

Final Rule Change Report:
ERA access to market information and SRMC
investigation process (RC_2018_05)

Standard Rule Change Process

28 June 2019

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1. Rule Change Proposal, Process and Timeline

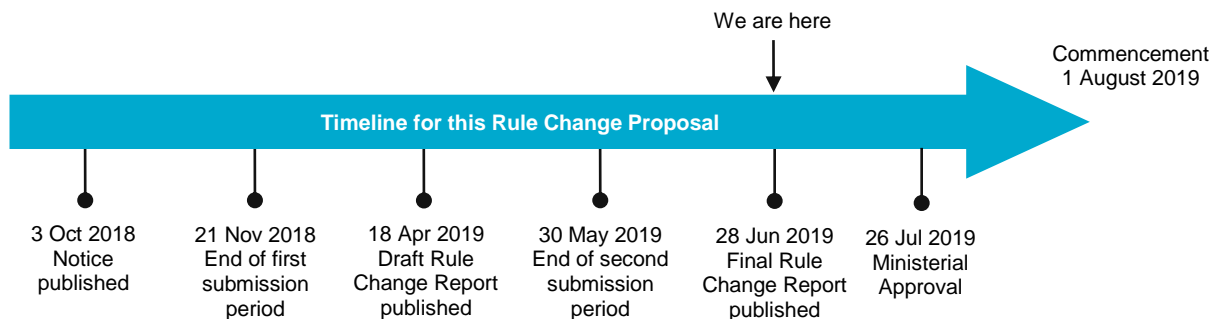
On 27 September 2018, the Economic Regulation Authority (**ERA**) submitted a Rule Change Proposal titled “ERA access to market information and SRMC investigation process” (RC_2018_05).

This Rule Change Proposal seeks to:

- require AEMO to provide the ERA with data and information for the ERA’s compliance monitoring function under the Market Rules;
- allow the ERA to use information provided by AEMO to the ERA under section 2.16 of the Market Rules for the ERA’s other functions by removing the restrictions in section 2.16 of the Market Rules;
- not require two separate investigations for the ERA to bring proceedings before the Electricity Review Board to address short run marginal cost (**SRMC**) non-compliance matters.

This Rule Change Proposal is being processed using the Standard Rule Change Process described in section 2.7 of the Market Rules. On 9 November 2018, the Rule Change Panel extended the timeframe for the end of the first submission period in accordance with clause 2.5.10. On 17 December 2018 and on 25 March 2019, the Rule Change Panel extended the timeframe for publication of the Draft Rule Change Report in accordance with clause 2.5.10. Further details of these extensions are available on the Rule Change Panel’s website.

The key dates for progressing this Rule Change Proposal are:



All documents related to this Rule Change Proposal can be found on the Rule Change Panel’s website at [Rule Change: RC_2018_05 – Economic Regulation Authority Western Australia](#).

1.1 Key Terms

Reference in this Final Rule Change Report is made to the following key terms:

- **Compliance function** – the ERA’s entire compliance function under clause 2.2A.1(a), which includes:
 - **compliance monitoring function** – the ERA’s function to monitor compliance with the Market Rules and Market Procedures; and

- **compliance investigation and enforcement function** – the ERA’s function to investigate potential non-compliance matters with the Market Rules and Market Procedures and associated enforcement;
- **Effectiveness Monitoring** – the ERA’s function to monitor the effectiveness of the market, as per clause 2.16.9; and
- **Chapter 10 of the Market Rules** – references the information policy regime set out in Chapter 10 of the Market Rules, in particular the regime around information confidentiality statuses and parties that have access to that associated information.

2. The Rule Change Panel’s Decision

The Rule Change Panel’s final decision is to accept the Rule Change Proposal in a modified form, as set out in section 8 of this Final Rule Change Report.

2.1 Reasons for the Decision

The Rule Change Panel has made its decision on the basis that the Amending Rules, as amended following the first submission period, will:

- ensure that the ERA can explicitly require AEMO to provide it with data, information and documents to carry out its compliance monitoring function;
- provide a more efficient avenue for the ERA to access information held by AEMO that the ERA requires for its compliance monitoring function, the absence of which would require the ERA to use inefficient, administratively cumbersome processes to obtain that same information (inside the Market Rules or external to them);
- continue AEMO’s obligations to support the ERA’s compliance monitoring function;
- minimise the administrative costs to the market by not requiring the ERA to separately obtain the same information requested under section 2.16 of the Market Rules for the ERA’s other functions;
- restore the mechanism to allow the ERA to bring proceedings before the Electricity Review Board pursuant to a clause 2.16.9B investigation; and
- allow the Market Rules to better achieve Wholesale Market Objectives (a) and (d) and will not affect, and thus be consistent with, the remaining Wholesale Market Objectives.

The details of the analysis behind the Rule Change Panel’s decision is provided in section 7 of this report.

2.2 Commencement

Subject to Ministerial approval, the amendments to the Market Rules resulting from this Rule Change Proposal will commence at **8:00 AM on 1 August 2019**.

3. Proposed Amendments

3.1 The Rule Change Proposal

The ERA's Rule Change Proposal is seeking to address three issues that it identified with the Market Rules following the transfer of the Compliance function from the Independent Market Operator (**IMO**) to the ERA, which are:

- **Provision of information for compliance monitoring from AEMO to the ERA**

Currently, the Market Rules do not expressly require AEMO to provide the ERA with any data or information that the ERA needs for its compliance monitoring function under the Market Rules.¹ The ERA proposes to change clauses 2.13.3A, 2.13.9A and 2.13.9B to require AEMO to provide data and information to the ERA that the ERA requires to fulfil its compliance monitoring function.

- **Restriction on the use of information that the ERA obtains from AEMO under section 2.16 of the Market Rules**

Clause 2.16.14 currently specifies that the ERA can only use information collected under section 2.16 of the Market Rules for the purposes of carrying out the ERA's functions under section 2.16. The ERA is seeking to remove this restriction by amending clause 2.16.14 to make it explicit that any information collected under section 2.16 can be used by the ERA for the performance of any of its designated functions under the Market Rules. The ERA seeks this amendment because a legal argument could be made that the ERA has used information collected under section 2.16 of the Market Rules for another purpose, which contravenes the current clause 2.16.14 restriction.

- **Enforcement Issue**

The process for investigating SRMC non-compliance matters under the Market Rules currently requires two separate investigations to bring proceedings before the Electricity Review Board. This is because the ERA's enforcement powers exist in section 2.13 of the Market Rules, which cover an investigation referred to in clause 2.13.10(b) but does not extend to an investigation under clause 2.16.9B (SRMC non-compliance investigations). Thus, subsequent to an investigation under clause 2.16.9B, the ERA would need to complete an additional and separate investigation into the same behaviour so that the matter can be brought before the Electricity Review Board under its section 2.13 enforcement powers. The ERA proposes to overwrite the currently blank clause 2.16.9G to allow the ERA to bring proceedings before the Electricity Review Board pursuant to an investigation under clause 2.16.9B.

Full details of the Rule Change Proposal are available on the Rule Change Panel's website.

3.2 The Rule Change Panel's Initial Assessment of the Proposal

The Rule Change Panel decided to progress this Rule Change Proposal based on its preliminary assessment that the proposal is consistent with the Wholesale Market Objectives.

¹ AEMO must support the ERA's compliance monitoring function (clause 2.13.9A) and must ensure it has processes and systems in place to support the ERA's compliance monitoring function (clause 2.13.9B), but there is no clause that expressly requires AEMO to provide data or information to the ERA.

4. Consultation

4.1 The Market Advisory Committee

In preparing its Rule Change Proposal, the ERA consulted with stakeholders at several Market Advisory Committee (**MAC**) meetings, as follows.

8 November 2017 Market Advisory Committee (MAC) Meeting

At the 8 November 2017 MAC Meeting, the ERA raised an issue relating to its use of data for market monitoring and compliance purposes, which was discussed under Agenda Item 8 (MAC Market Rules Issues List – Review of Candidate Issues). This issue was assigned to the Potential Rule Change Proposal category, to be discussed at the next MAC meeting. Mrs Jacinda Papps noted that she disagreed with the proposal and considered that information provided by Market Participants should only be used for the purpose for which it was provided.

13 December 2017 MAC Meeting

At the 13 December 2017 MAC Meeting, the ERA's use of data for monitoring and compliance was discussed as part of Agenda Item 9 (Update on the Market Rules Issues List). Mr Adrian Theseira from the ERA noted that although this issue was raised by AEMO, it was really an ERA issue. AEMO is required to provide running transactional data and other information to the ERA under section 2.16 of the Market Rules. The information, which includes the information specified in the Market Surveillance Data Catalogue (**MSDC**), is used by the ERA to support its monitoring of the effectiveness of the market under section 2.16 of the Market Rules.

Mr Theseira noted that since 1 July 2016, the ERA was also responsible for compliance monitoring. Mr Theseira noted that the transactional data provided under section 2.16 would also be useful for compliance monitoring purposes, but a restriction in section 2.16 prevents any information gathered under that section from being used by the ERA for any other function.

Mrs Papps expressed Alinta's general concern with the use of information for multiple purposes. Mrs Papps considered that when a participant provides data, knowing the intended use of the data is important because it allows the participant to structure how they present the data, so use of the data for other purposes, such as compliance monitoring, is a concern for Alinta.

Mr Theseira noted that the ERA was predominantly interested in being able to use the transactional data in the MSDC. Mr Theseira was unsure whether the ERA would want to extend the scope of a Rule Change Proposal to cover other information provided by participants to the ERA under section 2.16. Mrs Papps advised that while she would be very much against the broader scope, her view on the information in the MSDC might be slightly different, subject to further review of the contents of the MSDC.

Mr Will Bargmann considered that if the ERA wished to use data collected under section 2.16 for compliance purposes, then it should seek consent from the relevant participant on a case-by-case basis, so that the participant can ensure that it submits the appropriate data.

13 June 2018 MAC Meeting

Prior to developing the Pre-Rule Change Proposal, the ERA brought this issue to the MAC for discussion, to satisfy the requirement of clause 2.5.1B.² The MAC discussed the development of the Rule Change Proposal under Agenda Item 8(b) at the 13 June 2018 MAC meeting.

Mr Theseira discussed the ERA's plan to develop a Rule Change Proposal to address issues relating to data use restrictions and the SRMC investigation process. A copy of Mr Theseira's presentation is available in the MAC meeting papers on the Rule Change Panel's website.

Mr Andrew Stevens asked what specific data the ERA needed but did not currently have access to. Mr Theseira replied that outage data was a good example of the problem; currently the ERA only has access to the real time outage data published on AEMO's public website and cannot see the full version history of Outage records. Mr Theseira noted that, while the ERA has powers under section 51 of the *Economic Regulation Authority Act 2003 (ERA Act)* to obtain information and documents, it would prefer to access the data it requires under the Market Rules rather than rely on other powers.

Mr Stevens considered that, while participants may want to understand more clearly what additional information (if any) would become available to the ERA, most would not object to the proposed changes.

The MAC supported the ERA's plan to develop a Pre-Rule Change Proposal and present it to the MAC for consideration at a future meeting.

8 August 2018 MAC Meeting

The ERA brought a draft of the Pre-Rule Change Proposal for RC_2018_05 to the MAC for discussion at its meeting on 8 August 2018. The MAC discussed the Pre-Rule Change Proposal under Agenda Item 8(d). The Chair, Mr Stephen Eliot, invited feedback from the MAC on the ERA's Pre-Rule Change Proposal: Market Rules 2.13 and 2.16: Market data access and use restrictions and SRMC investigation process (RC_2018_05). The Chair noted that the MAC had previously assigned a medium urgency rating to the issues addressed by this Pre-Rule Change Proposal.

Mrs Papps noted that the ERA's comments on the meaning of 'market data' in the Pre-Rule Change Proposal suggested that market data included data contained in the list of market information referred to in clause 10.1.1, but did not include commercially sensitive information. However, the list in clause 10.1.1 includes some commercially sensitive information, such as prudential support documentation and supporting information provided by a Market Participant that is not expressly mentioned in the Market Rules.

Mrs Papps acknowledged that the proposed drafting did not refer to clause 10.1.1 but considered that the description in the text was very broad. Mr Theseira agreed that the scope of clause 10.1.1 was very broad and reiterated that the ERA's intention related to transactional and operational data.

Mrs Papps asked if the data being sought by the ERA was already contained in the MSDC. Mr Theseira replied that only some of the required information was included in the MSDC. For example, the MSDC referred to the number and frequency of outages, but not to actual outage records. Mrs Papps asked what information the ERA required that was not included

² Clause 2.5.1B requires the ERA to consult with the MAC before commencing the development of a Rule Change Proposal.

in the MSDC. Mr Theseira replied that this was challenging to define, and that the ERA had considered but rejected the idea of linking the definition to clause 10.1.1.

Mr Theseira noted that the IMO was not restricted in the information it could use for compliance, and that the ERA is seeking the same level of access to information. If there are express concerns about specific pieces of information, then these could be dealt with on an exclusion basis, but the ERA would have to understand why it should not be able to use the information for compliance purposes.

Mrs Papps considered that some of the information provided for certification was not appropriate for compliance monitoring. Ms Papps indicated that Alinta would prefer to receive an explicit request from the ERA for such information so that Alinta could provide the information knowing what the request was for.

There was some discussion about options to specify the required market data, including listing items to be included, listing items to be excluded, and defining categories of required information. Mr Martin Maticka considered that the use of exclusion to specify the information created a risk that a new type of sensitive information might be included without proper consideration. Mr Maticka considered that specifying categories of information might be a better option.

Ms Jenny Laidlaw noted that the current confidentiality provisions allowed any information covered under the Market Rules to be made available to the ERA; and considered that the question was what information AEMO should be required to routinely provide to the ERA.

The MAC discussed what process the ERA should follow to obtain non-transactional information, such as contract or financial details. Mr Theseira noted that the ERA was already able to obtain such information under section 51 of the ERA Act, and had noted earlier that it was able to use section 51 to obtain any information from AEMO, albeit this was not the ERA's preferred approach. Mr Maticka considered that the section 51 process was reasonable for non-standard requests, to help clarify requirements and ensure the appropriateness of such requests.

Mr Will Bargmann considered that if a Market Participant was providing information as part of a compliance exercise, then it may want to provide more context and explanation around that information than it would normally provide if the information was to be used, for example, for normal market monitoring. Mr Bargmann considered it would be very administratively burdensome for a Market Participant to always have to provide information with the caveats and explanations that may be needed if the information was used in a compliance exercise.

Mr Theseira asked how this situation had changed since the IMO held the Compliance function. Mr Maticka considered that the previous arrangement was not necessarily the best and agreed with Mr Bargmann that additional context may need to be provided to avoid information being misunderstood.

The Chair asked whether it mattered whether the additional context was provided before or after the provision of the original information. Mr Maticka replied that the provision of incomplete information could lead to the ERA wasting time on investigations that could have been avoided if more information was made available at the start.

The MAC discussed how much information the ERA needed to fulfil its functions, what boundaries should apply to its ability to request information from AEMO, and how much of the information collected by AEMO should be proactively provided to the ERA.

Mr Theseira advised that the ERA would give consideration to the use of categories to define its requirements for proactive data provision from AEMO. Mr Maticka and Mrs Papps were

supportive of this approach.

4.2 Submissions Received During the First Submission Period

The first submission period for this Rule Change Proposal was held between 4 October 2018 and 21 November 2018.

The Rule Change Panel received submissions from AEMO, Alinta Energy (**Alinta**), Perth Energy and Synergy; and one supplementary submission from Perth Energy. These submissions are available on the Rule Change Panel’s website.

In accordance with clause 2.7.7, a summary of each submission is set out in Appendix A of the Draft Rule Change Report together with the Rule Change Panel’s response to each issue raised. Although the Rule Change Panel has summarised the submissions in accordance with clause 2.7.7, the Rule Change Panel has reviewed the submissions in their entirety and taken each matter raised by the Rule Participants into account when making its decision on this Rule Change Proposal.

AEMO was supportive of this Rule Change Proposal in its entirety. Alinta and Synergy were not supportive of the changes proposed to address the information provision and information use restriction issues as proposed by the ERA. Perth Energy supported the ERA’s proposal to correct oversights in relation to the provision of information from AEMO to the ERA and correcting the enforcement issue. However, Perth Energy was not supportive of the ERA’s ability to access any information it considers necessary for any of its functions under the Market Rules. Alinta suggested an alternative approach to addressing the enforcement issue but was supportive of the intent of the ERA’s proposed amendment on the enforcement issue.

The assessment by submitting parties as to whether the Rule Change Proposal would better achieve the Wholesale Market Objectives is summarised in Table 1.

Table 1: Submitters’ Comments on the Wholesale Market Objectives

Submitter	Wholesale Market Objective Assessment
AEMO	AEMO agreed with the Wholesale Market Objectives assessment provided by the ERA in the Rule Change Proposal.
Alinta	Alinta made no specific comment regarding the Wholesale Market Objectives.
Perth Energy	Perth Energy considers the correction of the administrative oversight to be consistent with the Wholesale Market Objectives. However, Perth Energy considers the provision of information by AEMO to the ERA for “any information considered necessary” would be contrary to objectives (a) and (d) as it is likely to increase the cost of compliance, through: the duplication of effort between AEMO in its market monitoring role and the ERA in its market surveillance role; and potential increase in the cost of provision and storage of confidential information which has not been demonstrated to be necessary.
Perth Energy – Supplementary	Made no specific comment regarding the Wholesale Market Objectives.

Submitter	Wholesale Market Objective Assessment
Synergy	Synergy considers the proposed changes to clauses 2.13.3A, 2.13.9A, 2.13.9B and 2.16.14 would not better facilitate the achievement of the Wholesale Market Objectives.

Copies of all submissions received during the first submission period are available in full on the Rule Change Panel's website.

4.3 The Rule Change Panel's Response to Submissions Received During the First Submission Period

The Rule Change Panel's response to each of the specific issues raised in the first submission period is presented in Appendix A of the Draft Rule Change Report, which is available on the Rule Change Panel's website. A more general discussion of the underlying themes and main issues raised from the first period submissions is available in section 6 of the Draft Rule Change Report, which is reproduced in Appendix B of this Final Rule Change Report.

The Rule Change Panel agreed with an issue raised in the first period submissions that the original drafting of the changes to the Market Rules by the ERA would give the ERA broader powers to obtain data and information from AEMO than was intended. After clarification with the ERA that the intention of the Rule Change Proposal was to maintain the ERA's level of access to information for its Compliance function that it held at the time of the Rule Change Proposal, the Rule Change Panel modified the proposed Amending Rules to give effect to this. These changes were discussed in section 6.3 of the Draft Rule Change Report and are detailed in Appendix B of the Draft Rule Change Report.

4.4 Submissions Received During the Second Submission Period

The second submission period was held between 18 April 2019 and 30 May 2019. The Rule Change Panel received submissions from Alinta and Synergy and neither submission stated whether either supported the Rule Change Proposal.

Although the Rule Change Panel has summarised the second period submissions in accordance with clause 2.7.7, the Rule Change Panel has reviewed the submissions in their entirety and taken into account each matter raised by the associated Rule Participant in making its final decision on RC_2018_05.

Alinta considered that the modified drafting of clause 2.13.3A in the Draft Rule Change Report was an improvement on the originally proposed wording changes but had some residual concerns:

- Alinta accepted that the proposed process would be more administratively efficient for the ERA but considered that the proposal would still allow the ERA to obtain Market Participants' information through AEMO in a non-transparent manner that could limit procedural fairness for Market Participants. Alinta noted that the ERA's Compliance and Monitoring Framework includes a "fairness" principle and considered that this framework affords Market Participants procedural fairness. However, since the ERA can approve amendments to its Monitoring Protocol, Alinta recommended that the Market Rules should include a requirement for the ERA to ensure that the Monitoring Protocol must afford procedural fairness to affected parties;

- Clause 2.13.3A should only apply to information provided to AEMO after the Amending Rules commence, which will give Market Participants the opportunity to develop and implement internal protocols to ensure that all staff are aware that any information produced or exchanged under the Market Rules and/or Market Procedures can be used by the ERA for any of its functions; and
- Alinta stated that from its viewpoint, it was difficult to see why the ERA asserts that it does not currently have sufficient access to information to carry out its compliance monitoring function since AEMO must report alleged breaches to the ERA and any Rule Participant can bring alleged breaches to the attention of the ERA. Alinta interprets that the modified clause 2.13.3A will require the ERA to undertake a process to specifically identify the data, information and documents that it would like to obtain from AEMO and suggests that the Rule Change Panel should add a requirement that the Monitoring Protocol require the ERA to inform Market Participants of the specific information that the ERA believes will assist its compliance monitoring function under the proposed clause 2.13.3A.

Synergy submitted that the proposed changes to clause 2.16.14 in the Draft Rule Change Report to allow the ERA to use information obtained under section 2.16 of the Market Rules for the ERA's other functions under the Market Rules, should not be applied retrospectively. Synergy reasoned that if the ERA applied the proposed clause 2.16.14 to information obtained prior to this clause becoming effective, it would breach the terms under which the Market Participants shared their information with AEMO.

The assessment by submitting parties as to whether the proposal would better achieve the Wholesale Market Objectives is summarised in Table 2.

Table 2: Submitters' Comments on the Wholesale Market Objectives

Submitter	Wholesale Market Objective Assessment
Alinta	Alinta made no specific comment regarding the Wholesale Market Objectives.
Synergy	Synergy made no specific comment regarding the Wholesale Market Objectives.

Copies of all submissions received during the second submission period are available on the Rule Change Panel's website.

4.5 The Rule Change Panel's Response to Submissions Received During the Second Submission Period

The Rule Change Panel notes Alinta's view that the modified drafting of clause 2.13.3A in the Draft Rule Change Panel is a vast improvement on the drafting proposed in the Rule Change Proposal.

The Rule Change Panel's response to each of the specific issues raised in the second submission period is presented in Appendix A of this Final Rule Change Report and has been considered in the Rule Change Panel's assessment of this Rule Change Proposal in section 7 of this report.

4.6 Public Forums and Workshops

No public forums or workshops were held for this Rule Change Proposal.

5. The Rule Change Panel's Draft Assessment

The Rule Change Panel's draft assessment against clauses 2.4.2 and 2.4.3 and analysis of the Rule Change Proposal are provided in section 6 of the Draft Rule Change Report and are included in Appendix B of this Final Rule Change Report.

6. The Rule Change Panel's Proposed Decision as set out in the Draft Rule Change Report

The Rule Change Panel's proposed decision in section 2 of the Draft Rule Change Report was to accept the Rule Change Proposal in a modified form, as detailed in section 7 of the Draft Rule Change Report.

The reasons for the Rule Change Panel's proposed decision are set out in section 6.1 of the Draft Rule Change Report.

7. The Rule Change Panel's Final Assessment

7.1 Assessment Criteria

In preparing its Final Rule Change Report, the Rule Change Panel must assess the Rule Change Proposal in light of clauses 2.4.2 and 2.4.3 of the Market Rules.

Clause 2.4.2 of the Market Rules states that the Rule Change Panel "*must not make Amending Rules unless it is satisfied that the Market Rules, as proposed to be amended or replaced, are consistent with the Wholesale Market Objectives*". Additionally, clause 2.4.3 states that, when deciding whether to make Amending Rules, the Rule Change Panel must have regard to:

- any applicable statement of policy principles the Minister has issued to the Rule Change Panel under clause 2.5.2;
- the practicality and cost of implementing the proposal;
- the views expressed in submissions and by the MAC; and
- any technical studies that the Rule Change Panel considers necessary to assist in assessing the Rule Change Proposal.

In making its final decision, the Rule Change Panel has had regard to each of the matters set out in clauses 2.4.2 and 2.4.3 as follows:

- the Rule Change Panel's assessment of the Rule Change Proposal against the Wholesale Market Objectives is available in section 7.4 of this report;
- the Rule Change Panel notes that there has not been any applicable statement of policy principles from the Minister in respect of this Rule Change Proposal;
- the Rule Change Panel's assessment of the practicality and cost of implementing the Rule Change Proposal is available in section 7.6 of this report;
- a summary of the views expressed in submissions and by the MAC is available in section 4 of this report. The Rule Change Panel's responses to the submissions is available in section 5.3 and Appendix A of the Draft Rule Change Report, and section 4.5 and Appendix A of this report; and

- the Rule Change Panel does not believe a technical study in respect of this Rule Change Proposal is required and therefore has not commissioned one.

The Rule Change Panel's assessment is presented in the following sections.

7.2 Assessment of the Proposed Changes

The Rule Change Panel's final assessment of the proposed amendments does not differ from the assessment detailed in section 6 of the Draft Rule Change Report (included as Appendix B to this report). Since the time of issue of the Draft Rule Change Report, the Rule Change Panel notes that the ERA approved AEMO's Monitoring and Reporting Protocol on 15 May 2019, so transitional clause 1.14.1(e) no longer has any effect.

The Rule Change Panel has considered the issues raised in the second period submissions (see Appendix A of this report) and determined that these issues do not warrant further alteration of the proposed Amending Rules as set out in the Draft Rule Change Report and as indicated in section 8 of this report.

The Rule Change Panel is satisfied that the Amending Rules will reinforce the efficient operation of the ERA's Compliance function regime under the Market Rules and will further the Wholesale Market Objectives (see section 7.4 of this report). The nature of the proposed changes to the Market Rules should not alter how Market Participants operate with respect to the Compliance function in the Market Rules, as the ERA can already access Market Participants' information held by AEMO through Chapter 10 of the Market Rules.³

7.3 Additional Amendments to the Proposed Amending Rules

7.3.1 Additional Amendments following the First Submission Period

Following the first submission period, the Rule Change Panel made some additional changes to the proposed Amending Rules. A summary of these changes is provided in section 6.3 of the Draft Rule Change Report and these additional amendments are detailed in Appendix B of the Draft Rule Change Report. Briefly, these were:

- amending clause 2.13.3A to maintain the ERA's access to information to be in line with arrangements current at the time under the Market Rules, which predominantly reflects the scope defined in clause 10.2.1;
- consequential changes to clause 2.13.9B due to the Rule Change Panel's amendments to clause 2.13.3A; and
- administrative and minor grammatical changes to clauses 2.16.14 and 2.16.9G.

7.3.2 Additional Amendments following the Second Submission Period

After considering the submissions from the second submission period, the Rule Change Panel does not see a need to further change the Amending Rules.

7.4 Assessment against the Wholesale Market Objectives

The Rule Change Panel has not altered its view from the Draft Rule Change Report and considers that the proposed amendments to the Market Rules, as detailed in section 8 of this Final Rule Change Report, will:

³ The ERA also has powers to obtain Market Participants' information via heads of power external to the Market Rules, such as section 51 of the ERA Act.

- provide the ERA with more efficient access to information for the performance and discharge of its Compliance function, particularly the compliance monitoring function, which will promote the economically efficient, safe and reliable production of electricity, thereby promoting Wholesale Market Objective (a); and
- help minimise the long-term cost of electricity supplied to customers by minimising administration costs, which promotes Wholesale Market Objective (d) by allowing the ERA to:
 - use information collected under section 2.16 of the Market Rules for any of its functions under the Market Rules; and
 - bring proceedings before the Electricity Review Board pursuant to an investigation under clause 2.16.9B rather than having to perform duplicate investigation processes.

The Rule Change Panel also considers that the proposed changes will not affect, and thus are consistent with the remaining Wholesale Market Objectives.

7.5 Protected Provisions, Reviewable Decisions and Civil Penalties

The Rule Change Proposal proposes changes to clauses 2.13.3A, 2.13.9A, 2.13.9B, 2.16.9G and 2.16.14 of the Market Rules, which are Protected Provisions under clause 2.8.13. Thus, as required by clause 2.8.3 of the Market Rules, the Amending Rules in this Final Rule Change Report will require Ministerial approval.

This Rule Change Proposal does not amend any Reviewable Decisions or civil penalty provisions, nor does the Rule Change Panel consider that any of the proposed amendments to the clauses in the Market Rules should be made into Reviewable Decisions or civil penalty provisions.

7.6 Practicality and Cost of Implementation

The Rule Change Panel does not consider the cost and practicality of implementing this Rule Change Proposal to be a barrier to implementing the Amending Rules. The Rule Change Panel notes that this Rule Change Proposal is essential to provide the ERA access to information for its functions and responsibilities under the Market Rules and that implementing this Rule Change Proposal should not significantly change how Market Participants currently operate under the Market Rules.

7.6.1 Cost

No comments were made in the second period submissions regarding the costs to implement the Amending Rules. Therefore, as indicated in section 6.6.1 of the Draft Rule Change Report, the Rule Change Panel does not consider that this Rule Change Proposal will create any material costs for AEMO or Market Participants.

7.6.2 Practicality

No additional concerns were raised in the second period submissions regarding the practicality of implementing the Amending Rules. Therefore, as indicated in section 6.6.2 of the Draft Rule Change Report, the Rule Change Panel does not consider that there are any concerns with the practicality of implementing this Rule Change Proposal.

8. Amending Rules

The Rule Change Panel has decided to implement the following Amending Rules (~~deleted text~~, added text):

2.13.3A. AEMO must co-operate with the Economic Regulation Authority and facilitate any processes and systems put in place by the Economic Regulation Authority under clause 2.13.3, including by providing any market related data, information and document produced or exchanged in accordance with the Market Rules or Market Procedures in AEMO's possession or control (including in AEMO's role as System Management) that the Economic Regulation Authority has reason to believe may assist the Economic Regulation Authority to monitor Rule Participants' behaviour for compliance with the provisions of the Market Rules and Market Procedures.

...

2.13.9A. AEMO must support the Economic Regulation Authority's function of monitoring Rule Participants' behaviour for compliance with the provisions of the Market Rules (~~other than a provision of the Market Rules referred to in clause 2.13.9~~) and the Market Procedures.

2.13.9B. AEMO must ensure it has processes and systems in place to allow it to support the Economic Regulation Authority's monitoring of Rule Participants' behaviour, including processes and systems to provide the Economic Regulation Authority with data, information and documents under clause 2.13.3A.

...

2.16.9G. ~~Blank~~ Where the Economic Regulation Authority determines pursuant to the investigation under clause 2.16.9B that:

(a) prices offered in the Portfolio Supply Curve, the subject of the investigation, did not reflect the Market Generator's reasonable expectation of the short run marginal cost of generating the relevant electricity;

(b) prices offered in a Balancing Submission, the subject of the investigation, exceeded the Market Generator's reasonable expectation of the short run marginal cost of generating the relevant electricity; or

(c) prices offered in the LFAS Submission, the subject of the investigation, exceeded the Market Generator's reasonable expectation of the incremental change in short run marginal cost incurred by the LFAS Facility in providing the relevant LFAS,

and that the behaviour related to market power, the Economic Regulation Authority may bring proceedings before the Electricity Review Board.

...

2.16.14. The Economic Regulation Authority ~~must~~may use any information collected under this ~~clause~~section 2.16, including information provided to it by AEMO, ~~only~~ for the purpose of carrying out any of its functions under the Market Rules ~~this clause 2.16~~. The Economic Regulation Authority must treat information collected under this section 2.16 as confidential and must not publish any of that information other than in accordance with this ~~clause~~section 2.16 or where required in the performance of the Economic Regulation Authority's functions under the Market Rules. AEMO must

use information provided to it by the Economic Regulation Authority under clause 2.16.6(c) only for the purpose of carrying out its functions under this [clause section](#) 2.16. AEMO must treat information provided to it by the Economic Regulation Authority under clause 2.16.6(c) as confidential and must not publish any of that information other than in accordance with this [clause section](#) 2.16.

Appendix A. Responses to Submissions Received in the Second Submission Period

Issue	Submitter	Comment/Issue Raised	Rule Change Panel's Response
1	Alinta	<p>Administrative efficiency for the ERA could limit procedural fairness for Market Participants as the proposed Amending Rules will allow the ERA to obtain Market Participants' information through AEMO in a manner that is not transparent and could limit procedural fairness for Market Participants.</p> <p>Alinta considers that the current ERA compliance and monitoring framework affords a Market Participant procedural fairness. However, it notes that the ERA can approve amendments to its own Monitoring Protocol and recommends the Rule Change Panel to add a requirement to section 2.15 of the Market Rules to ensure that processes in the Monitoring Protocol must afford procedural fairness to affected parties.</p>	<p>The Rule Change Panel does not agree that there is a need to insert the provision suggested by Alinta into the Market Rules.</p> <p>The ERA is already required as a matter of Administrative Law to adhere to the principle of procedural fairness whenever it makes an administrative decision, including when undertaking its Compliance function.</p>
2	Alinta	<p>New clause 2.13.3A should only apply to information provided to AEMO after the Amending Rules commence as:</p> <ul style="list-style-type: none"> there has been no formal review of how chapter 10 of the Market Rules should operate under the institutional changes from 30 November 2015 through to 28 April 2018 as the amendments to Chapter 10 of the Market Rules were simply adding/or removing references to AEMO, AEMO (in its capacity as System Management) and IMO rather than a complete review; and the ERA's functions have changed since chapter 10 was originally drafted. 	<p>The Rule Change Panel is seeking to maintain each parties' rights under the Market Rules to allow them to efficiently meet their obligations under the Market Rules.</p> <p>Further, the Rule Change Panel has no indication from Government that it had a different policy intent to what is currently contained in the Market Rules.</p> <p>Therefore, since the ERA already has access to all records required to be kept by AEMO under the Market Rules and Market Procedures, the Rule Change Panel does not agree that there is a need to amend clause 2.13.3A to only apply to information provided by Market Participants to AEMO after commencement of this Rule Change Proposal.</p>

Issue	Submitter	Comment/Issue Raised	Rule Change Panel's Response
3	Alinta	<p>There is some uncertainty as to how modified clause 2.13.3A will work in practice as Alinta has interpreted the operation of clause 2.13.3A to mean that the ERA will have to undertake a process to identify the data, information and documents it would like to obtain from AEMO to assist in the ERA's monitoring role. Alinta recommends that the Rule Change Panel add a requirement that the Monitoring Protocol should require the ERA to inform Market Participants of the specific information that the ERA believes will assist its compliance monitoring function.</p>	<p>The Rule Change Panel disagrees with Alinta's proposal to require the ERA to disclose to a Market Participants the specific information that the ERA has requested from AEMO about the Market Participant. In addition to placing additional administrative burdens on both AEMO and the ERA to inform the Market Participant, this would depart from the current Compliance function regime, which does not require such a disclosure.</p> <p>Alinta's proposal would be a significant departure from the existing compliance process.</p> <p>The Rule Change Panel views that it would be reasonable for Market Participants to assume that the ERA has access to any information that has been provided to AEMO under the Market Rules.</p>
4	Synergy	<p>Synergy considers that the proposed amendments to clause 2.16.14 of the Market Rules should not apply retrospectively, that is the ERA should not be able to use information obtained under section 2.16 of the Market Rules for its other functions if that information was obtained prior to the amendments to clause 2.16.14 become effective.</p>	<p>The Rule Change Panel notes that because chapter 10 of the Market Rules already allows the ERA to access any information provided under section 2.16 of the Market Rules and to use that information for any of its functions, there is no need to place an obligation on AEMO to segregate and categorise section 2.16 information into prior and post commencement of these Amending Rules. The Rule Change Panel seeks to maintain the rights and obligations afforded to all parties under the Market Rules to allow them to carry out their functions in an efficient manner.</p>

Appendix B. Assessment of the Proposed Changes as set out in the Draft Rule Change Report

The following is a reproduction of section 6.1 of the Draft Rule Change Report. The only changes have been to:

- the heading references (to conform with the style guide for this Appendix);
- footnote 6 – to update that AEMO’s Monitoring and Reporting Protocol has now been approved by the ERA;
- footnote 9 – updated a reference to a footnote within the same section to ensure internally consistent referencing; and
- replacing references to ‘this report’ to ‘the Draft Rule Change Report’ to ensure clarity and prevent confusion of which report is being referenced.

B.1 Assessment of the Proposed Changes

B.1.1 General Concept of the Rule Change Proposal

The general concept of the Rule Change Proposal is to ensure that the Market Rules do not constrain the ERA’s ability to perform any of its functions under the Market Rules, with particular emphasis on the ERA having efficient access to information that it needs to carry out its compliance monitoring function. In making its assessment, the Rule Change Panel has also considered the historical development of the Compliance function.

The Rule Change Panel also notes that the ERA currently has access to any type of market related information and document produced or exchanged in accordance with the Market Rules or Market Procedures under Chapter 10 of the Market Rules⁴ or if the ERA exercises its powers under section 51 of the ERA Act.

B.1.2 Historical development

In discussing the historical development of the Compliance function, the pertinent parts of the Market Rules are:

- Section 2.13 – relates to the Compliance function;
- Section 2.16 – relates to the Effectiveness Monitoring function; and
- Clause 1.14.1(e)(i) – is a transitional clause requiring AEMO to provide records that AEMO is required to keep under the Market Rules and Market Procedures.

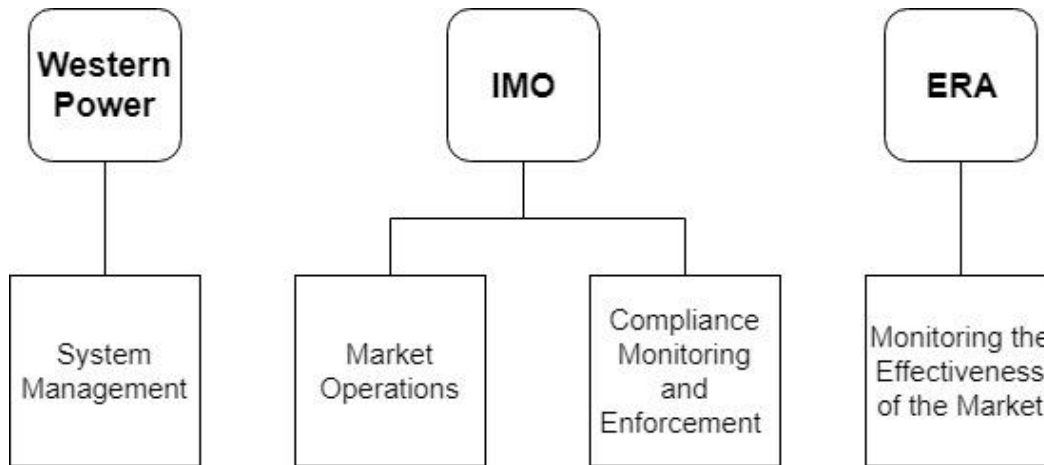
The historical development of these parts of the Market Rules provides context for the Rule Change Panel’s assessment of the Rule Change Proposal and is not intended as a comprehensive description for all functions of each agency at each historical stage.

⁴ Clause 10.2.1 of the Market Rules requires AEMO to set and publish the confidentiality status of all market related information and documents produced or exchanged in accordance with the Market Rules or Market Procedures. The confidentiality status document is available on AEMO’s website at <https://www.aemo.com.au/Electricity/Wholesale-Electricity-Market-WEM/Data/Managing-market-information>.

The Rule Change Panel notes that the confidentiality status document has not been updated since 1 July 2012, so there may be some market related information and documents under the Market Rules or Market Procedures that has not yet been classified. However, the Rule Change Panel assumes that, if the ERA requires access to such information to undertake its Compliance functions, then AEMO would take the necessary steps to classify the information or documents within the timelines required by the ERA.

Pre-30 November 2015

The main functions and responsible entities at the pre-30 November 2015 stage were:

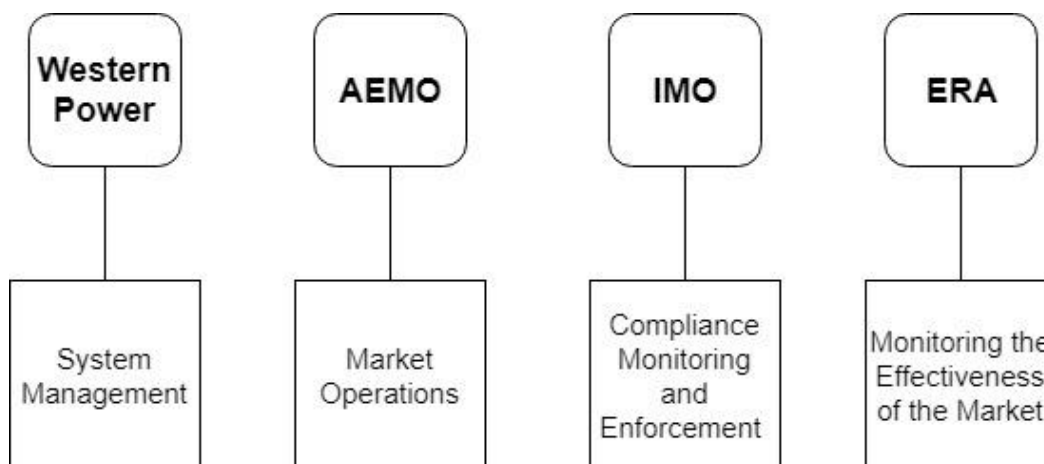


Prior to 30 November 2015, the IMO was responsible for market operations and for the Compliance function. Clause 2.13.2 of the 1 September 2015 Market Rules required the IMO to monitor Rule Participants’ behaviour for compliance with the Market Rules and Market Procedures. Clause 2.13.3 of the 1 September 2015 Market Rules required IMO to have the processes and systems in place to allow it to monitor Rule Participants’ behaviour for compliance. The IMO thus had access to the information necessary for it to carry out its Compliance function.

At this time, the ERA had responsibility for the Effectiveness Monitoring function as specified in section 2.16 of the 1 September 2015 Market Rules. The IMO was required to provide data identified in the MSDC (detailed in clause 2.16.2 of the 1 September 2015 Market Rules) to the ERA at least monthly or upon the ERA’s request (as required in clause 2.16.5 of the 1 September 2015 Market Rules).

30 November 2015 to 30 June 2016

The main functions and responsible entities from 30 November 2015 to 30 June 2016 were:



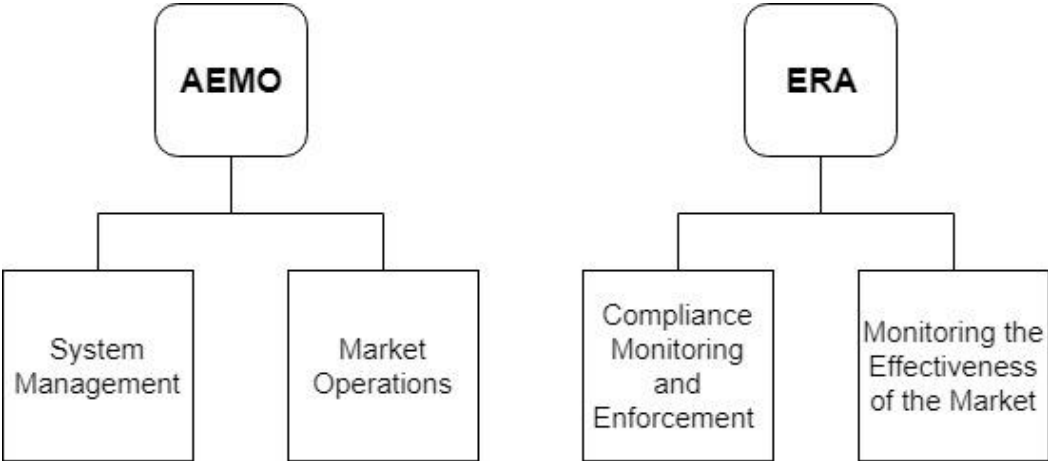
From 30 November 2015, the IMO’s market operations function was transferred to AEMO, whilst the IMO retained the Compliance function. As the IMO previously had access to all of the information it needed for its Compliance function when it was also the market operator, transitional clause 1.14.1(e)(i) was inserted into the Market Rules to require AEMO to provide the IMO with all records required to be kept by AEMO under the Market Rules and Market Procedures. Clause 2.13.3A was also inserted into the 30 November 2015 Market Rules to

require AEMO to co-operate with the IMO to allow it to monitor Rule Participants' behaviour for compliance with the Market Rules and Market Procedures. The effect of these clauses was to preserve the IMO's access to information for its Compliance Function to be the same scope as when IMO also had responsibility for market operations.

With the transfer of the market operations function to AEMO, section 2.16 was updated to require AEMO (instead of IMO) to provide the data identified in the MSDC to the ERA. Additionally, clause 2.16.5 required AEMO to provide the MSDC data to both the IMO and ERA at least once a month or upon request from either entity. The effect of the change to clause 2.16.5 was that the MSDC information provided to the ERA for its Effectiveness Monitoring function was also provided to the IMO who could use this information for its Compliance function.

1 July 2016

The main functions and responsible entities from 1 July 2016 were:



On 1 July 2016, the majority of the Compliance function was transferred from the IMO to the ERA. Through the Transitional Compliance Functions in clause 1.17.6 of the 1 July 2016 Market Rules, the IMO continued its Compliance Function in relation to an investigation of any breaches or potential breaches of clause 7A.2.17 commenced prior to the ERA Transfer Date⁵ (i.e. the Vinalco investigation).

Transitional clause 1.14.1(e)(i) was not changed and still required AEMO to provide the IMO with all records required to be kept by AEMO under the Market Rules and Market Procedures. As IMO was still conducting an investigation at the time, it required continued access to the information it had access to prior to the transfer of the Compliance function to the ERA.

Clause 2.16.5 (provision of MSDC data) was amended to require AEMO to provide the MSDC information to only the ERA (i.e. no longer requiring MSDC information to be provided to the IMO) as the ERA was made responsible for the vast majority of the Compliance function. The ERA continued to be responsible for the Effectiveness Monitoring function.

Concurrently, AEMO took over the System Management functions from Western Power.

28 April 2018

The Minister's amendments to the Market Rules commenced on 28 April 2018, and effectively dissolved the IMO. Upon dissolution of the IMO, the transitional clause 1.14.1(e)(i)

⁵ Including initiation of any enforcement action under the Market Rules or *Electricity Industry (Wholesale Electricity Market) Regulations 2004*.

was amended to require AEMO to provide the ERA with all records required to be kept by AEMO under the Market Rules and Market Procedures.

The Minister's amendments did not directly amend the clauses that the ERA is seeking to change in this Rule Change Proposal.

Historical Context – Conclusion

The Rule Change Panel considers that the transfer of the Compliance function was meant as a functional transfer and was not intended to limit the ability of the entity responsible for the Compliance function to undertake its duties. By necessity, this includes providing the ERA with appropriate access to information to carry out the compliance monitoring function. A compelling factor that the ERA's access to information for its compliance monitoring function was not intended to be limited is in the 30 November 2015 period, where AEMO was specifically required to provide both the IMO (who had responsibility for the entire Compliance function) and the ERA with information under section 2.16 (this included the MSDC information). Despite the IMO already being entitled to access to AEMO's records under transitional clause 1.14.1(e)(i), by specifically requiring information obtained under section 2.16 be provided to the IMO (via clause 2.16.5 of the Market Rules), this ensured that the IMO could use this information to carry out its compliance monitoring function. The issues raised in the Rule Change Proposal will principally arise when transitional clause 1.14.1(e) of the Market Rules ceases to operate.

B.1.3 Information Provision Issue

A central tenet of the Rule Change Panel's assessment of this Rule Change Proposal is the efficiency and ease of the ERA's access to information held by AEMO to carry out the ERA's functions under the Market Rules. Enabling the ERA to easily access information that it can already obtain under the Market Rules is a more efficient outcome than requiring the ERA and AEMO to undertake administrative processes to gather and exchange information, such as under clause 10.4.1 of the Market Rules, or the ERA enacting its rights under section 51 of the ERA Act. That is, providing ease of access to data, information and documents held by AEMO that the ERA is already entitled to will be a more efficient outcome for the market.

While the ERA is entitled to information under the Market Rules, the Rule Change Panel agrees with the Rule Change Proposal that there is no power in the Market Rules for the ERA to expressly require AEMO to provide it with access to market related information for compliance monitoring outside of transitional clauses 1.14.1(e)(i) and 1.16.1 of the Market Rules. The ERA is seeking to explicitly state, in section 2.13, the requirement on AEMO to provide data and information to ensure that the ERA has access to the data, information and documents required to carry out its compliance monitoring function. This is necessary because transitional clause 1.14.1(e)(i) will cease to have effect once AEMO develops, and the ERA approves, the Monitoring and Reporting Protocol,⁶ which the ERA argues will leave it with inadequate power to require AEMO to provide it with the information necessary for its compliance monitoring function.⁷

⁶ AEMO submitted the Monitoring and Reporting Protocol to the ERA for approval on 15 March 2019. *[Additional Note – the ERA approved and published AEMO's Monitoring and Reporting Protocol on 15 May 2019].*

⁷ Once transitional clause 1.14.1(e)(i) ceases to have effect, the ERA will have less efficient access to information for its compliance monitoring function than it currently has, given the loss of the obligation on AEMO to provide access to all records they are required to keep (from transitional clause 1.14.1(e)(i)) and the operation of clause 2.16.14, which restricts the usage of information obtained under section 2.16.

To overcome this deficiency in the Market Rules, and taking into account the ERA's functions and powers under the Market Rules, the Rule Change Panel has modified the amendments to clause 2.13.3A (see section 7 of the Draft Rule Change Report) to require AEMO to give the ERA access to the same scope of information that it would have to provide under Chapter 10 of the Market Rules, with the added requirement that the ERA believes that the data, information and documents may assist it to monitor Rule Participants' behaviour with the Market Rules and Market Procedures. The Rule Change Panel's assessment is based upon:

1. the ERA being able to obtain data and information through the Market Rules (i.e. Chapter 10) or other means (i.e. section 51 of the ERA Act) with consideration of making it more efficient and less costly for the ERA to get access to information that it is entitled to access under the Market Rules; and
2. defining the scope of the information to be 'any market related data, information or document produced or exchanged in accordance with the Market Rules or Market Procedures that is within AEMO's possession or control' is consistent with the scope of Chapter 10 of the Market Rules, and ensures that the ERA continues to have access to information from AEMO consistent with its current arrangements.

Without the amendments to clause 2.13.3A, the ERA would not have the power under the Market Rules to require AEMO to provide the data, information and documents that it needs in an efficient manner, and would have to resort to using other powers within of the Market Rules to acquire the information (i.e. Chapter 10). This is an inefficient, resource intensive process; and by its design, can only apply to data and information existing at a point in time. Should the ERA require the same data and information in the future for its compliance monitoring function, without these amendments, the ERA would have to undertake a cumbersome, inefficient process which is clearly an inefficient outcome.

Consequential to the changes to clause 2.13.3A, the Rule Change Panel agrees with the required associated change to clause 2.13.9B of the Market Rules. This amendment ensures that AEMO's processes and systems to support the ERA's monitoring of Rule Participant's behaviour includes where AEMO provides data, information and documents as described in clause 2.13.3A. Thus, the amendment to clause 2.13.9B facilitates the operation of clause 2.13.3A of the Market Rules.

The Rule Change Panel also agrees with the ERA's proposed amendment to clause 2.13.9A of the Market Rules. Currently, clause 2.13.9A of the Market Rules requires AEMO to provide support for certain clauses, except for those monitored by System Management under clause 2.13.9. Since AEMO provides support to the ERA for compliance monitoring that includes the clauses that System Management is required to monitor under clause 2.13.9, these clauses should not be excluded (as is currently stated in clause 2.13.9A). Thus, the exclusion in clause 2.13.9A is to be removed as it is no longer relevant.

B.1.3.1 ERA's Proposed Powers are Greater than that of Commonwealth Agencies

Alinta's submission indicated that Commonwealth regulatory agencies, like the Australian Energy Regulator (**AER**) and the Australia Competition and Consumer Commission (**ACCC**), have less powers to compel provision of information than what is being proposed by the ERA in this Rule Change Proposal; and that Commonwealth regulatory agencies conduct their compliance monitoring through publicly available information and voluntary information requests.

Although Commonwealth regulatory agencies do monitor publicly available information, the convention is that these agencies ask market participants to voluntarily hand over information, including confidential information, and these agencies have significant powers to compel provision of the information if it is not provided voluntarily (e.g. section 28 of the *National Electricity Law*, where the AER may issue a notice to compel provision of information or a document). As such, participants generally provide information voluntarily to avoid forcing the regulatory agency to compel provision of information.

However, the more relevant comparator for evaluation of this Rule Change Proposal is how the AER and ACCC obtain information from AEMO. Rule 8.7 of the National Electricity Rules allows the AER to impose reporting requirements on AEMO and to establish the procedures and standards applicable to AEMO relating to information required by the AER for matters relevant to the National Electricity Rules. Additionally, the relationship between the AER and AEMO is covered by a Memorandum of Understanding⁸ (**MOU**) that stems from the AER's powers to obtain confidential information and routine market related data and information. The MOU states that:

Both the AER and AEMO will endeavour to accommodate the information requirements and reasonable requests for information by the other party in a timely and effective manner. This may include the provision of routine data from the energy market systems, administered by AEMO, or ad hoc request for information by either party.

AEMO and the AER will share information, including confidential information, in a manner consistent with any legal requirements. The AER and ACCC may share information in accordance with the '*ACCC – AER information policy: the collection, use and disclosure of information*'.

The MOU, coupled with the AER's powers under the National Electricity Rules, demonstrates that the AER has access to any market systems data and confidential information from AEMO that the AER requires to carry out its statutory responsibilities, particularly for compliance monitoring. Hence the Rule Change Panel is of the view that the amendments to clause 2.13.3A and 2.13.9B will not provide the ERA with greater information gathering powers than those of the AER or ACCC.

B.1.4 Information Use Restriction

Section 2.16 of the Market Rules deals with the ERA's Effectiveness Monitoring function and establishes the MSDC. Under clause 2.16.14 of the current Market Rules, any information obtained by the ERA under section 2.16 can only be used for its functions in section 2.16, which precludes the ERA from using this information for any of its other functions under the Market Rules, including for its Compliance function. The ERA's proposed changes to clause 2.16.14 would remove this barrier and allow the ERA to use information obtained under section 2.16 for any of its functions under the Market Rules (including for its Compliance function).

The Rule Change Panel agrees that the restrictions placed on information obtained under section 2.16 by clause 2.16.14 are unnecessary because:

- For information obtained from AEMO, the restriction on the ERA's use of information acquired under section 2.16 of the Market Rules is inconsistent with the information policy regime set out in Chapter 10 of the Market Rules. Clause 10.2.1 requires AEMO to set the confidentiality status for each type of market related information and document

⁸ The MOU is dated June 2011 and is available at <https://www.aer.gov.au/about-us/agreements-mous>.

produced or exchanged in accordance with the Market Rules or Market Procedures. All information under the Market Rules would thus be assigned a confidentiality status as set out in clause 10.2.2 of the Market Rules and as prescribed in AEMO's Information Confidentiality Market Procedure. Section 10.4 of the Market Rules requires AEMO to make information and documents available on application by any person that is a member of the class able to receive that information or document in accordance with the relevant confidentiality status.

Since the ERA is a member of all confidentiality classes to whom information can be disclosed (clause 10.2.2 of the Market Rules), it can currently obtain from AEMO all information and documents produced or exchanged in accordance with the Market Rules or Market Procedures – it does not need to provide reasons for why it wants that information, and it can use that information for any purpose.⁹ Should the restriction under clause 2.16.14 remain in place, the ERA could utilise section 10.4 to obtain information from AEMO for any of its functions, but this is an inefficient way for both the ERA and AEMO to operate, as the ERA would need to apply to AEMO for the information or documents, and then AEMO would have to assess its information holdings, and collate and prepare the documents accordingly.

- Under section 2.16 of the Market Rules, AEMO is required to provide information to the ERA, including the MSDC data. Should any of this information reveal an alleged breach of the Market Rules, clause 2.13.10 requires the ERA to investigate. However, as the information is collected under section 2.16, the clause 2.16.14 information use restriction would prevent this information from being used outside of section 2.16, and the ERA would then have to ask for that same information again in the process of the investigation under section 2.13 of the Market Rules. A further issue about information obtained under section 2.16 and the operation of clause 2.13.10 of the Market Rules is discussed in section 6.2 of the Draft Rule Change Report.

The other amendments to clause 2.16.14 proposed by the ERA are to allow information that is collected under section 2.16 of the Market Rules to be published in accordance with the performance of that function of the ERA under the Market Rules. The Rule Change Panel agrees with this amendment to prevent conflicts with the ERA's obligations relating to publication under other parts of the Market Rules when information gathered under section 2.16 is utilised in this way. The Rule Change Panel notes that the ERA would have access to this information as per the information policy regime set out in Chapter 10 of the Market Rules and the ERA would treat confidential information appropriately (as set out in section 6.1.4.2 of the Draft Rule Change Report).

B.1.4.1 Use of Information for Unintended Purposes

Synergy, Perth Energy and Alinta all suggest that where Market Participants voluntarily provide information to AEMO for a specific purpose, the ERA should not be able to obtain that information from AEMO and use it for the ERA's other purposes/functions under the Market Rules.

⁹ As indicated in footnote 4, the confidentiality status document has not been updated since 1 July 2012, so there may be some market related information and documents under the Market Rules or Market Procedures that has not yet been classified. Since information that has not yet been classified must be placed in one of the six confidentiality classes, and the ERA can get access to all six confidentiality classes, the ERA would be able to get access to the unclassified information accordingly.

The Rule Change Panel's view is:

- If AEMO is reliant on voluntary provision of information to allow it to perform some of its functions, it would be important to preserve the flow of this information to AEMO by making the provision of this information mandatory (this would need to be the subject of a separate Rule Change Proposal).
- If the information provided to AEMO indicates an alleged breach of the Market Rules, then AEMO must notify the ERA regardless of whether this information is provided voluntarily or under the Market Rules.¹⁰
- If the ERA becomes aware of an alleged breach of the Market Rules, it must investigate the alleged breach (under clause 2.13.10) and can meet with relevant Market Participants to discuss the matter, which the ERA typically does as a matter of process. Thus, although the ERA may have obtained information originally intended for one purpose (e.g. under section 2.16 for monitoring the effectiveness of the market), if the information indicates an alleged breach, then the ERA must investigate the alleged breach under the Market Rules and the affected parties will have opportunity to provide any relevant context at that time.
- If the ERA uses Chapter 10 of the Market Rules or a section 51 notice under the ERA Act to procure information from AEMO, there is no explicit obligation on either the ERA or AEMO to disclose the release of this information to the relevant Market Participant or to give them an opportunity to provide context (i.e. the risk identified in the submissions already exists).¹¹

The Rule Change Panel's amendments to clause 2.16.14 will allow the ERA to use information that it could already obtain from AEMO under the Market Rules for any of its functions under the Market Rules, which is a more efficient outcome than requiring the ERA to obtain the same information through alternative means.

B.1.4.2 Handling of Confidential Information

Alinta, Perth Energy and Synergy expressed concern with the handling of confidential information provided by Market Participants to AEMO. The submissions highlighted that AEMO would be required to pass information to the ERA under the proposed changes to the Market Rules, but Market Participants would not know if/when their confidential information had been accessed by the ERA or the ERA's third-party service providers, and that Market Participants may have contractual liabilities to third-parties upon the disclosure of confidential information.

The Rule Change Panel has not seen any evidence of a contractual liability arising from the disclosure of information by AEMO to the ERA that was information disclosed by a Market Participant to AEMO. The Rule Change Panel's views on the handling of confidential information by the ERA are:

- Access to confidential information – the ERA has the power under section 51 of the ERA Act to require anyone to provide the ERA with information. If the ERA uses section 51 of the ERA Act to obtain information regarding a Market Participant from AEMO, the Market

¹⁰ If AEMO becomes aware of an alleged breach of the Market Rules, it is obliged by transitional clause 1.14.1(e)(ii) or clause 2.13.9C (once transitional clause 1.14.1 ceases) to report the alleged breach to the ERA.

¹¹ An obligation would exist on AEMO if it released information to the ERA that it received from Market Participants on a voluntary basis, if AEMO agreed to an undertaking to inform the relevant party if AEMO had to make such a disclosure.

Participant would not necessarily know that their confidential information has been provided to the ERA, so the risk that has been identified by Alinta, Perth Energy, and Synergy already exists. Similarly, if the ERA obtains documents or information from AEMO under Chapter 10 of the Market Rules, the Market Participant would not necessarily be informed that this has occurred.

- ERA confidentiality protection – the primary means to protect the confidentiality of information within the ERA stems from section 57 of the ERA Act, which imposes strict penalties on all individuals within the ERA for breach of confidentiality. ERA employees can be liable for a \$10,000 fine or up to 12 months imprisonment for a breach. Thus, there is a strong individual incentive for the ERA and its staff to maintain confidentiality.
- Publication of confidential information – the ERA will adhere to its publicly available Code of Conduct and internal procedures in relation to how confidential information is handled and when it can be published.
- Market Participant response – if the ERA was to use confidential information obtained from AEMO in an investigation of an alleged breach, it will typically meet with the Market Participant to first discuss the matter (clauses 2.13.10 and 2.13.11 of the Market Rules).
- Confidentiality in contractual clauses – although it is common in contracts to require a disclosing party to notify the other party that information is being disclosed to another entity, contractual clauses do not generally make the disclosing party liable where they have no control over the entity to whom they are making the disclosure. This is especially the case where the entity being disclosed to is required by law to obtain or disclose this information in the performance of its functions under the law.

The Rule Change Panel sees no reason that the ERA should not have access to confidential information held by AEMO that it can then use for any of its functions given that:

- it is beneficial for the market to have a fully informed regulator;
- the ERA has a comprehensive confidentiality regime stemming from the ERA Act;
- the ERA is an agency accustomed to dealing with confidential information; and
- the ERA will continue to manage confidential information through its current processes and those under the Market Rules (such as the information policy regime in Chapter 10 of the Market Rules).

The proposed amendments in this Rule Change Proposal are unlikely to create any additional material risks for Market Participants.

B.1.5 Enforcement Issue

The Rule Change Panel agrees with the drafting proposed in the Rule Change Proposal for clause 2.16.9G that creates an avenue for the ERA to bring proceedings before the Electricity Review Board pursuant to an investigation under clause 2.16.9B.

The Rule Change Panel agrees with the ERA that its ability to bring proceedings before the Electricity Review Board subsequent to an investigation conducted under clause 2.16.9B has been severed. Prior to the transfer of the Compliance function from the IMO to the ERA, if the ERA conducted an investigation under clause 2.16.9B and found sufficient grounds to refer this matter to the Electricity Review Board, then the ERA would ask the IMO to refer the matter accordingly. However, when the Compliance function was transferred from the IMO to the ERA, the ERA was not given powers to refer an investigation under clause 2.16.9B to the

Electricity Review Board, and with the dissolution of the IMO, the ERA's power to refer such matters to the Electricity Review Board was lost.

As the ERA's power to bring proceedings before the Electricity Review Board under clause 2.13.18(b) relates only to an investigation under clause 2.13.10(b), the Rule Change Panel agrees that it is appropriate to amend clause 2.16.9G to reinstate the power to refer an investigation under clause 2.16.9B to the Electricity Review Board. Otherwise the current situation of requiring the ERA to run two similar investigations under section 2.16 and then again under section 2.13 of the Market Rules would continue.

The Rule Change Panel acknowledges Alinta's suggestion to modify the existing clause 2.13.18(b) power of referral to include an investigation under clause 2.16.9B. After further analysis, the Rule Change Panel has found that the required changes would increase the complexity of the clause and add unintentional ambiguity relative to the Rule Change Proposal's proposed drafting for the new clause 2.16.9G.

B.1.6 Conflict of Interest between the ERA and the Rule Change Panel

Perth Energy made a supplemental submission to the Rule Change Panel on 25 January 2019. This submission was made in response to an email that the Rule Change Panel's staff (**RCP Support**) sent to Alinta Energy, Perth Energy and Synergy on 3 January 2019, seeking further clarification on some aspects of their first period submissions.

In its supplemental submission, available on the Rule Change Panel's website, Perth Energy raised a number of allegations of conflict of interest between RCP Support and the staff of the ERA.

The Chairman and the Executive Officer of the Rule Change Panel met with Perth Energy on 12 February 2019 to discuss its conflict of interest concerns. The Rule Change Panel notes that:

- The State Government has put the *Electricity Industry (Rule Change Panel) Regulations 2016 (Rule Change Panel Regulations)* and the Market Rules in place, which:
 - require the ERA to provide support to the Rule Change Panel; and
 - allow, and in some cases require, the ERA to develop and submit Rule Change Proposals to the Rule Change Panel.

All of the actions undertaken by RCP Support and ERA staff with respect to this Rule Change Proposal have been consistent with the Rule Change Panel Regulations and the Market Rules.

- RCP Support did not provide any assistance to the ERA in developing this Rule Change Proposal beyond what would be provided to other Market Participants, and only RCP Support has worked on processing the proposal for consideration by the Rule Change Panel, not ERA staff.
- Numerous steps have been taken to address potential conflict of interest concerns:
 - Clause 2.5.1B of the Market Rules requires the ERA to consult with the MAC before commencing development of a Rule Change Proposal, and to consider the MAC's advice in deciding whether and how to develop a proposal. The ERA complied with clause 2.5.1B in developing and submitting this Rule Change Proposal.

- The ERA has developed a 'Statement on ERA-initiated Rule Change Proposals' (**Statement**)¹² indicating its policy on when it will develop a Rule Change Proposal and how it will interact with the Rule Change Panel in developing a Rule Change Proposal. The ERA complied with the Statement in developing this Rule Change Proposal.
- The arrangements to manage any potential conflict of interest from the ERA providing support to the Rule Change Panel are specified in a document titled 'Internal governance arrangements for providing secretariat support to the Economic Regulation Authority and the Rule Change Panel' (**Governance Arrangements**).¹³ The Governance Arrangements explain:
 - the organisation structure of the ERA and the Rule Change Panel, including separation of the processes for RCP Support and ERA staff;
 - ERA's resourcing of RCP Support;
 - separation of decision-making by the ERA's Governing Body and the Rule Change Panel; and
 - that RCP Support will treat ERA-initiated Rule Change Proposals in the same way as any other Rule Change Proposal, including in setting the priority of such proposals.

All of the above information and documentation has been appropriately communicated to Market Participants, including to all MAC members.

The Rule Change Panel is of the view that RCP Support and ERA staff have appropriately followed all of the established arrangements to ensure independence of decision-making by the Rule Change Panel.

The Rule Change Panel has asked RCP Support to reaffirm these arrangements with the MAC at its next available MAC meeting.

B.1.7 Separation of Compliance and Effectiveness Monitoring Functions

The Market Rules separate the ERA's Compliance function from its Effectiveness Monitoring function. Alinta and Perth Energy both contend that the existence of the MSDC is proof that there is an intended boundary to the free flow of information between the entity in charge of Market Operations (AEMO) and the entity in charge of the Compliance function (the ERA).

Conceptually, there appears to be confusion surrounding the MSDC, which is only relevant to the Effectiveness Monitoring function, and is not supposed to impact the ability of the organisation in charge of the Compliance function to carry out its obligations. The Effectiveness Monitoring function is completely separate to the Compliance function.

Section 6.1.2 of the Draft Rule Change Report provides a history of the evolution of the Compliance function and the Effectiveness Monitoring function. The issue about the MSDC only arises because the ERA is now responsible for conducting both functions and if the Compliance function were moved to a different body, the MSDC and section 2.16 issue

¹² The Statement was published on 24 May 2018 at: <https://www.erawa.com.au/cproot/19094/2/Statement%20on%20ERA%20initiated%20Rule%20Change%20Proposals.pdf>.

¹³ The ERA consulted the MAC in developing the Governance Arrangements on 8 August 2018, and published the document on the ERA website on 22 November 2018 at: <https://www.erawa.com.au/cproot/19856/2/Governance%20arrangements%20for%20staff%20supporting%20the%20ERA%20and%20Rule%20Change%20Panel.PDF>.

would not exist. In consideration of the historical context (see section 6.1.2 of the Draft Rule Change Report), the Rule Change Panel concludes that there was no intention to restrict the ERA's access to information for its Compliance function, and particularly the compliance monitoring function. That is, the restrictions on the use of MSDC information and other information obtained under section 2.16 of the Market Rules was never intended to prevent the flow of that information to the ERA to undertake its Compliance function, and clause 2.16.14 of the Market Rules currently compromises the ERA's ability to fulfil its Compliance function duties.¹⁴

B.1.8 Duplication of efforts and costs

Perth Energy raised an issue that the ERA's amendments could create a duplication of effort between AEMO in its capacity to monitor the market and the ERA in its capacity to survey and enforce compliance with the Market Rules and Market Procedures.

Clause 2.2A.1(a) confers the function of compliance monitoring squarely on the ERA. AEMO, does not have an explicit function to monitor compliance with the Market Rules, but must support the ERA's compliance monitoring function under clause 2.1A.2(j)(i). That is, there should be no duplication of effort or costs between AEMO and the ERA for monitoring compliance with the Market Rules. Thus, the Rule Change Panel does not agree that the amendments to the Market Rules change the relationship between the ERA and AEMO in respect of monitoring Market Participants for compliance with the Market Rules.

¹⁴ Information obtained under section 2.16 of the Market Rules and MSDC information form only a subset of information that the ERA requires to execute its compliance monitoring function.