when a scheduling error occurs. Compensation for scheduling errors is paid from a participant compensation fund established for that purpose. The Fund can be accessed by a determination of a DRP [Rule 3.8.24 (a) (1)]

where there is agreement that there has been an error and the compensation principles. A fast track process is available for a DRP of one person to make the determination. User notes are available for this process. See <http://www.aer.gov.au/node/14740#Compensation_for_scheduling_errors>

**1.2.2.2 Dispute adviser process**

The NER provides the dispute adviser with wide discretion to providing a dispute resolution process, if the parties so elect. In practice this has also been used, with the consent of the parties, for the dispute adviser to provide a co-ordination and case management function to narrow down issues and prepare matters for a DRP.

For the substantive process and case management, the parties have been afforded certainty about the process by the dispute adviser providing an outline of the process and timeframe, before them consenting to such a process. During this case management process, assisted by the clarification of the issues and quantum some matters have been settled by commercial negotiation.

.

**3 Key differences between the processes**

The expert appraisal process provides a non- binding expert evaluation of a discrete issue at the initiation of one of the parties. The Stage 2 chapter 8 Process is designed to assist with resolving a dispute in its totality by a binding determination. It can also be used to assist with a single issue through expert evaluation, or ADR using the assistance of the dispute resolution adviser.

The incentive to consent to a stage 1 process comes from the binding nature of the stage 2 process and the ability of a party to take the matter to that stage.

There are also differences in the mechanics mainly reflective of the differences for a binding or non- binding process:

**3.1 Differences- Appointment of an expert**

The expert appraisal process in 5.9A.3 allows for either party to initiate a process requiring expert evaluation by providing a Notice to the other party and for the parties to agree on the expert. It has a provision for the AER to nominate a person if such agreement is not forthcoming.

For a DRP determination under the chapter 8 process it is the dispute adviser’s role to establish a DRP in consultation with the parties (8.2.6A(c)). The dispute adviser draws from a pool of experts established and maintained for this purpose.

For the Adviser process under Chapter 8, the dispute adviser has a broad discretion if agreed by the parties. It would be possible to provide the option of a non binding expert evaluation as a defined choice under the Adviser process.

**3.2 Differences in Logistics and Powers**

The DRP process has similar logistic provisions as the evaluative process. This includes appointment of the DRP, procedure, timeline, determination of disputes and costs (covered by 5.9A.4 to 5.9A.9 of the Draft Rules). In addition, Chapter 8 also deals with:

8.2.7 Legal representation;

8.2.9 effective resolution;

8.2.10 Recording and publication;

8.2.11 Appeals and questions of law.

The costs provisions under stage to of the Chapter 8 process provides for the DRP to take into consideration how the parties have conducted themselves in the setup of the process.

**3.3 Differences in Case management**

The challenge of an expert process is the formulation of the question and the determination of the expertise useful to resolve the question in dispute. Under the Chapter 8 Process the dispute adviser has published Practice Notes, which provide for a mechanism to ensure that a dispute is case managed to maximise the prospects of the question being fully articulated, documents are exchanged and the right kind of expert is engaged.

The current appraisal process provides that the appointment of the expert to happen within ten business days. It is not explicit about the preparation of the question, leaving it to the initiating party to formulate. The challenge is that if the parties are not in agreement the initiating party (rather than the responding party) has the obligation to provide the other party and the expert with notice of the matters to be subject to Expert Appraisal (5.9A.4 (d) (3)). There is no provision for what happens if the two parties are in disagreement about the matter to be decided by the expert, nor what the AER needs to do if the parties do not agree on the nature of the expertise required.

This increases the risk of a non- binding process adding delay and cost without being useful.

**4 Using Chapter 8 for Processes:**

I have not considered the mechanism for referral of these matters to Chapter 8 processes. I would be willing to do so if that were deemed appropriate.

There is a policy decision as to whether parties are willing to have a binding process for these types of matters. If they are, the Chapter 8 process can be used in its entirety.

It may be useful to have some additional user notes and forms to allow for the easy use of an expert evaluation processes, if required. This could be done as a standard option under the adviser process.

If there is no need for a binding process the Chapter 8 case management may be useful together with a bespoke evaluative option.

**4.1 The other matters -Adviser:**

Under the current agreement, the dispute adviser is engaged for a fixed number of days a month for energy disputes.

There would need to be some additional user notes and forms to give effect to the case management of these disputes if they were to be included in the Chapter 8 Process. There is precedent for this; scheduling errors have their own forms. To the extent this requires additional time from the adviser it would require the approval of the AER.

It would be useful to estimate the likely quantum of disputes under this provision to determine whether any additional resources are required or additional pool members for determinations/evaluations.

**5 Summary:**

In summary, the expert evaluation process foreshadowed is one that could be administered together with the Chapter 8 process. It would also be possible to provide the more expansive ADR/determinative option that the Chapter 8 Process affords.

Consideration will need to be given:

* Incorporation of these disputes/ parties under the Rules.
* If the DMS is to be used how will it operate?
* Additional forms or user notes required in order to facilitate the process.
* If the dispute adviser is to administer the expert evaluation process, additional efficacy may be achieved by using either the Stage 1 Process or the Adviser Process under Stage 2 to assist in fully identifying the issues to ensure that the right expert is engaged and that the process is properly outlined to maximise the efficiency and cost effectiveness of the process.
* Consent will be needed from the AER.

I am happy to provide any further information or assistance as required.

Kind regards,

Shirli Kirschner

Dispute Resolution Adviser

Wholesale Energy Market.