Wholesale Electricity Market Rule Change Proposal Submission

RC_2018_05: ERA access to market information and SRMC investigation process

Submitted by:

Name:	Jacinda Papps
Phone:	08 9486 3009
Email:	Jacinda.papps@alintaenergy.com.au
Organisation:	Alinta Energy
Address:	Raine Square, 300 William St, Perth WA 6000
Date submitted:	13 November 2018

Submissions on Rule Change Proposals can be sent by:

Email to: rcp.secretariat@rcpwa.com.au

Post to: Rule Change Panel
Attn: Executive Officer
C/o Economic Regulation Authority
PO Box 8469
PERTH BC WA 6849

---

1. Please provide your views on the proposal, including any objections or suggested revisions.

Alinta Energy (**Alinta**) welcomes the opportunity to provide a submission to the Rule Change Panel on its the Rule Change Proposal: *RC_2018_05 ERA access to market information and SRMC investigation process* (**Rule Change Proposal**).

Executive Summary

Alinta does not support the Rule Change Proposal in its current form. Alinta considers that the Rule Change Proposal is drafted very broadly and is concerned that it will allow the ERA to obtain Market Participants' information through the AEMO in a manner that:

- is not transparent;
- is not subject to proper scrutiny;
- potentially bypasses the safeguards provided for in the Market Rules; and
- does not afford an affected Market Participant the opportunity to raise its concerns about its commercially sensitive and confidential information directly with the ERA prior to the time of disclosure.

Alinta considers that the ERA currently has sufficient access to information to carry out its monitoring function for the purposes of its compliance and enforcement function. Under the Market Rules, the ERA already has access to a range of publicly available information. The ERA also has appropriate information sources to trigger its investigative power in that AEMO and System Management, in their day to day operational roles, are required to report any alleged breaches to the ERA. Any Rule Participant can also bring to the ERA's attention any alleged breaches of another Market Participant.

Alinta does not support the ERA's assertion that the historic underlying information access principle was to allow for the free flow of all information between the compliance/enforcement and market operation arms of the Independent Market Operator (**IMO**). The reason for this is due to the existence of the Market Surveillance Data Catalogue (**MSDC**). If it was intended that there be a free flow of information Alinta considers that the MSDC would not need to exist in the Market Rules.

Alinta notes that, while it doesn't consider the historic underlying principle was to allow for the free flow of all information between the compliance/enforcement and market operation arms of the IMO, it acknowledges that this practice may have emerged over time. However, it is important to note that historic practice does not mean it is how something was intended to apply and therefore does not provide justification, in and of itself, for how it should apply in the future.

Alinta considers that the current Market Rules have been deliberately designed to:

- avoid conflicts of interest that previously existed in a market operator carrying out a range of functions including undertaking enforcement action; and
- balance the need to protect commercially sensitive and confidential information of Market Participants against the need to provide sufficient monitoring and enforcement powers, particularly in relation to monitoring behaviour that has a significant and material impact on the market.

Alinta is concerned that the Rule Change Proposal, in its current form, may provide a deterrent to the free and voluntary exchange of information between a Market Participant and the Market Operator over and above what is required by the Market Rules. A barrier to the free flow of information will potentially lead to market inefficiencies and perverse outcomes.

Finally, Alinta notes that key Commonwealth enforcement agencies such as the ACCC do not have general compliance monitoring functions. There are some exceptions in regulated industries such as electricity (through the AER), water and communications but in those circumstances, the ACCC and the AER largely perform their monitoring functions by routine monitoring of public data, requesting information to be provided on a voluntary basis, using their statutory powers to compel production of documents (thereby also protecting the disclosing parties from potential claims) and through complaints and enquiries they receive. The proposed changes requested by the ERA appear to provide the ERA with far greater access to information for the purposes of monitoring than those given to agencies such as the ACCC and the AER.

ERA issue identification

The ERA is seeking to address three problems with the Market Rules that have arisen following the transfer of the compliance function, namely:

1. the inability of the ERA to require the Australian Energy Market Operator (AEMO) to provide it with market information for compliance monitoring (**Issue 1 - information**

provision);

2. restrictions on the ERA's compliance functions from using information already provided by AEMO to the ERA (**Issue 2 - information use restriction**); and
3. the processes for investigating short run marginal cost non-compliance matters, which now require two separate investigations in order to bring proceedings to the Electricity Review Board (**Issue 3 - enforcement issue**).

Alinta addresses each of these issues in turn below.

1. ISSUE 1 – INFORMATION PROVISION

The ERA proposes to amend clauses 2.13.3A and 2.13.9B of the Market Rules to address its issue 1.

a) Broad reference to "data and information"

The language used in draft clause 2.13.3A is very broad and appears at face value to capture all data and information in the AEMO's possession. This includes:

- information required to be provided to AEMO by Market Participants under the Market Rules (which could be public or confidential information); and
- market information obtained by, or given to, the AEMO which may not necessarily be because of an obligation under the Market Rules to provide such information to the AEMO.

If such information (which may be confidential to third parties) is provided by the AEMO to the ERA, there is no opportunity afforded to the affected party to raise concerns regarding the disclosure of that information. This may raise concerns regarding procedural fairness and also discourage Market Participants from voluntarily providing information to the AEMO over and above what is strictly required by the Market Rules.

The proposed rule 2.13.3A has no limits on the "data and information" to be provided by the AEMO and should be contrasted with:

- Market Rule 10.2.1 which requires the AEMO to set and publish the confidentiality status for each type of "market related information and document produced or exchanged in accordance with the Market Rules or Market Procedures"; and
- Market Rule 1.14.1 which talks to "all records required to be kept by AEMO under the Market Rules and Market Procedures".

Even if it is ultimately accepted that it is appropriate for the ERA to have access to all information for compliance monitoring purposes, Alinta is of the view that the information to be provided by the AEMO to the ERA should not extend beyond the records required to be kept by the AEMO under the Market Rules and Market Procedures and the drafting should reflect this.

b) Discretionary nature and lack of scrutiny over ERA's requests

Under the Rule Change Proposal, the nature of data and information to be provided by the AEMO to the ERA is at the ERA's discretion. That is, the ERA can, from time to time determine what data and information it requires from the AEMO. This potentially creates the problem that the ERA can bypass a rule change requirement in obtaining information that it may not have been entitled to under the Market Rules.

There are safeguards built into the rule change process so that any rule change is subject to the Rule Change Panel consideration, public consultation and if they relate to "protected provisions" of the Market Rules, then Ministerial approval to implement those changes.

Allowing the ERA to require the AEMO to "facilitate any processes and systems in place… including by providing data and information considered necessary by the ERA" may allow the ERA to effectively make its own rules in relation to the collection and provision of information in the Wholesale Electricity Market (**WEM**).

There is also the concern that the proposed rule change provides no certainty at the outset about the type of data and information to be provided by AEMO to the ERA from time to time. If the ERA's requirements for data and information to be provided by the AEMO change and the AEMO is required to have in place processes and systems to provide the ERA with data and information, then there appears to be no opportunity for a cost/benefit analysis to be undertaken at that time in relation to such requests. Future data feed requirements from the AEMO to the ERA may necessitate significant capital upgrades to systems which may impose a cost to the AEMO and the Market and AEMO should not be compelled to comply with such a requirement without an appropriate assessment of the costs and benefits.

c) Rule change required to fix an "oversight"

The ERA asserts that there was an "oversight" in drafting when the IMO functions were transferred to the AEMO and the provisions allowing ERA's access to AEMO's data was mistakenly omitted from the Market Rules.

Alinta considers that the current provisions of the Market Rules were deliberately drafted to control the information flow from AEMO to the ERA. The key reason being that the transfer of the compliance and enforcement function from the IMO to the ERA was to deal with the conflict of interest that the IMO inherently faced in its functions.

With the segregation of market operations and enforcement functions between the AEMO and the ERA, it would appear appropriate that the ERA has access to information (particularly third party confidential information held by AEMO) only to the extent that such information is necessary to allow the ERA to encourage compliance through efficient and effective enforcement.

It is relevant to consider whether a potential compliance breach and the impact of such breach on the WEM justifies the ERA also having full access to, and monitoring AEMO's data and information. This is particularly so given the fact that under the Market Rules, there are obligations imposed on the AEMO and System Management to monitor the behaviour of Rule Participants and they have an obligation to report any alleged breaches to the ERA.

Any Rule Participant may also inform the ERA or the AEMO that it considers another Rule Participant has breached the Market Rules.

Alinta considers that in allowing the ERA powers to obtain information that is commercially sensitive or confidential in nature to Market Participants, it is important, as far as possible, to provide for methods of data collection[1]:

- which enable confidentiality of information to be maintained and afford the affected parties an opportunity to raise concerns about disclosure directly to the ERA prior to such disclosure being made. For instance, often the power of the ERA to obtain

[1] Consistent with the principles adopted by the AER in its market monitoring and enforcement guideline.

information under s51 of the Economic Regulation Authority Act 2003 is used to protect the disclosing party from breaching confidentiality obligations owed to third parties;

- in a manner that affords procedural fairness to affected parties; and
- that are proportional to the nature of the potential breach and the impact of such breach on the Market and end-users and participants in the Market.

d) Monitoring and information gathering processes in other regulatory instances

The ERA has sought to draw parallels between the Gas Services Information Rules and the Market Rules. However, given the nature of the Gas Bulletin Board and the information provided by participants to the AEMO under the Gas Services Information Act 2012, this does not appear to be an appropriate precedent for making changes to the Market Rules.

Given the limited nature of the Gas Bulletin Board (not being a gas trading platform or market), it may be of greater assistance and relevance to consider the AER's approach to information gathering for monitoring and enforcement purposes in relation to the National Electricity Market (**NEM**). In this respect, Alinta understands that the AER largely relies on public data to monitor compliance. The rationale for this appears to be founded on protecting confidential information of Market Participants.

For instance, in relation to its market monitoring function, the AER is required by law to use public data in carrying out its function[2]. If the AER identifies a relevant matter from monitoring of public data, then the AER has very broad powers to carry out investigations and gather information directly from the relevant Market Participants[3].

Similarly, the AER carries out the function of enforcing the NEM Rules in relation to rebidding behaviour by generators. In that instance, we understand that the AER monitors public data (AEMO is required to publish the time of rebids and reason for rebids under NEM Rule 3.8.22(g)(2)) and undertakes its investigative function by requiring additional information directly from the rebidding participant under NEM Rule 3.8.33(c)(3).

Alinta notes that other federal enforcement agencies such as the ACCC have limited "market" monitoring functions and where they are conferred such functions, they largely perform their monitoring functions through routine monitoring of public data, requesting information on a voluntary basis, using express statutory powers conferred on them[4] and complaints and enquiries they receive.

e) **Recommendation**

Alinta recommends that the Rule Change Proposal be amended to specifically:

- refer to the data and information that the ERA would like to obtain from the ERA. This mirrors the approach with regard of the "Market Surveillance Data Catalogue" such that all Market Participants are aware of the nature of information being provided to the ERA in connection with Rule 2.16. If the ERA determines that additional information in the future is required, then the proper scrutiny under the Rule Change Process will afford participants some certainty as to type of data and information to be provided

[2] See s18D(1) of the *National Electricity (South Australia) Act 1996*

[3] Noting that, under clauses 2.16.5 to 2.16.7, the ERA has the power to collect further information from Rule Participants. In particular, the ERA can collect cost data for Synergy (including actual fuel costs) and terms of Bilateral Contracts entered into by Synergy. The exercise of the power is not limited to collecting data from Synergy and where market power issues are concerned, such information could be obtained from other Market Participants.

[4] For example, see s155 of the Competition and Consumer Act 2010

by AEMO to the ERA from time to time; and

- exclude any data and information that may be provided to AEMO from time to time that extends beyond any data and information specifically required to be provided to AEMO under the Market Rules and/or Market Procedures.

2. ISSUE 2 – INFORMATION USE RESTRICTION

The ERA proposal is that there should be no restriction on the ERA's use of information collected from the AEMO to perform its functions. This includes:

- all information provided under Rule 2.16 (i.e. Market Surveillance Data) – currently the subject of specific restriction under Rule 2.16.4; and
- all information provided by the AEMO under proposed Rule 2.13.3A.

Alinta notes that the ERA functions under the Market Rules cover:

- Monitoring and enforcement;
- To provide secretariat support services;
- To carry out any functions conferred, or obligations imposed under the Market Rules (which includes the many 5 yearly reviews); and
- To do anything else that the ERA determines to be conducive or incidental to the performance of its functions.

Alinta is strongly of the opinion that commercially sensitive information should only be used for the purpose for which it was provided. For example, SRMC information obtained under the monitoring and enforcement functions should not be used by the ERA for any other purpose such as determining the Energy Price Limits. We note that if participants were aware that information might be used for other purposes then the nature and form in which they provided that information originally may have been different.

3. ISSUE 3 – ENFORCEMENT ISSUE

The ERA suggests that there are concerns about having to conduct separate investigation processes under Rules 2.13 and 2.16.9G in relation to any "market power" behaviour identified through monitoring the Market Surveillance Data.

Alinta suggests that a better way of addressing the ERA's concern is to link the investigation power under Rule 2.16.9B back to Rule 2.13.10 along the lines that where the ERA conducts an investigation under Rule 2.16.9B, the ERA may take such actions as are required or permitted under Rule 2.13 in relation to that investigation. That is, ERA must record the results of an investigation, may issue warning notices under Rule 2.13.10 and ultimately, may take enforcement action for a Category C breach under Rule 2.13.18.