



## DISPUTE RESOLUTION MECHANISM FOR EXISTING TRANSMISSION CONNECTED GENERATING SYSTEMS

### DRAFT WHOLESALE ELECTRICITY MARKET (WEM) PROCEDURE

#### Background

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The Tranche 1 Amending Rules have introduced into the Wholesale Electricity Market (WEM) Rules a new framework for registering generator performance standards and an associated monitoring and compliance regime for generating systems connected to the South West Interconnected System (SWIS). The new framework commences on 1 February 2021.

The WEM Rules include arrangements for existing transmission connected generating systems (existing generators) to transition to the new framework by determining a set of registered standards and Generator Monitoring Plan. Where agreement on the registered standards or Generator Monitoring Plan cannot be reached, the WEM Rules outline a time-limited bespoke dispute resolution process. The Coordinator of Energy (Coordinator) must appoint Generator Arbitrator(s) and a Technical Panel of Experts for this dispute resolution mechanism.

The Coordinator must also develop a WEM Procedure that sets out the process for referring matters to the Generator Arbitrator, the manner in which the dispute is to be resolved (including how costs are to be awarded), and reasons where the Coordinator may determine that a Secondary Arbitrator may be used. The Coordinator is responsible for referring a dispute for arbitration once she/he has been determined that the process(es) outlined in the WEM Procedure have been followed.

This draft WEM Procedure is provided for the purposes of stakeholder consultation. Note the templates referred to in the WEM Procedure will be developed for consultation prior to 1 February 2021. Specific questions are also highlighted below.

#### Questions for stakeholders

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- The WEM Rules specify several reasons the Coordinator may form an opinion that the dispute should be referred to a Secondary Generator Arbitrator (1.42.6(a-c)) and an “other” category (1.42.6(d)). The draft WEM Procedure does not provide further detail on what this other category may include. Rather, the Coordinator is required to consult with the Generator Arbitrator before forming this opinion.
  - *Stakeholders are asked whether there are additional reasons that should be specified in the procedure.*
- The draft WEM Procedure is relatively silent on the process the Generator Arbitrator might use for arbitral proceedings with the Generator Arbitrator able to determine the most appropriate process for each dispute (Paragraph 3.1.2).
  - *Stakeholders are asked to advise whether there are existing, defined arbitral proceeding processes which should be specified and/or used.*

Please provide any feedback on the Coordinator's WEM Procedure by 5:00pm on Friday 8 January 2021 to: [energytransformation@energy.wa.gov.au](mailto:energytransformation@energy.wa.gov.au)



Government of Western Australia  
Energy Policy WA

# WEM Procedure

## Dispute Resolution Mechanism for Existing Transmission Connected Generating Systems

11 December 2020

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## Energy Policy WA

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### Document Information

<b>Title</b>	WEM Procedure
<b>Subtitle</b>	Dispute Resolution Mechanism for Existing Transmission Connected Generating Systems

### Document History

Rev No	Date	Amended by	Details of amendment
1	11/12/2020	Brooke Eddington	Consultation Draft

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# 1. Introduction

## 1.1. Purpose and scope

- 1.1.1. This Wholesale Electricity Market (WEM) Procedure: Dispute Resolution Mechanism for Existing Transmission Connected Generating Systems (Procedure) is made in accordance with clauses 1.36.5 and 1.42.10 of the Electricity Industry (Wholesale Electricity Market) Rules (WEM Rules).
- 1.1.2. The *Electricity Industry Act 2004*, the *Electricity Industry (Wholesale Electricity Market) Regulations 2004* (WEM Regulations) and the WEM Rules prevail over this Procedure to the extent of any inconsistency.
- 1.1.3. The purpose of this Procedure is to provide further information on the implementation of the arbitral dispute resolution mechanism applicable to the resolution of disputes arising in relation to Registered Generator Performance Standards (GPS) and Generator Monitoring Plans for Existing Transmission Connected Generating Systems (existing generators).
- a. This dispute resolution mechanism applies where the processes outlined in sections 1.40 and 1.41 of the WEM Rules do not result in agreement of Registered Generator Performance Standards and a Generator Monitoring Plan for an Existing Transmission Connected Generating System.

## 1.2. Definitions

- 1.2.1. Terms defined in the *Electricity Industry Act 2004*, the WEM Regulations and the WEM Rules (including Appendix 12) have the same meanings in this Procedure unless the context requires otherwise.
- 1.2.2. The following definitions apply in this Procedure unless the context requires otherwise.

**Table 1 Definitions**

Term	Meaning
Coordinator of Energy	Means the Coordinator of Energy referred to in section 4 of the <i>Energy Coordination Act 1994 (WA)</i> .

## 1.3. Interpretation

- 1.3.1. The following principles of interpretation apply in this Procedure unless otherwise expressly indicated:
- a. The conventions described in clauses 1.3 to 1.5 of the WEM Rules apply in this Procedure.
- b. References to time are references to Australian Western Standard Time.
- c. Terms that are capitalised, but not defined in this Procedure, have the meaning given in the WEM Rules.
- d. A reference to the WEM Rules or WEM Procedures includes any associated forms required or contemplated by the WEM Rules or WEM Procedures.
- e. Words expressed in the singular include the plural and vice versa.
- f. A reference to a paragraph or part refers to a paragraph or part of this Procedure.
- g. A reference to a clause or section refers to a clause or section of the WEM Rules.

## 1.4. Related documents

1.4.1. The documents in Table 2 are associated with this Procedure.

**Table 2** Related documents

<b>Title</b>	<b>Location</b>
WEM Rules	Economic Regulation Authority (ERA) website
WEM Procedure: Generator Monitoring Plans (Australian Energy Market Operator (AEMO))	AEMO website
WEM Procedure: Generator Model Submission and Maintenance (Western Power)	Western Power website
WEM Procedure: Transitional Procedure for Generator Performance Standards (Western Power)	Western Power website
GPS Dispute Resolution Notice Template	Energy Policy WA (EPWA) website
GPS Dispute Resolution Notice Response Template	EPWA website

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## 2. Referral to dispute resolution

### 2.1. Overview

- 2.1.1. Sections 1.40 to 1.41 of the WEM Rules describe all relevant requirements and obligations to be fulfilled by a Market Participant, Western Power and the Australian Energy Market Operator (AEMO) in determining Registered Generator Performance Standards and a Generator Monitoring Plan for each Existing Transmission Connected Generating System.
- 2.1.2. Where parties cannot agree Registered Generator Performance Standards or a Generator Monitoring Plan, section 1.42 of the WEM Rules sets out a dispute resolution framework whereby an arbitrator can hear the dispute and make a binding decision.
- 2.1.3. The arbitration process allows for a range of potential disputes including, but not limited to, disputes relating to technical generator-specific information; engineering and modelling of system impact by existing generating systems; and commercial, contracting or risk allocation costs between AEMO, Western Power and Market Participants.
- 2.1.4. The framework includes obligations on the Coordinator of Energy (the Coordinator) to appoint one Primary Generator Arbitrator and at least two Secondary Generator Arbitrators (who may hear a dispute where the Primary Generator Arbitrator is unable) as well as a Technical Panel of Experts that the Generator Arbitrator may call upon for technical advice. The Coordinator must publish the process by which these appointments are made, and details of the appointments.
- 2.1.5. The Coordinator is required to refer Disputes to arbitration and must also develop a WEM Procedure (this Procedure) providing further information on how the dispute resolution process is to be conducted (clause 1.42.10 of the WEM Rules).
- 2.1.6. Part 2.2 of this Procedure describes the details of the first stage of the dispute resolution process, which includes the process by which a Party to a Dispute is to apply to have the dispute heard by a Generator Arbitrator; the process by which the Coordinator will refer a dispute to arbitration; and the logistics of pre-arbitration such as the choice in arbitrator and administrative assistance provided.
- 2.1.7. Part 3 of this Procedure describes the process by which the arbitrator is to conduct the proceedings.

### 2.2. Request for dispute resolution

- 2.2.1. A Market Participant, Network Operator or AEMO must comply with the process as outlined in this Procedure in order to seek referral of a Dispute to arbitration by the Coordinator under clause 1.42.4 of the WEM Rules.
- 2.2.2. A Party requesting referral of a Dispute must use the *GPS Dispute Resolution Notice* template (available on the Coordinator's website) when providing written notification for a Dispute to the Coordinator and each other Party to the Dispute in accordance with clause 1.42.4 of the WEM Rules.
- 2.2.3. The *GPS Dispute Resolution Notice* template contains the information required by the Coordinator to determine if a dispute is to be referred to arbitration including, but not limited to:
  - a. name and contact details of the person giving the notice;
  - b. name and contact details for each other Party involved in the Dispute;



- c. details of the matter under Dispute (being related to either GPS or Generator Monitoring Plan);
- d. a statement of the Party's position on the matter in dispute;
- e. an overview of the evidence to be provided to the Generator Arbitrator;
- f. information on how the applicable process outlined in sections 1.40 (GPS) and 1.41 (Generator Monitoring Plan) of the WEM Rules have been followed; and
- g. whether the referring Party believes that the Primary Generator Arbitrator, or any of the Secondary Generator Arbitrators, has an actual, potential or perceived conflict of interest with the subject matter of the Dispute, and the reasons why.

**2.2.4.** Unless a longer timeframe is agreed by the Coordinator, the counterparty to a dispute must provide a written response to the Coordinator within 10 business days of receipt of a *GPS Dispute Resolution Notice* using the *GPS Dispute Resolution Notice Response* template. This response must include but is not limited to:

- a. the name and contact details of the person responding to the notice;
- b. the counterparty's response to the *GPS Dispute Resolution Notice* including their view of the matter under Dispute and a statement of their position on the matter;
- c. an overview of the evidence to be provided to the Generator Arbitrator;
- d. how the applicable process outlined in sections 1.40 and 1.41 of the WEM Rules have been followed; and
- e. whether the counterparty believes the Primary Generator Arbitrator, or any of the Secondary Generator Arbitrators, have an actual, potential or perceived conflict of interest with the subject matter of the Dispute, and the reasons why.

**2.2.5.** Before referring a Dispute to arbitration, the Coordinator must consider the information provided under paragraph 2.2.3 and 2.2.4 of this Procedure against the following criteria:

- a. whether the Parties have undertaken their relevant obligations outlined in clauses 1.40 and 1.41 of the WEM Rules; and
- b. whether the statements and overview of evidence provided in accordance with paragraph 2.2.3 and 2.2.4 of this Procedure are sufficient to satisfy the Coordinator that the dispute is genuine.

**2.2.6.** The Coordinator may request either Party provide additional information prior to determining whether to refer a dispute to arbitration. The Coordinator may specify a reasonable timeframe for this purpose. Where a request for further information is made, the relevant Party must provide it within the timeframe specified by the Coordinator.

**2.2.7.** The Coordinator may reject a request to refer a dispute to arbitration if the information required under paragraph 2.2.5 or 2.2.6 of this Procedure is not provided or insufficient.

## **2.3. Administrative support to Generator Arbitrator(s)**

**2.3.1.** The administrative support the Coordinator will provide to the Generator Arbitrator is limited to the dispute referral process outlined in Part 2.2.

**2.3.2.** Once a Dispute is referred to the Generator Arbitrator in accordance with clause 1.42.5 of the WEM Rules, the Generator Arbitrator must provide his/her own administrative support services (such as calendar management, meeting rooms, record keeping and invoicing).

- a. Clause 1.42.27 of the WEM Rules allows the Generator Arbitrator to procure any support and services associated with arbitral proceedings and recover associated costs.

**2.3.3.** The Coordinator will not provide any administrative support to the Technical Panel of Experts, other than the initial appointment of members under clauses 1.42.2 or 1.42.28 of the WEM Rules.

## **2.4. Use of Primary or Secondary Generator Arbitrator**

**2.4.1.** The Coordinator may consult with the Primary Generator Arbitrator in advance of a Dispute referral to determine:

- a. whether any of the circumstances outlined in clause 1.42.6(a) to 1.42.6(d) of the WEM Rules apply;
- b. whether there are any other relevant aspects of the submission that may influence the decision to use the Primary or a Secondary Generator Arbitrator; and
- c. whether, in the Primary Generator Arbitrator's view, there are any other reasons why he/she may not be able to perform the functions under section 1.42 of the WEM Rules.

**2.4.2.** The Coordinator must refer a Dispute to a Secondary Generator Arbitrator if:

- a. in the Coordinator's reasonable opinion any of the matters under paragraph 2.4.1 of this Procedure apply; or
- b. if any of the Parties to the Dispute have indicated they believe the Primary Generator Arbitrator, or any of the Secondary Generator Arbitrators, have an actual, potential or perceived conflict of interest with the subject matter of the Dispute, and the Coordinator agrees with that assessment.

**2.4.3.** Under clause 1.42.7 of the WEM Rules, the Coordinator must select which Secondary Generator Arbitrator is to be the Generator Arbitrator if, in the reasonable opinion of the Coordinator, the Dispute cannot be referred to the Primary Generator Arbitrator.

**2.4.4.** In selecting a Secondary Generator Arbitrator, the Coordinator must undertake the processes outlined in paragraphs 2.4.1 – 2.4.2 of this Procedure (in which references to Primary Generator Arbitrator should be read as references to a Secondary Generator Arbitrator) and advise the relevant Parties to the Dispute of the selected Secondary Generator Arbitrator when referring the Dispute to the Generator Arbitrator.

**2.4.5.** If none of the appointed Primary or Secondary Generator Arbitrators can fulfil their functions due to the reasons outlined in paragraphs 2.4.1 and 2.4.4 of this Procedure, then the Coordinator and each Party to the Dispute will appoint an alternative independent arbitrator in accordance with clause 1.42.9 of the WEM Rules (appointment by a majority vote of each Party and the Coordinator, with the Coordinator having the deciding vote in the event of a tied vote).

**2.4.6.** The Coordinator may also appoint new Primary or Secondary Generator Arbitrators after the Tranche 1 Commencement Date by following the process outlined in paragraph 2.6.3 of this Procedure.

## **2.5. Coordinator referral of a Dispute**

**2.5.1.** The Coordinator must use reasonable endeavours to refer a Dispute to the Generator Arbitrator within 5 business days of receipt of all information provided under paragraphs 2.2.3 and 2.2.4 of this Procedure.

**2.5.2.** The Dispute commences in accordance with clause 1.42.11 of the WEM Rules on the date the Coordinator refers the Dispute to arbitration in accordance with paragraph 2.5.1 of this Procedure.

**2.5.3.** Following the referring of a Dispute under paragraph 2.5.1 of this Procedure, the Coordinator must advise all Parties of the Dispute that the referral has been made, including the Generator Arbitration Commencement Date (as described in clause 1.42.11 of the WEM Rules).

## **2.6. Appointment of additional arbitrators or experts**

**2.6.1.** As noted in paragraph 2.1.3 of this Procedure, the Coordinator is responsible for the appointment of Generator Arbitrator(s) and technical experts for the purposes of this dispute resolution process.

**2.6.2.** Under clause 1.42.28 of the WEM Rules, the Coordinator can appoint a new Primary Generator Arbitrator, Secondary Generator Arbitrators or members to the Technical Panel of Experts after the Tranche 1 Commencement Date, if it is considered necessary. Reasons for this may include:

- a. an existing Primary or Secondary Generator Arbitrator resigns;
- b. illness or death of an existing Primary or Secondary Generator Arbitrator; or
- c. a need for expertise which is not currently available on the Technical Panel of Experts.

**2.6.3.** The process the Coordinator will follow in undertaking these appointments will be published by the Coordinator on the EPWA website.

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## 3. Arbitration process

### 3.1. Generator Arbitrator

- 3.1.1.** The Generator Arbitrator must resolve disputes with as little formality and technicality, and as much expedition and efficiency, as the requirements of section 1.42 of the WEM Rules, and a proper hearing and determination of the dispute, permit.
- 3.1.2.** The Generator Arbitrator may conduct the arbitral proceedings in any manner he/she considers is appropriate for the dispute, noting the need for procedural fairness.
- a. This may be in accordance with model rules provided by an applicable industry body.<sup>1</sup>
- 3.1.3.** The Generator Arbitrator must notify all Parties to the Dispute of any intended processes and timeframes required in relation to the arbitration within 10 business days of the referral by the Coordinator and may require Parties to execute an Arbitration Agreement.
- 3.1.4.** The Generator Arbitrator must use best endeavours to resolve a Dispute within six months from the Generator Arbitration Commencement Date under clause 1.42.13(a) of the WEM Rules. Clause 1.42.13(b) of the WEM Rules requires the Generator Arbitrator to advise Parties in writing where they reasonably consider that this timeline will not be met.
- 3.1.5.** Parties to a Dispute must comply with the requirements of the arbitration process, including attendance at meetings or hearings (virtually or in-person), as required, and the provision of any information (in writing or via other means) requested by the Generator Arbitrator, or the expert(s) (as applicable) within the timeframes specified.
- 3.1.6.** Where any information requested under paragraph 3.1.5 of this Procedure cannot be obtained by the responsible party, that party must notify the Generator Arbitrator as soon as practicable, including the reasons why the information cannot be provided.
- 3.1.7.** The Generator Arbitrator may agree to alter timeframes or processes for the arbitration (other than processes or timeframes specified in this procedure or the WEM Rules) following a request from either Party, subject to suitable notice.
- 3.1.8.** A Market Participant must provide no less than 3 business days' notice when requesting a delay to a scheduled meeting or hearing, or to extend the timeframes for the provision of any information requested.
- 3.1.9.** The Generator Arbitrator may determine whether to hold meetings or hearings in-person or virtually in consultation with the Parties to a Dispute. The Generator Arbitrator is responsible for providing suitable rooms for in-person meetings, where required.
- 3.1.10.** Unless the Parties agree otherwise, the Dispute must be heard in private, and the Generator Arbitrator may give written directions as to the persons who may be present, having regard to the need for commercial confidentiality.
- 3.1.11.** The Generator Arbitrator may resolve the Dispute by way of written submissions only, including where advice has been sought from the Technical Panel of Experts.
- 3.1.12.** The Generator Arbitrator may request additional information<sup>2</sup> from any Party to a Dispute in whatever form the Generator Arbitrator deems suitable, and may make copies of, or take extracts from that documentation for as long as is necessary.

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<sup>1</sup> Such as the Resolution Institute or Australian Centre for International Commercial Arbitration.

<sup>2</sup> Beyond that which is provided in the initial dispute referral process outlined in Section 2 of this Procedure.

- 3.1.13.** All statements, documents or other information supplied to the Generator Arbitrator by a party must be communicated to the other parties, subject to the confidentiality requirements outlined in Part 4 of this Procedure.
- 3.1.14.** Any expert report or evidentiary document on which the Generator Arbitrator may rely in making its decision must be communicated to the parties, subject to the confidentiality requirements outlined in Part 4 of this Procedure.
- 3.1.15.** The Generator Arbitrator may request the Parties to a Dispute execute a Confidentiality Agreement for the purposes of sharing information related to the Dispute.
- 3.1.16.** The Parties to a Dispute may settle during arbitral proceedings and request the proceedings be terminated at any time in accordance with clause 1.42.17 of the WEM Rules by providing written notice to the Generator Arbitrator.
- 3.1.17.** The Generator Arbitrator must record a Generator Arbitration Decision<sup>3</sup> in writing, including the reasons on which the decision is based and cost orders, and convey to the Coordinator for publishing within 5 business days of the decision being made.
- 3.1.18.** Clause 1.42.21 of the WEM Rules sets out circumstances, other than the Parties agreeing to settle the Dispute noted in paragraph 3.1.16 of this Procedure where the arbitral proceedings may be terminated.

## 3.2. Use of experts

- 3.2.1.** The Generator Arbitrator has access to a Technical Panel of Experts to provide advice on specific issues relating to a Dispute.
- 3.2.2.** Prior to appointment, the Generator Arbitrator must consult with the Parties to a Dispute regarding the scope of advice to be sought and the expert(s) who this advice will be sought from. Clause 1.42.15(a-c) of the WEM Rules requires the Generator Arbitrator to advise the Parties to a Dispute of the following information prior to appointing an expert from the Technical Panel:
- a. name of the expert;
  - b. scope of the advice being sought; and
  - c. approximate cost of the appointment (based on the hourly rate of the expert and an assessment of the scope).
- 3.2.3.** The Parties to the Dispute must advise the Generator Arbitrator whether they consider the particular expert has a conflict of interest in respect of the matter or advice being sought as required under clause 1.42.15(d) of the WEM Rules or any other reasons why, in the Party's opinion, the Technical Expert is not suitable to provide advice in relation to the dispute.
- 3.2.4.** Where the Generator Arbitrator has appointed an expert, the Parties to a Dispute must provide that expert with access to any relevant material (information, documents, access to goods or other property) in order to provide advice on the matter.
- 3.2.5.** The expert(s) must provide the Generator Arbitrator with a written or oral report of their findings (as agreed) which may also be shared with Parties to the Dispute in accordance with Paragraph 3.1.10 of this Procedure, and may be required to attend a meeting where the Generator Arbitrator and Parties to the Dispute may post questions to the expert in accordance with clause 1.42.14 of the WEM Rules.

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<sup>3</sup> Whether made by the Generator Arbitrator or through the Parties agreeing to settle the Dispute in accordance with 1.42.17.

### 3.3. Fees and costs

- 3.3.1.** Clause 1.42.19 of the WEM Rules provides the general position on costs for Disputes which (unless otherwise determined by the Generator Arbitrator for reasons outlined under clause 1.42.20 of the WEM Rules) is:
- a. all administrative costs will be borne equally by the Parties; and
  - b. all legal and other costs will be borne by the Party that incurred such cost.
- 3.3.2.** In accordance with clause 1.42.20 of the WEM Rules, the Generator Arbitrator may assign costs associated with the arbitral proceedings at any stage during the arbitral proceedings and may make payment of those costs a condition to continue the proceedings.
- 3.3.3.** Any cost orders made under clause 1.42.20 of the WEM Rules, including the reasons for them, must form part of the Generator Arbitrator Decision under clause 1.42.22 of the WEM Rules.
- 3.3.4.** Where the Generator Arbitrator requires payment of costs, the Parties to the Dispute must make payment within timeframes specified, which must not be less than 10 business days.

### 3.4. Limitations of the Generator Arbitrator

- 3.4.1.** Under clause 1.42.25 of the WEM Rules, the Generator Arbitrator is not liable for anything done, or omitted to be done, in good faith in his or her capacity as the arbitrator of a Dispute.
- 3.4.2.** The Generator Arbitrator may require each party to the Dispute (and any one of them) to execute a release and indemnity in favour of the Generator Arbitrator for any loss, damage or liability that party may suffer or incur as a consequence of anything done or omitted to be done in good faith in his or her capacity as Generator Arbitrator.

## 4. Confidential information

- 4.1.1. Clause 1.42.23 of the WEM Rules requires that Confidential Information must not be disclosed by the Parties, the Generator Arbitrator or any member of the Technical Panel of Experts unless the disclosure is permitted under clause 1.42.24 of the WEM Rules.
- 4.1.2. Each Party to the Dispute must clearly label any information that it considers to be Confidential Information and may request the Generator Arbitrator not give a copy of all or part of that information to another party.
- 4.1.3. Where the Generator Arbitrator considers that the disclosure of information marked as confidential is required and permitted under the WEM Rules, the Generator Arbitrator will advise the Party prior to sharing its information.
- 4.1.4. No Party must reproduce Confidential Information of another party for any purpose other than for the purposes of resolving the Dispute.
- 4.1.5. At the conclusion of the arbitration process, the Generator Arbitrator may require parties to destroy any Confidential Information that is provided to a party in the process of resolving the dispute.

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