

Regulatory Test Dispute Resolution Guidelines

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1 Abbreviations

AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
ANTS	Annual National Transmission Statement
IRPC	Inter-regional Planning Committee
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NEM	National Electricity Market
NER	National Electricity Rules
NEMMCO	National Electricity Market Management Company
NPV	Net Present Value
NSP	Network Service Provider
TNSP	Transmission Network Service Provider
TPA	Trade Practices Act 1974

2 Glossary

Applicant

A person who proposes to establish a new large transmission network asset.

Application Notice

A notice which sets out details in relation to a proposed new large transmission network asset as required by clause 5.6.6(c) of the National Electricity Rules (NER).

Connection applicant

A person who:

- (1) wants to establish or modify connection to a transmission network or distribution network and/or
- (2) wishes to receive network services and who makes a connection enquiry as described in clause 5.3.2 of the NER.

Final report

A report setting out the matters detailed in an application notice, provides summaries of submissions received in response to the application notice and the applicant's response to each submission as required under clause 5.6.6(h) of the NER.

Intending participant

A person who is registered by NEMMCO as an Intending Participant under Chapter 2 of the NER.

Interested party

For the purposes of chapter 5, an interested party is a person including an end user or its representative who:

- in NEMMCO's opinion has, or identifies itself to NEMMCO as having, an interest in the network planning and development activities under clause 5.6 or in the determination of plant standards covered under clause 5.3.3(b2); or
- in the AER's opinion has, or identifies itself to the AER as having, the potential to suffer a material and adverse market impact from the new large transmission network asset identified in the clause 5.6.6(j) Final Report,.

Inter-regional Planning Committee (IRPC)

Formed under clause 5.6.3 of the NER, the IRPC is a working group that sits within NEMMCO and is responsible for the coordination of inter-regional planning in the NEM. The IRPC consists of NEMMCO representatives and representatives from each

NEM jurisdictional planning body (i.e. Powerlink, TransGrid, VENCORP, ESIPC and Transend. A number of specialist technical groups are set up as required to support the IRPC.

New large transmission network asset

An asset of a TNSP which is an augmentation and has an estimated total capitalised expenditure in excess of \$10 million.

New small transmission network asset

An asset of a TNSP which is an augmentation and has an estimated total capitalised expenditure valued between \$1 million and \$10 million.

Reliability augmentation

A transmission network augmentation that is necessitated principally by inability to meet the minimum network performance requirements set out in schedule 5.1 or in relevant legislation, regulations or any statutory instrument of a participating jurisdiction.

Registered participant

A person who is registered by NEMMCO in any one or more of the categories listed in clauses 2.2 to 2.7 (in the case of a person who is registered by NEMMCO as a Trader, such a person is only a Registered Participant for the purposes referred to in clause 2.5A).

Transmission Network Service Provider (TNSP)

A person who engages in the activity of owning, controlling or operating a transmission system.

3 Introduction

This guide has been created to help disputing parties understand how the AER will resolve a dispute in relation to applications to establish new large transmission network assets ('regulatory test dispute') within the timeframes prescribed by the National Electricity Rules (the NER). The objective of this guideline is to outline the provisions of clause 5.6.6 of the NER and how the AER proposes to administer these provisions. The recommended dispute resolution process is illustrated in Part 5 of this guideline.

The areas addressed in this guideline include:

- relevant legislation
- the dispute resolution process
- dispute resolution requirements
- the contents and scope of determinations
- flows of information, procedural fairness and confidentiality
- costs.

This guide also discusses issues and considerations the AER may take into account in making a determination. Accordingly, this guide may be reviewed or amended from time to time.

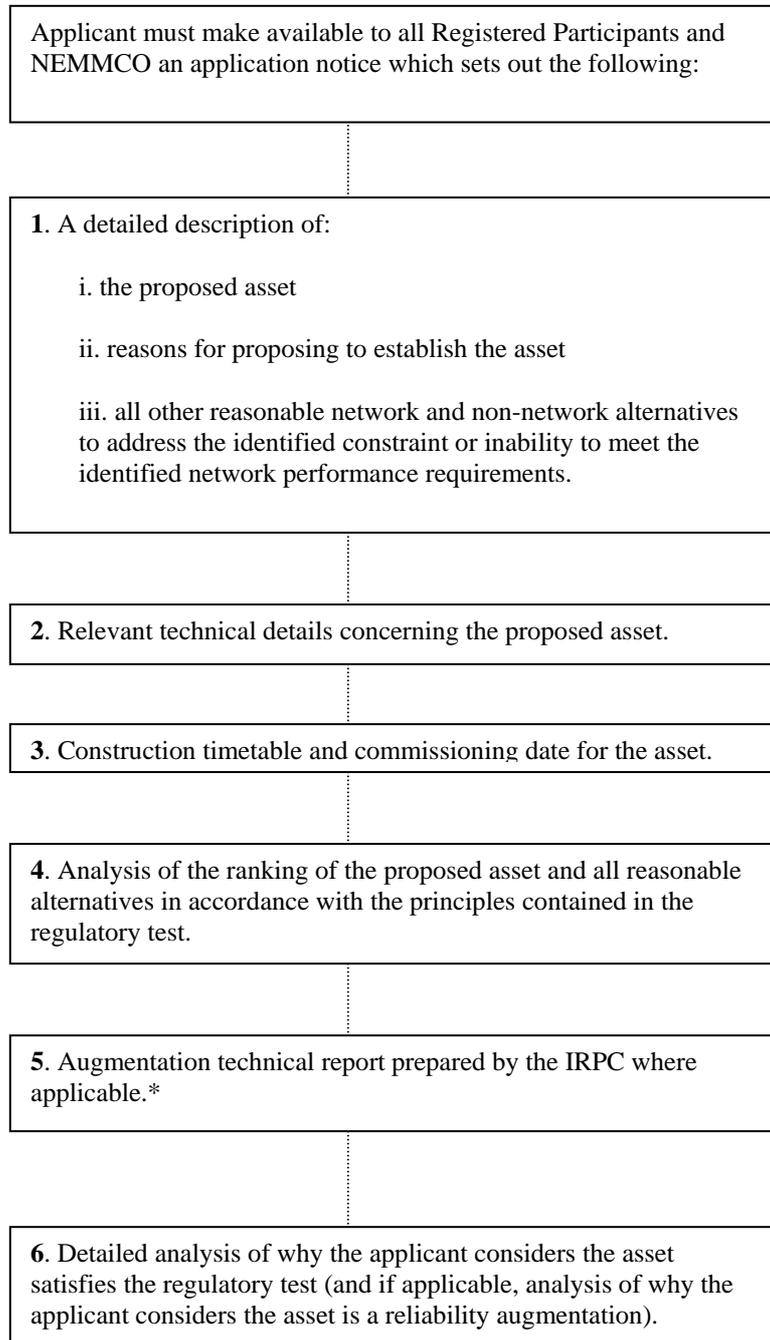
Establishing new large transmission network assets

The NER requires that a formal consultation process be conducted where a party proposes to establish a new large transmission network asset.¹

The proponent (the applicant) must prepare an **application notice** setting out certain information relating to that project, including details of why the project passes the regulatory test. Figure 1 sets out the details required in an application notice.

¹ As set out in clause 5.6.6 of the NER. Large assets are those estimated to exceed \$10 million in value.

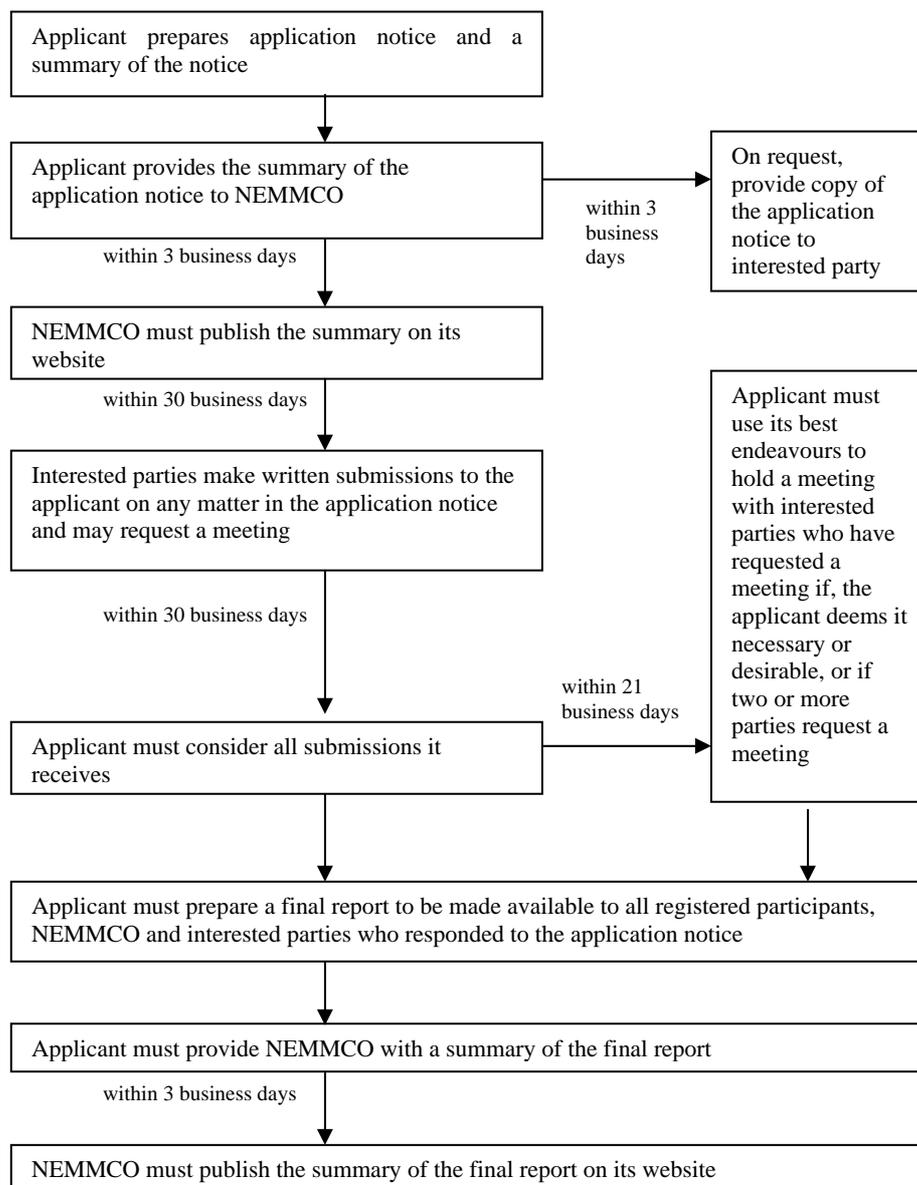
Figure 1. Information requirements for establishing new large transmission assets



* Applicant must have regard to any relevant criteria published by IRPC if reasonably likely to have material inter-network impact or is a reliability augmentation

The applicant must also provide a summary of the application notice to NEMMCO, which must publish the summary on its website. Following the preparation of an application notice and the publication of the application notice summary, the applicant must conduct a consultation process before publishing a **final report** on the proposed project. The final report must set out the matters detailed in Figure 1 and summarise the submissions received from interested parties and the applicant's response. Details of the consultation process are set out in Figure 2. This process provides transparency around the network investment decision.

Figure 2. Consultation process for establishing new large transmission assets²



² Note that applicants will be required to follow a request for information process on potential alternative options.

The Regulatory Test

The regulatory test is applied by Network Service Providers (NSPs) to assess the efficiency of proposed network investments by assessing and ranking the economic viability of network and non-network investment options. The test is based on a cost-benefit analysis and has regard to the principles of economic efficiency and competitive neutrality. The regulatory test is a planning and consultative tool used to promote economically efficient investment in the electricity grid.

An investment satisfies the regulatory test through one of two limbs:

1. *The reliability limb*- this is applied to reliability-driven augmentations which are based on service obligations imposed by the NER or state legislation, regulations or statutory instruments. A proposed reliability augmentation will satisfy the regulatory test if it is the least cost option compared with the costs of alternative options to those who produce, distribute or consume electricity in the National Electricity Market (NEM) in a majority of reasonable scenarios.
2. *The market benefits limb*- this is applied to non-reliability driven investment. A proposed augmentation will satisfy the test if it maximises the expected net present value of the market benefit compared with a number of alternative options and timings in a majority of reasonable scenarios.

The AER has issued regulatory test application guidelines to assist project proponents in applying the test. These provide guidance and clarity on the operation of the test.

AER's role in regulatory test disputes

In 2006, the AER was made responsible for resolving all disputes relating to certain matters in regulatory test final reports.³ If certain aspects of a final report are in dispute, eligible parties may apply to the AER for a finding in relation to the disputed matter.

In situations where no dispute has been raised, provisions in the Rules allow proponents to apply to the AER to determine whether the project satisfies the regulatory test, when the project is non-reliability in nature. This guideline does not discuss this function as it is not dispute-driven.

³ In June 2006, the Australian Energy Market Commission (AEMC) approved a Rule change proposal from the Ministerial Council on Energy (MCE) to streamline the regulatory test dispute resolution process and make the AER the primary body responsible for regulatory test disputes. The Rule commenced operation on 1 July 2006.

4 Dispute resolution lodgement requirements

What can be disputed?

The disputing party must specify the grounds for dispute in its dispute notice. The AER can only hear a dispute if it falls within at least one of five grounds set out in clauses 5.6.6(j) (1)-(5) of the NER.

The NER states that eligible parties may dispute the final report, but only in relation to the contents, assumptions, findings or recommendations of the final report with respect to:

- (1) possible alternatives considered and their ranking under clause 5.6.6(c)(4);
- (2) whether the *new large transmission network asset*:
 - (i) will have a *material inter-network impact*; and
 - (ii) will satisfy any criteria for a *material inter-network impact published by the Inter-regional Planning Committee (IRPC)* in accordance with clause 5.3.6(i) that are in force at the time of preparation of the final report;
- (3) the basis on which the applicant has assessed that the *new large transmission network asset* satisfies the *regulatory test* but only where that asset is not a *reliability augmentation*;
- (4) whether the *new large transmission network asset* is a *reliability augmentation* and whether the asset satisfies the criteria for a *reliability augmentation published by the Inter-regional Planning Committee* in accordance with clause 5.6.3(1) provided any such criteria had been *published by the Inter-regional Planning Committee* at the time of preparation of the final report; and
- (5) the finding in the final report that the *new large transmission network asset* satisfies the *regulatory test* provided the asset is not a *reliability augmentation*,

A consequence of this provision is that the grounds for dispute are linked to the limb of the regulatory test used in the analysis. The table below illustrates which grounds are available for dispute in relation to each limb of the test.

Table 1: Grounds for dispute available by regulatory test limb used.

Ground for dispute	Regulatory Test Limb	
	Reliability	Market benefits
1. alternatives and ranking	✓	✓
2. if the asset will have a material inter-network impact	✓	✓
3. basis on which the regulatory test is satisfied (only where the asset is not a reliability augmentation)	✗	✓
4. whether the asset is a reliability augmentation	✓	✗
5. findings that the asset satisfies the the regulatory test (provided the asset is not a reliability augmentation)	✗	✓

Matters that may not be part of a dispute

Under clause 5.6.6(j) a dispute may not be in relation to any matters set out in the final report which:

- are treated as an externalities by the regulatory test, or
- relate to an individual’s personal detriment or property rights.

Who can lodge a dispute?

To lodge a dispute, disputing parties must be either:

- a Registered Participant
- the AEMC
- a Connection Applicant
- an Intending Participant
- NEMMCO, or
- an Interested Party.

The NER defines these eligible disputing parties as:

Registered Participant

A person who is registered by NEMMCO in any one or more of the categories listed in clauses 2.2 to 2.7 (in the case of a person who is registered by NEMMCO as a Trader, such a person is only a Registered Participant for the purposes referred to in clause 2.5A).

Connection Applicant

A person who wants to establish or modify connection to a transmission network or distribution network and/or who wishes to receive network services and who makes a connection enquiry as described in clause 5.3.2.

Intending Participant

A person who is registered by NEMMCO as an Intending Participant under Chapter 2.

Interested party

For the purposes of chapter 5, an interested party is a person including an end user or its representative who:

- in NEMMCO's opinion has, or identifies itself to NEMMCO as having, an interest in the network planning and development activities under clause 5.6 or in the determination of plant standards covered under clause 5.3.3(b2); or
- in the AER's opinion has, or identifies itself to the AER as having, the potential to suffer a material and adverse market impact from the new large transmission network asset identified in the clause 5.6.6(j) Final Report.

Lodging a dispute

Clause 5.6.6(k) sets out how to lodge a dispute.

(k) A person disputing the final report under clause 5.6.6(j) (the **disputing party**) must:

- (1) lodge notice of the dispute in writing (the **dispute notice**) with the AER;
- (2) give a copy of the dispute notice to the applicant within *30 business days* after the publication of the summary of the final report on NEMMCO's website;
- (3) specify in the dispute notice the grounds for the dispute in accordance with clause 5.6.6(j).

The disputing party must lodge their notice with the AER in writing and specify the grounds for the dispute. The notice may be in electronic or hard copy form. The AER must receive the dispute notice for it to be lodged.⁴

⁴ Dispute notices may be lodged electronically at aer inquiry@aer.gov.au.

The disputing party must also provide the applicant with a copy of the dispute notice within 30 business days of the publication of the summary of the final report on NEMMCO's website.

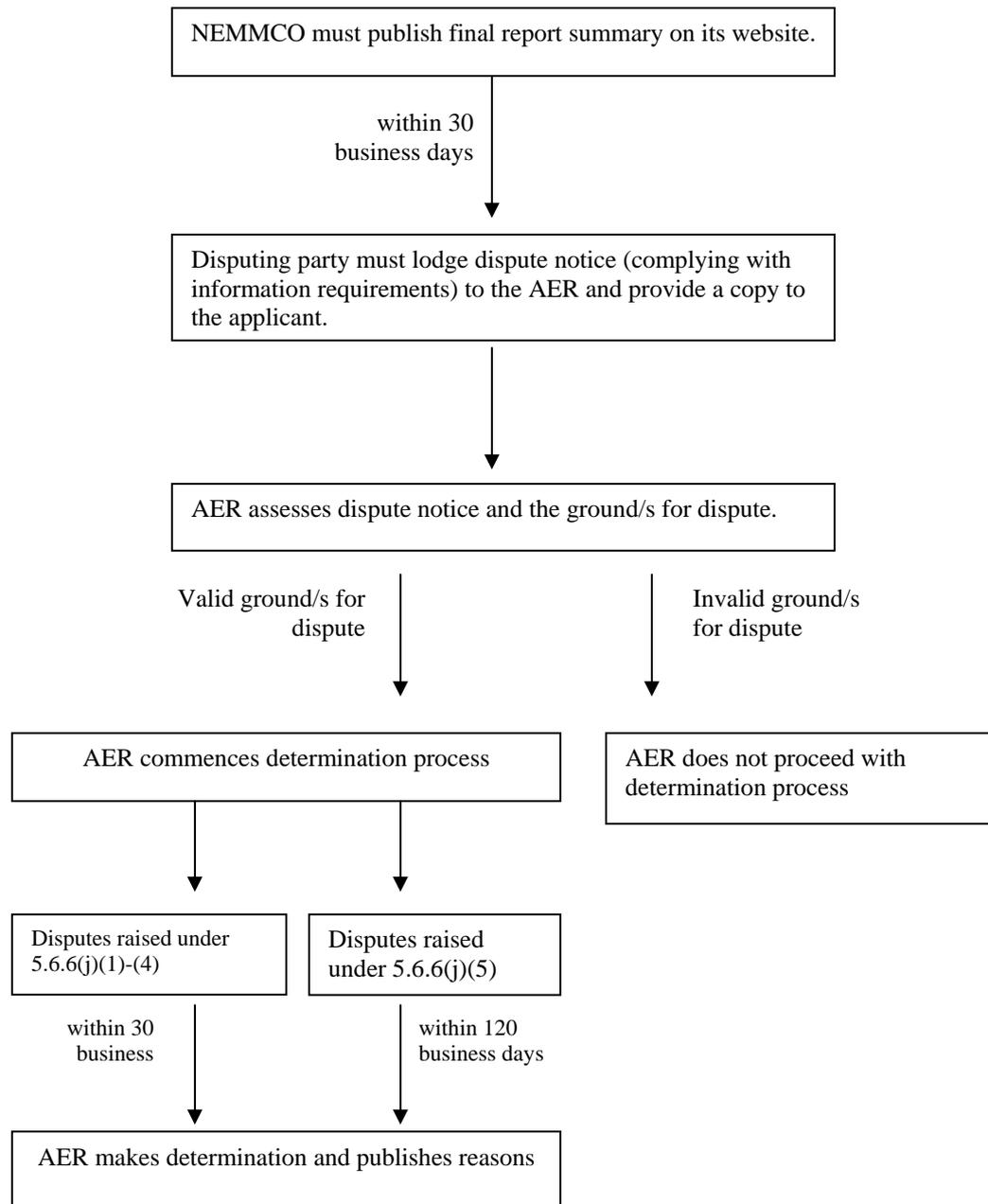
A dispute notice should include the following information:

- disputing party's name, contact officer, address, email and telephone number
- applicant's name and contact details
- ground/s the dispute is lodged under
- copy of the TNSP's regulatory test Final Report
- any submissions the disputing party made in relation to the Final Report
- applicant's reply to any submissions made by the disputing party in relation to the Final Report if applicable
- details of any meetings held by the applicant with the interested party (if applicable), and
- details of any other known parties involved in the matter.

5 Procedure for a dispute

The diagram below sets out the process the Rules prescribe for regulatory test dispute resolution.

Figure 3: Dispute resolution process



Time frames

The AER must publish its determination within 30 business days of receiving the dispute notice, if the dispute falls under clauses 5.6.6(j)(1)-(4).

If a dispute is brought under clause 5.6.6(j)(5), then the AER must make a determination within 120 business days of receiving the dispute notice.

The grounds for dispute and the prescribed timeframe are set out in Table 2:

Table 2: Applicable timeframes by ground for dispute.

Ground for dispute	Timeframe (business days)	Regulatory Test Limb	
		Reliability	Market benefit
1.alternatives and ranking	30	✓	✓
2.if the asset will have a material inter-network impact	30	✓	✓
3.basis on which the regulatory test is satisfied (only where the asset is not a reliability augmentation)	30	✗	✓
4.whether the asset is a reliability augmentation	30	✓	✗
5.findings that the asset satisfies the market the regulatory test (provided the asset is not a reliability augmentation)	120	✗	✓

Upon receipt of a dispute notice, the AER will advise the applicant and disputing party of whether a 30 or 120 business days will apply to the dispute. This will avoid potential uncertainty as to the expiry of the relevant time-period.

Given the regulatory deadlines and limited time available to resolve disputes, it is essential that any party considering bringing a dispute inform the AER of their intention at the earliest opportunity. It would be prudent for parties to inform the AER of any concerns in relation to a proposed project at a number of earlier stages, including where issues have arisen following:

- a request for network support proposals
- a formal request for information on alternative options or
- the publication of an application notice

Early engagement would allow the AER to track the developments in relation to the proposed project and prepare for potential disputes. The earlier and more thoroughly informed the AER is on issues of concern, the better positioned it will be to make timely and sound dispute resolution decisions.

The AER will decide on whether it will seek submissions on the dispute notice or hold consultation meetings on a case by case basis. The applicable timeframes will heavily influence whether there will be any opportunity for consultation.

Extension of time

There are two ways the AER may extend the above timeframes.

Firstly, under clause 5.6.6(n):

- (n) The *AER* may, with the written consent of the disputing parties, extend the period of time in which the *AER* must make a determination under paragraph (m), if the *AER* considers there are issues of sufficient complexity or difficulty involved.

Secondly, under clause 5.6.6(p):

- (p) The relevant period of time in which the *AER* must make a determination under paragraphs (l) and (o) is automatically extended by the period of time taken by an applicant or a disputing party to provide any additional information requested by the *AER* under this clause 5.6.6, provided:
 - (1) the *AER* makes the request for the additional information at least *7 business days* prior to the expiry of the relevant period; and
 - (2) the applicant or the disputing party provides the additional information within *14 business days* of receipt of the request.

The AER must make a request for an extension of time to the parties at least *7 business days* prior to the expiry of the relevant period and the additional information should be provided within *14 business days* of receiving the request.

6 Determinations

Scope of a determination

The AER may only resolve disputes in relation to the matters set out in clause 5.6.6(j). Therefore, an AER dispute resolution determination will focus on those matters set out in clause 5.6.6(j), depending upon the specific ground or grounds under which the dispute was raised.

Expert consultants

The AER may engage an expert to provide advice. Given the level of technical and engineering detail involved in regulatory test assessments, such experts may include engineers, economists or experts in the electricity industry.

It is likely that an engineering consultant would be needed to advise the AER on the engineering/planning aspects of a reliability-driven dispute. Given the complex economic modelling and analysis required, the AER may also require an economic consultant to assist in resolving disputes in relation to the market-benefits limb of the regulatory test.

Material to be taken into account

In making its determination, the following matters are likely to be relevant to the AER's consideration:

- the dispute notice
- the application notice
- the regulatory test final report
- submissions on the application notice
- any expert advice /reports on the proposed asset
- the Annual National Transmission Statement, Annual Planning Reports and any other planning publications where relevant
- any criterion on reliability augmentation published by the IRPC
- relevant planning criteria, reliability requirements or jurisdictional licensing requirements
- relevant regulatory decisions relating to the proposed asset.

The AER is not limited to taking into account these matters, and other matters may be considered relevant.

In relation to disputes relating to reliability augmentations, the AER may have regard to the issues paper on the *IRPC's Criterion on Reliability Augmentation* in the absence of a published set of criteria.

Material that may be disregarded

Clause 5.6.6(m)(3) states:

(m) In making a determination referred to in clause 5.6.6(1), the *AER*:

- (3) may disregard any matter raised by a party in the dispute that is misconceived or lacking in substance.

This enables the AER to disregard certain matters raised by the disputing parties during the course of a determination if it is misconceived or lacking in substance.

Request for further information from parties to a dispute

Under clause 5.6.6(m)(4), the AER may make a request for additional information from the parties to a dispute in certain circumstances.

(m) In making a determination referred to in clause 5.6.6(1), the *AER*:

- (4) may request further information from a party bringing a dispute, or from the applicant, if the *AER* is not able to make a determination based on the information provided to it under clause 5.6.6(m).

The NER allows the AER to request further information 'if the AER is not able to make a determination based on the information provided to it'.

A request for further information will be in writing and the notice will explain that:

- the request is being made pursuant to clause 5.6.6(m)(4)
- the applicant or disputing party has 14 business days to provide the information, and
- the clock has stopped, under clause 5.6.6(p), for calculating the relevant period of time the AER must make a determination

While the NER expressly provides for the AER to request information from 'an applicant or the disputing party' the AER is not prohibited from requesting information from a party that is external to a dispute.

The AER may ask third parties to provide information voluntarily. The AER can also issue a section 28 notice (as discussed below).

Depending on the nature of the information from external parties, and the anticipated use to which the information will be put, the AER may allow the applicant and/or disputing party an opportunity to comment on the information.

Failure to provide information

Section 28 of the NEL can be used to obtain information required for the AER's dispute resolution function.

A section 28 notice can require the person to furnish the information within the time specified in the notice. In the case of a regulatory test dispute, the notice will likely require that information be provided within 14 business days.

Section 28(3) provides that a person must not:

- (a) without reasonable excuse, refuse or fail to comply with a relevant notice; or
- (b) in purported compliance with a relevant notice, knowingly furnish information that is false or misleading.

A breach of section 28 carries a penalty of up to \$2,000 (in the case of a natural person) or \$10,000 (in the case of a body corporate).

Publishing a determination

Under clause 5.6(m)(1) and (2), the AER must publish its determination and its reasons for making a determination. The term 'publish' is defined in Chapter 10 of the NER as 'make available to Registered Participants electronically.'

A decision will generally take effect on the date that it is made by the AER.

AER determination register

The AER intends to keep a public register of all determinations it makes.⁵ Once a determination is published, it will be added onto the AER determination register.

The disputing notice and all submissions (except those that are confidential) will be uploaded onto this register within 5 business days of publishing the determination.

Merits Review

The AER's regulatory test dispute determinations will not be subject to merits review under the currently proposed amendments to the NEL set out in the *National Electricity (South Australia) (National Electricity Law – Miscellaneous Amendments) Amendment Bill 2007* which was introduced into South Australian Parliament on 27 September 2007.

⁵ This will be located at the AER's public website.

7 Flow of information, procedural fairness and confidentiality

Procedural fairness

The requirements of procedural fairness (or natural justice) vary and will depend on the circumstances of the dispute. There are, however, two key requirements that have a bearing on the manner in which disputes are conducted:

- The parties to a dispute should have a reasonable opportunity to present their case to the AER; and
- The AER should be free from bias or the perception of bias.

Reasonable opportunity to present the case

All parties to a dispute should ensure that copies of all submissions and any other information provided to the AER are also made available to all other parties to the dispute. While the AER is able to withhold confidential information from a party, it would only do so after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information (this is addressed in more detail below).

The requirements of procedural fairness also to certain process issues. For example, when the AER is establishing or modifying a process concerning how the parties present their cases, it will usually endeavour to seek the views of the parties where this is practical and appropriate. However, given the tight timeframes that apply, this may not always be possible. In such instances, the AER will at a minimum, follow the procedural requirements set out in the NER.

In resolving procedural issues, the AER must balance several competing considerations including the likely effect on the party raising the issue and the desirability of resolving disputes in a timely manner.

Freedom from bias

During the preliminary phase of a dispute, generally the parties will be advised of any relevant interests or involvement in related matters of the AER. If a party has any concerns in this regard they should be raised at this point.

The AER will usually not publicly comment on specific issues in dispute until it has been completed and after the determination for that dispute has been published.

Confidentiality issues in general

Unless clearly claimed to be confidential, information provided to the AER will generally be treated as non-confidential. It should be noted that, as the AER may be

restricted from testing the veracity of any confidential information, it may be necessary to give less weight to the information in making its decision.

Use of information obtained during a dispute for other purposes

The AER is subject to a number of general limitations in the use of information:

- it cannot make improper use of information.
- when information provided under a statutory power is confidential, the AER must comply with any specific statutory restrictions on disclosure.

Subject to these limitations the AER considers that if it has legitimately obtained information using its powers for one purpose, and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other statutory function.⁶

Confidential information

Section 44AAF(1) of the TPA provides that:

The AER must take all reasonable measures to protect from unauthorised use or disclosure information:

- (a) given to it in confidence in, or in connection with, the performance of its functions or exercise of its powers; or
- (b) that is obtained by compulsion in the exercise of its powers.

Sections 44AAF(2) and (3) set out a non-exhaustive list of circumstances that are taken to be authorised use and disclosure.

The AER is careful to exclude information that is protected when publishing its determination and its reasons for making a determination. However, as discussed above, it is likely that the AER has an obligation to provide interested parties access to, and an opportunity to comment on, information that is relevant to the AER's decision, particularly where that information may be adverse to the party's interests.

However, confidentiality may modify the duty to provide procedural fairness so that either:

- no disclosure is required
- only a modified form of disclosure is required (eg disclosure of the substance but not the detail), or
- disclosure is only provided to professional advisers of the party concerned.

In considering disclosure requirements, the AER will consider the following three factors:

⁶ For further information see ACCC, *Collection and Use of Information*, October 2000.

- the extent to which disclosure will hinder the proper performance of the functions of the AER
- the extent to which disclosure will harm the provider of the information, and
- the extent to which the non-disclosure will harm the party who does not have access to the information.

These principles need to be applied with caution in the context of a clear statutory restriction protecting against unauthorised use or disclosure. The AER will make an assessment on a case by case basis. In order to comply with the requirements of section 44AAF, the AER will consult with the provider of the information prior to deciding to disclose it.

8 Cost determinations

Clause 5.6.6(q) provides '[w]here the AER engages a consultant to assist in making a determination ... the AER may include a costs determination.' Costs determination will be limited to consultancy costs. The NER goes on to state:

- (r) Where a costs determination is made, the *AER* may:
 - (1) render the applicant an invoice for the costs; or
 - (2) determine that the costs should;
 - (i) be shared by all the parties to the dispute, whether in the same proportion or differing proportions; or
 - (ii) borne by a party or parties to the dispute other than the applicant whether in the same proportion or differing proportions; andthe *AER* may render invoices accordingly.
- (s) If an invoice is rendered, the *AER* must specify a time period for the payment of the invoice that is no later than *30 business days* from the date the *AER* makes a determination under clause 5.6.6.

If a costs determination is made an invoice will be provided to the appropriate party. The invoice will set out a break down of the costs involved. Consistent with the requirements of the NER, payment of the invoice will be required no later than 30 days from the date of the regulatory test dispute determination.

In making a cost determination, the AER has the discretion to determine the proportion of costs that each party should bear. Where the AER considers it appropriate that costs will be shared, the AER will take into account the circumstances and nature of the dispute to make its decision.