

1 Overview

There are 2 stages to dispute resolution process in the Rules Stage 1 DMS and Stage 2 DRP/Adviser process.

These notes provide some indication of how the Adviser intends to approach Stage 2, the establishment and management of the 'DRP' and the 'Adviser process'. These notes are intended to assist the effective participation of participants, their advisers and the DRP in the Stage 2 DRP process and the Adviser process. *If you have a scheduling error please note there is a separate user note for Scheduling Errors on the website, [Guidelines and application for compensation for a scheduling error](#).*

It is useful to understand different types of dispute resolution processes in reviewing this section.

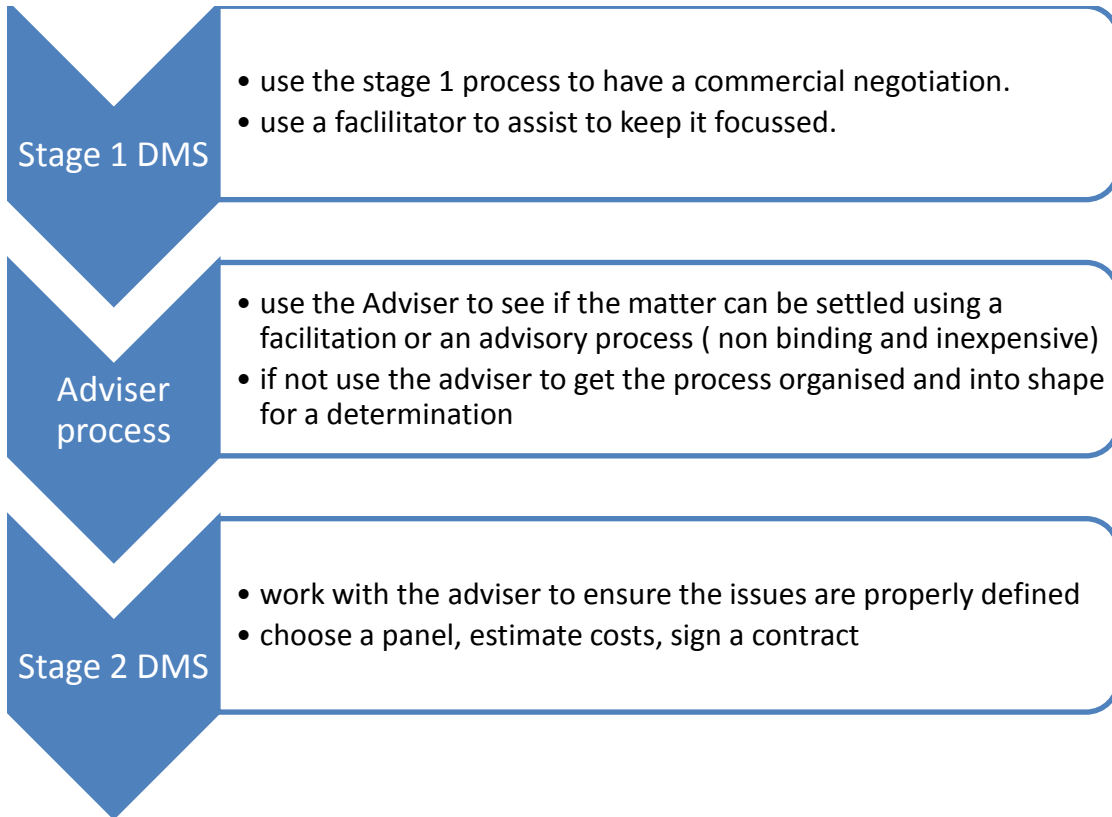
Types of processes:

Facilitative processes: where a neutral specialist is involved in assisting the parties to negotiate to resolve the dispute themselves. ([Mediation](#), facilitation)

Advisory processes: where the neutral specialist gives the parties a non-binding evaluation of how the dispute could be resolved or provides an opinion on the substance of the dispute.

Determination: where the neutral specialist decides the issues in dispute for the parties. (DRP; except determination, arbitration, mini trial)

2 Suggested path



Stage 2 - Provides the opportunity for the dispute to be decided by a dispute resolution panel ('DRP') or (by consent of the parties) resolved (in part or in whole) by a process, designed by the Wholesale Energy Market Dispute Resolution Adviser ('Adviser'). Stage 2 is designed to be a determination. Only if all parties agree can there be mediation or other facilitative or advisory process for the resolution of the dispute. There is also scope for facilitative or advisory processes to be used to narrow down the issues or, to effectively manage a determinative process.

For example if the parties have an issue in dispute and know they would like an expert determination, they may agree to the Adviser assisting to scope and prepare the matter for a hearing in a similar way a registrar assists to manage a matter before the court. This may reduce time and cost.

3 Starting into stage 2

3.1 Timing of referral to Stage 2 Adviser process: (references are to the NER)

If:

- (1) *a Registered Participant on whom a DMS referral notice is served does not agree to become a party to the dispute; or*
- (2) *the dispute is not resolved within 20 business days (or such lesser period as is agreed by all the parties) after the day on which a DMS referral notice was last served on a Registered Participant,*

any Registered Participant that has served a DMS referral notice in relation to the dispute or that has agreed to become a party to the dispute may, no later than 60 business days after the day on which a DMS referral notice was last served on a registered participant, refer the matter to the Adviser in accordance with clause 8.2.5.

[Clause 8.2.4(i)]

The dispute can be referred to Stage 2 after the period in which the parties have agreed to try and resolve it in the DMS process. The idea of this is to ensure that participants give the commercial processes that are contained in the DMS a fair go.

There may be a number of reasons why one or more parties may want to send the dispute to the Adviser as early as allowable. These include:

- where there are a number of parties and it is felt that it would be useful to have the Adviser to case manage the dispute to keep it on time – this may be sent as an 'Adviser process' (see below)

- there are external time constraints
- the issue is one which effects the market as a whole and parties feel that it is necessary to notify the market and set up a DRP as quickly as possible
- It is an issue that requires a determination and the parties feel that Stage 2 offers more procedural protections.

If things are going well in the DMS in Stage 1 and it is on the road to resolution parties should still be mindful of the time lines. There is an upper limit for the time that the matter can stay in Stage 1 – see clause 8.2.4 which provides:

If the dispute has not been referred to the adviser within 60 business days after the day on which a DMS referral notice was last served on a Registered participant, any obligations or requirements arising under this clause in relation to that dispute cease to have effect.

[Clause 8.2.4 (j)]

Being out of time means that there is no automatic right to proceed to Stage 2. A test needs to be applied by a DRP which balances the needs of the parties and the affects to others of such a matter proceeding. If for some reason you are outside this time frame you may wish to consult clause 8.2.4 (k).

3.2 How to send a Dispute to Stage 2

3.2.1 A dispute may be referred to the Adviser by serving on the Adviser an Adviser referral notice in accordance with this clause. An Adviser referral notice must:

- (1) *be in a form approved and published by the Adviser; and*
- (2) *contain the names of all parties to the dispute; and*
- (3) *if the Registered participant serving the Adviser referral notice does not agree to the Adviser attempting to resolve the dispute in accordance with clause 8.2.5(c)(1) and requires the Adviser to refer the dispute to a DRP for determination, the adviser referral notice must contain a statement to that effect.*

[Clause 8.2.5 (a)]

[Stage 2 - Adviser referral notice](#) is the 'form approved and published by the Adviser referred to in 8.2.5. It can be used to refer the matter to an Adviser process to resolve it or prepare it for a DRP.

The Adviser process referred to in 8.2.5 (c) (1) is designed to provide maximum flexibility. It can be used in its own right to refer an appropriate matter for mediation etc. Alternatively, it can be used to allow for clarification of the issues and the proper exchange of documents before a DRP is established.

This will normally result in a timetable for

- issues facts and contentions from the applicant;
- issues facts and contentions from the respondent;
- common facts agreed;
- common documents agreed;
- response from the applicant with a list of potential witnesses (number and what they are attesting to);
- response from the respondent with a list of potential witnesses;
- a list of questions for the DRP and the skills required.

Once this is received the adviser will consider the information and provide options on what can be done, and estimate of the resources required and the likely costs involved.

Where a dispute is referred to the Adviser, the Adviser must immediately notify each Registered Participant that is party to the dispute of that fact. Each Registered Participant must, within 5 business days of being so notified, provide to the Adviser a statement setting out:

- (1) *a brief history of the dispute and the circumstances giving rise to it; and*

(2) a statement of its issues in relation to the dispute.

[Clause 8.2.5 (b)]

In a complex dispute this does not allow sufficient time. As a matter of practice a more extensive period is devoted to defining the issues. This usually occurs by sending the Adviser a [Stage 2 - Adviser referral notice](#) asking her to arrange a meeting to prepare the matter for Hearing.

4 The Adviser must, within 10 business days of being served with the Adviser referral notice, either:

5 (1) if the parties so agree, attempt to resolve the dispute by any means the Adviser, having regard to the principles set out in clause 8.2.1, considers appropriate; or

6 (2) if the parties do not agree to the adviser attempting to resolve the dispute in accordance with clause 8.2.5(c)(1), refer the dispute to a DRP for determination in accordance with clauses 8.2.6A to 8.2.6D.

[Clause 8.2.5 (c)]

7 The DRP process

7.1 Notification of market (See Form 4 & clause 8.2.5 (e))

Where the Adviser refers a dispute to a DRP, the Adviser must promptly publish to all Registered Participants the fact that the referral has been made.

[Clause 8.2.5 (e)]

Where the Adviser refers to a DRP she will promptly advise the market. The Adviser will endeavour to include in the notification sufficient information about the dispute to allow other participants to decide whether they are affected and should become parties to the dispute. As a practical matter the Parties will be asked to provide a draft Notice to the market ensuring that it is framed in a way that meets their interests.

7.2 Establishing a DRP 8.2.6A (c) – (d)

8.2.6A Establishment of dispute resolution panel

- (a) *Where the adviser decides to refer a dispute for resolution by a DRP, the Adviser (must establish the DRP to determine the dispute.*
- (c) *The Adviser must consult with the parties to the Stage 1 dispute resolution process on the composition of the DRP. For the avoidance of doubt, the requirement to consult on the composition of the DRP does not apply with respect to a party that is later joined as, or that later opts to become, a party to the dispute.*
- (d) *Despite the requirement to consult set out in clause 8.2.6A(c), a decision of the Adviser as to the composition of the DRP is final and binding upon all parties to the dispute.*

[Clause 8.2.6A]

A DRP is established to **determine**, not to **resolve** the dispute. It may also give directions to manage the process.

The Adviser is required to determine the composition of a DRP, but must consult with parties to the Stage 1 dispute resolution process before doing so. When consulted by the Adviser on a decision as to the number and type of people to sit on a DRP, it is useful for participants to consider:

7.2.1 Timing

The Adviser must within 10 business days of receipt of an [Stage 2 - Adviser referral notice](#) (unless parties agree to her resolving the dispute) under 8.2.5 (c) (1)) refer the dispute to a DRP for determination.

Ten days is not a long time to co-ordinate three busy and senior people

If the parties want meaningful input into the choice of panel member it is useful for them to:

- be prepared to participate in joint discussions with the Adviser on this topic **prior** to issuing the [Stage 2 - Adviser referral notice](#).
- The range of experience necessary to deal with the issues in dispute needs to be identified.

7.2.2 Composition of the DRP

It is useful to remember that where at least the DRP chair has experience, the process will run smoothly. [**Clause 8.2.6A (k)**: “The Adviser must nominate one of the DRP members to be the chairperson.”]

While the parties are in dispute on the substantive issue it is often in both parties’ interest to have a rigorous dispute resolution process. It may also be in parties’ interest to use best endeavours to agree on the composition of a DRP, or at least on a process for determining its composition (e.g. each party select one person and the Adviser select their chair). The Adviser is more likely to accede to the recommendation of participants as to the composition of a DRP if it is unanimous, especially if all persons nominated are from the pool.

There is scope to co-opt additional pool members if there is a dearth of skills. This could happen due to a lack of available times or due to conflicts of interest (see 8.2.6 below).

The Adviser may, if in his or her reasonable opinion no member of the pool established under clause 8.2.2(e) is:

- (1) eligible for appointment to a DRP; or*
 - (2) sufficiently skilled and experienced to resolve the dispute,*
- appoint to the DRP another person whom he or she considers to be eligible and sufficiently skilled and experienced, but who is not a member of the pool. A person so appointed is deemed to be a member of the pool on and from his or her appointment to the DRP.*

[Clause 8.2.6A (i)]

7.3 Number of DRP members

A DRP comprises three members or, if the parties agree that the circumstances and nature of the dispute warrant a panel comprised of one or two members, the number so agreed.

[Clause 8.2.6A (e)]

There may be one to three DRP members. The default provision in the event the parties do not agree is three panel members. A panel of three will obviously have a higher daily rate and will also need time for group preparation and discussion of issues as well as individual preparation time.

In deciding the number of panel members, it is important to consider:

7.3.1 The amount in dispute

The need for balance needs to be considered in the context of costs:

- what is the monetary and precedent value of a decision
- How many parties are there (the costs of the DRP can be shared between the parties).

7.3.2 Issues in dispute

- Where an issue has legal, economic and market dimensions it can be helpful to ensure that each of these skills is represented on the panel.

7.3.3 The time pressure

Getting the availability of more than one panel member can affect the time efficiency of the process especially for complex disputes requiring extensive time/commitment from the panel.

7.4 Role of the Adviser in establishing a DRP

7.4.1 Composition of DRP

The Adviser (must consult with the parties to the stage 1 dispute resolution process on the composition of the DRP. For the avoidance of doubt, the requirement to consult on the composition of the DRP does not apply with respect to a party that is later joined as, or that later opts to become, a party to the dispute.

[Clause 8.2.6A (c)]

The Adviser is required to determine the composition of a DRP, but must consult with parties to the Stage 1 dispute resolution process before doing so. As a practical matter, the Adviser will try to facilitate a **consensual** agreement on the size and composition of a DRP. This will involve the adviser in defining the nature of issues in dispute by a consensual process, as well as identify costing and timing issues.

7.4.2 Conflicts of interest DRP members

A person, whether a member of the pool established under clause 8.2.2(e) or not, is not eligible for appointment to a DRP if that person has any interest which may conflict with, or which may be seen to conflict with, the impartial resolution of the dispute. Where a person becomes aware of such a conflict after the DRP commences the determination of a dispute, the person must advise the parties to that effect. The person must advise the parties to that effect.

[Clause 8.2.6A (g)]

The Adviser will approach the pool member or other person to sit on a DRP. A person who is approached should be aware that under clause 8.2.6(A) she/he is not eligible if she/he has a conflict of interest

The list of what may be seen as a conflict is not exhaustive and is highly subjective. It includes:

- having direct or indirect relationship with one of the parties or their advisers
- being part of an organisation that does or has done work with one of the parties
- Having any financial or other interest that may be affected by the outcome of the dispute.

7.4.3 How to deal with conflicts

Where:

(1) a Registered participant believes that a person appointed to a DRP has an interest which may conflict with the impartial resolution of the dispute; or

(2) the person appointed to a DRP discloses the existence of such an interest: the person must not continue as a member of the DRP, except with the written consent of all parties to the dispute.

[Clause 8.2.6A (h)]

The pool members have been chosen because of their knowledge of and connection to the market. They will often have relationships with participants and it is often difficult to determine whether these may seem to be a conflict with the impartial resolution of the dispute.

The Adviser will ask each panel member to prepare a short note setting out any involvement with the parties. This will be sent to the parties and they will be asked to let the Adviser know if any of the connections is a perceived conflict. If not, the person can be appointed.

Where a conflict of interest has been identified, the member concerned may only continue as a member of the DRP with the written consent of all parties to the dispute.

7.4.4 [Contract for DRP](#)

Each of the Adviser, a person serving as a member of a DRP and a person to whom a dispute is referred for mediation or other form of resolution may, before acting in relation to the dispute, require the parties to the dispute (or any one of them) to execute a release and indemnity in relation to any loss, damage or liability that that person would, but for the release or indemnity, suffer or incur as a consequence of any act or omission done in good faith in connection with the dispute.

[Clause 8.2.12 (b)]

The powers of the DRP are set out in clause 8.2.6 of the code. A draft dispute resolution agreement is published on the AER web site. The [contract](#) sets out the terms on which DRP members are engaged generally and contains a release and indemnity as provided for in the Rules

7.4.5 Costs of DRP process**8.2.8 Cost of dispute resolution**

(a) *The costs of any dispute resolution processes (other than legal costs of one or more parties), including the costs incurred by the adviser (and where clause 8.2.6A(b) applies, the alternate) in performing functions of the adviser under clauses 8.2.5, 8.2.6A, 8.2.6B, 8.2.6C or 8.2.6D and costs of the DRP and its members, are to be borne equally by the parties to the dispute unless*

- (1) *Clause 8.2.8(b) applies; or*
- (2) *otherwise agreed between the parties.*

[Clause 8.2.8 (a)]

DRP costs include: consultancy fees of members usually as an hourly rate for both preparation and sitting time, travel and any accommodation or meals.

Disbursements for the hearing include transcript, room hire and refreshments.

Adviser costs include liaison and administration.

GST is payable and parties are entitled to a tax invoice.

7.4.6 Payment of DRP costs

The costs protocol is designed to minimise administrative time and costs involved. It is also designed to ensure members of the DRP are paid irrespective of the decision they deliver.

As a general rule the DRP process will start with a preliminary meeting to set a timetable for the process. The timetable will include an estimate of the number of steps and the time likely to be required to determine the dispute. Applying those estimates to the fees charged by DRP member(s) and the Adviser, and anticipated disbursements; the Adviser will prepare an estimate of the total cost of the DRP process. Before any further steps in the process have occurred, the adviser will issue to each of the parties an invoice for their share of the

estimated total cost of the DRP process, based on equal apportionment of costs between all parties.

To minimize administration costs, it is desirable that payment of the amounts due to each DRP member and the adviser be paid separately. The invoice will indicate the amounts to be paid to each of these parties. Cheques made out as directed in the invoice will be sent to the adviser for payment within 14 days.

If necessary, reconciliations will be done at the end of the DRP process. Any amount by which the actual costs are less or more than the estimate, and any changes in the shares in which the costs are to be paid, can be assessed and reconciled at that time.

7.4.7 Cancellation of dates

Once the DRP has set aside time for hearings or meetings with the parties, there may be cancellation fees if the dates are changed by request of the parties with less than 1 week's notice.

7.4.8 Publication of DRP decision

8.2.10 Recording and publication

- (a) Where a DRP makes a determination, a copy of the determination must be forwarded to the adviser.
- (b) The DRP must provide a copy of its determination (save to the extent that it contains confidential information), to the AER for publication.

[Clause 8.2.10]

A copy of the DRP determination (without any confidential information) will be published on the AER website www.AER.gov.au

8 Evaluation and review

Parties and their advisers will be asked to complete an [Evaluation of dispute resolution panel](#), for either DRP or adviser processes. The parties should be aware that a decision is final and binding subject to the right to judicial review set out in 8.2.11

8.2.11 Appeals on questions of law

A party to a dispute may appeal on a question of law against a decision or determination of a DRP in accordance with section 71 of the National Electricity Law.

[Clause 8.2.11]

Please feel free to contact the Adviser to discuss any specific questions you may have

9 Document control details

Please direct comments and questions to the Adviser, Shirli Kirschner, by email:
shirli@resolveadvisors.com.au

History of Amendments:

- History Sent to market April 2003 (version 1)
- Revised by Phillips Fox 9 April 2003 (version 2)
- Revised by Resolve 16 May 2003 DMS contacts comments and examples(version 4)
- Revised by Resolve 5 June 2003 (version 4)
- Revised by Resolve 12 June 2003 DMS contacts comments
- Sign off Phillips Fox
- Revision to hypothetical case studies and release 7 July 2003
- Rewrite to meet the Rules November 2011
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