

## **Rule Change Notice: ERA access to market information and SRMC investigation process (RC\_2018\_05)**

This notice is given under clause 2.5.7 of the Wholesale Electricity Market Rules (**Market Rules**).

**Submitter:** Adrian Theseira – Economic Regulation Authority (**ERA**)

**Date submitted:** 27 September 2018

### **The Rule Change Proposal**

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

1. the inability of the ERA to require the Australian Energy Market Operator (**AEMO**) to provide it with market information for compliance monitoring (information provision);
2. restrictions on the ERA's compliance functions from using information already provided by AEMO to the ERA (information use restriction); and
3. the processes for investigating short run marginal cost non-compliance matters, which now require two separate investigations to bring proceedings to the Electricity Review Board (enforcement issue).

The Rule Change Panel notes that the proposed amendments affect Protected Provisions and are thus subject to Ministerial approval.

Appendix 1 contains the Rule Change Proposal and gives complete information about:

- the proposed amendments to the Market Rules;
- relevant references to the Market Rules and any proposed specific amendments to those clauses; and
- the submitter's description of how the proposed amendments would allow the Market Rules to better address the Wholesale Market Objectives.

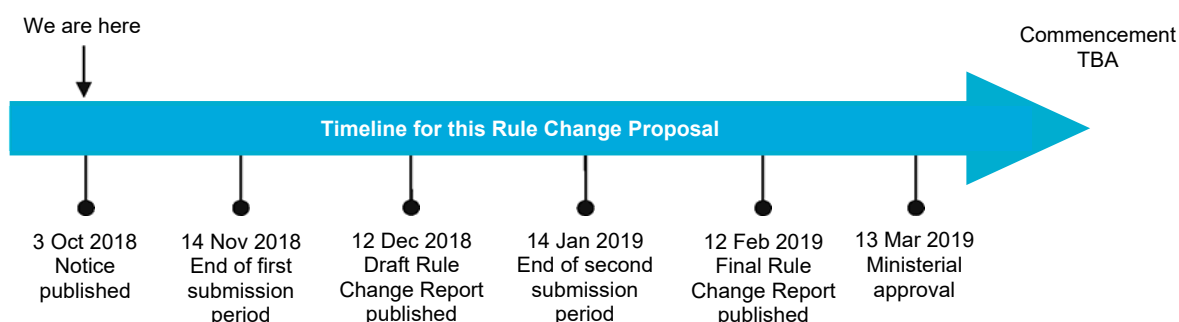
### **Decision to progress the Rule Change Proposal**

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

## Timeline

This Rule Change Proposal will be progressed using the Standard Rule Change Process, described in section 2.7 of the Market Rules.

The projected timeline for progressing this proposal is:



## Call for submissions

The Rule Change Panel invites interested stakeholders to make submissions on this Rule Change Proposal. The submission period is 30 Business Days from the Rule Change Notice publication date. Submissions must be delivered to the RCP Secretariat by **5:00 PM on Wednesday, 14 November 2018**.

The Rule Change Panel prefers to receive submissions by email, using the submission form available at: <https://www.erawa.com.au/rule-change-panel/make-a-rule-change-submission> sent to [rcp.secretariat@rcpwa.com.au](mailto:rcp.secretariat@rcpwa.com.au).

Submissions may also be sent to the Rule Change Panel by post, addressed to:

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

## Wholesale Electricity Market Rule Change Proposal

**Rule Change Proposal ID:** RC\_2018\_05  
**Date received:** 27 September 2018

### Change requested by:

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<b>Date submitted:</b>	27 September 2018
<b>Urgency:</b>	3 - Medium
<b>Rule Change Proposal title:</b>	ERA access to market information and SRMC investigation process
<b>Market Rule(s) affected:</b>	2.13.3A, 2.13.9A, 2.13.9B, 2.16.14, 2.16.9G

### Introduction

Clause 2.5.1 of the Wholesale Electricity Market (WEM) Rules (Market Rules) provides that any person may make a Rule Change Proposal by completing a Rule Change Proposal form that must be submitted to the Rule Change Panel.

This Rule Change Proposal can be sent by:

Email to: [rcp.secretariat@rcpwa.com.au](mailto: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

The Rule Change Panel will assess the proposal and, within 5 Business Days of receiving this Rule Change Proposal form, will notify you whether the Rule Change Proposal will be further progressed.

In order for the proposal to be progressed, all fields below must be completed and the change proposal must explain how it will enable the Market Rules to better contribute to the achievement of the Wholesale Market Objectives.

The objectives of the market are:

- (a) to promote the economically efficient, safe and reliable production and supply of electricity and electricity related services in the South West interconnected system;
- (b) to encourage competition among generators and retailers in the South West interconnected system, including by facilitating efficient entry of new competitors;
- (c) to avoid discrimination in that market against particular energy options and technologies, including sustainable energy options and technologies such as those that make use of renewable resources or that reduce overall greenhouse gas emissions;
- (d) to minimise the long-term cost of electricity supplied to customers from the South West interconnected system; and
- (e) to encourage the taking of measures to manage the amount of electricity used and when it is used.

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## Details of the Proposed Rule Change

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### 1. Describe the concern with the existing Market Rules that is to be addressed by the proposed rule change:

#### Background

The Economic Regulation Authority (ERA) became responsible for the compliance and enforcement functions under the Market Rules on 1 July 2016. These functions include requirements to monitor compliance and investigate non-compliance. Prior to this, the Independent Market Operator (IMO) was responsible for these functions.

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 (information provision);
2. restrictions on the ERA's compliance functions from using information already provided by AEMO to the ERA (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 (enforcement issue).

Problems 1 and 2 concern the ERA's function to monitor compliance<sup>1</sup>, while problem 3 concerns the ERA's function to investigate non-compliance.

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<sup>1</sup> The information provision and restriction problems referred to in points 1 and 2 above only concern the ERA's compliance monitoring function, and not the ERA's function to investigate alleged breaches of the Market Rules. The ERA already has powers under the Market Rules to require the provision of information from relevant parties for specific investigations of alleged breaches.

## **History of the development of this proposal**

The ERA raised these problems with the Public Utilities Office (PUO) in November 2016. There was agreement from the PUO, at officer level, that it would draft amendments to the Market Rules. Amendments did not eventuate due to Electricity Market Review reform priorities at the time.

Around the same time, the ERA began work on updating the Monitoring Protocol Market Procedure, after the transfer of responsibility for this document from the IMO to the ERA. The ERA assessed whether updates could be made to the procedure to address the information provision problem. The assessment confirmed that there is no head of power in the Market Rules to allow the problem to be addressed in the procedure.

The matters that are the subject of this proposal were added to the Market Advisory Committee's (MAC) Market Rules Issues List. These matters were discussed with MAC at its meeting on 13 December 2017.

To satisfy the requirement of clause 2.5.1B of the Market Rules, the ERA further consulted with MAC at its meeting on 13 June 2018. At this meeting it was agreed that the ERA should prepare a Pre-Rule Change Proposal.

A Pre-Rule Change Proposal was prepared for discussion at the MAC meeting held on 8 August 2018. MAC provided feedback on the Pre-Rule Change Proposal at the meeting.

## **History of the changes in institutional arrangements giving rise to these problems**

A concern raised at the 8 August 2018 MAC meeting was that the drafting of the proposed rule changes was broad and did not specify the types of information that the ERA may require AEMO to provide for the purposes of compliance monitoring.

In assessing MAC's feedback, it is relevant to consider the historical arrangements for the compliance function and the ability of the function to access information and require the provision of information for compliance monitoring.

These historical arrangements demonstrate an underlying principle that the organisation responsible for compliance monitoring must have access to market information held by the market operator, including the right to require provision of that information from the market operator. This principle has continued in subsequent amendments to the Market Rules, albeit the drafting of the most recent of these amendments contains an oversight. This oversight is explained further below.

Pre-30 November 2015: The IMO was the market operator from 2004 to 2015. The market operator's responsibilities included receiving, producing and disseminating information and data under the Market Rules and Market Procedures. The IMO was effectively the custodian of market information between 2004 and 2015.

The IMO was also responsible for the compliance function during this time. The IMO's compliance function as stated in the Market Rules was:

...to monitor other Rule Participants' compliance with the Market Rules, to investigate potential breaches of the Market Rules, and if thought appropriate, initiate enforcement action under the Regulations and these Market Rules...

Between 2004 and 2015, the Market Rules contained no restrictions on the information that the IMO could access, or the method in which it could access that information, to carry out its compliance function. In performing its compliance function, the IMO had full access to all the

information that it received, produced and disseminated under the Market Rules and Market Procedures as the market operator. The Market Rules did not require the IMO to ring-fence its compliance function from its other functions.

Between 30 November 2015 and 30 June 2016: On 30 November 2015, the IMO's market operation functions were transferred to AEMO. The IMO retained the compliance function. From 30 November 2015, AEMO became the custodian of all market information. For the period from 30 November 2015 to 30 June 2016, the IMO's position and responsibilities were the same as those currently held by the ERA for compliance. That is, the IMO was responsible for monitoring compliance and it required the provision of market information from AEMO to perform this responsibility.

The Market Rules included a transitional provision facilitating the IMO's access to market information held by AEMO for compliance from 30 November 2015. Clause 1.14.1 of the Market Rules stated as at 30 November 2015 (the Transition Date) the following<sup>2</sup>:

1.14.1. On and from the AEMO Transition Date:

...

- (e) until the date on which a Monitoring and Reporting Protocol developed by AEMO is approved by the IMO under clause 2.15.6A:
  - i. AEMO must provide to the IMO all records required to be kept by AEMO under the Market Rules and Market Procedures;
  - ii. if AEMO becomes aware of an alleged breach of the Market Rules, then it must record the alleged breach and notify the IMO; and
  - iii. clause 2.13.9C does not apply to AEMO...

Clause 1.14.1(e)i demonstrates the continuation of the underlying principle that the organisation responsible for compliance must have access to, and must be provided with, market information held by the market operator.

Clause 1.14.1 also seems to imply that at a later date, AEMO's Monitoring and Reporting Protocol would include a provision that would give effect to the requirement for AEMO to provide the IMO, and now the ERA, with any market information it requires. There are some problems with this, discussed further below.

From 1 July 2016: The compliance function was transferred from the IMO to the ERA on 1 July 2016. The ERA's compliance function from 1 July 2016, as stated in the Market Rules, is:

...to monitor other Rule Participants' compliance with these Market Rules, to investigate potential breaches of these Market Rules, and if thought appropriate, initiate enforcement action under the Regulations and these Market Rules...

This wording is materially the same as that applicable to the IMO prior to 1 July 2016 (the only difference being two references to 'the Market Rules' is now 'these Market Rules').

System operation functions were also transferred from Western Power's System Management business unit to AEMO on this date. One of the transitional provisions for the System Management transfer, effective from 1 July 2016, states:

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<sup>2</sup> In the version of the Market Rules published on 28 April 2018 references to the IMO in clause 1.14.1 were deleted and replaced with the Economic Regulation Authority.

1.16.1. On and from the System Management Transition Date:

...

- (e) AEMO may amend its Monitoring and Reporting Protocol to incorporate its System Management Functions, and until it is amended:
  - i. AEMO must provide to the Economic Regulation Authority, on request, all records required to be kept by System Management under the Market Rules and Market Procedures;
  - ii. if AEMO becomes aware of an alleged breach of the Market Rules, then it must record the alleged breach and notify the Economic Regulation Authority; and
  - iii. clause 2.13.8 does not apply to AEMO in its capacity as System Management...

It is clear that clause 1.16.1(e)i intends to continue to apply the underlying principle that the organisation responsible for compliance must be provided with market information held by the market operator. The transitional provisions imply that AEMO's Monitoring and Reporting Protocol would, when developed, provide the long term solution.

The temporary nature of the transitional provisions means they are not sufficient to provide the ERA with a lasting power under the Market Rules to require information from AEMO for compliance monitoring. This is an oversight in the drafting of the Market Rules.

Also, it is not appropriate to include in AEMO's Monitoring and Reporting Protocol the obligation for AEMO to provide information to the ERA. Firstly, the ERA considers that AEMO's Monitoring and Reporting Protocol should only cover how AEMO provides market information to the ERA, and not the obligation for it to provide market information to the ERA. Secondly, AEMO's Monitoring and Reporting Protocol is currently under development.

In assessing these problems, the ERA has considered the drafting of the Gas Services Information (GSI) Rules. Similar to the Market Rules, AEMO took over the GSI platform operations from the IMO on 30 November 2015. The IMO retained its GSI compliance functions between 30 November 2015 and 30 June 2016. Relevant GSI Rules during this period are below:

- GSI Rule 165(2)

The IMO must ensure it has processes and systems in place to allow it to monitor its own activities and those of Gas Market Participants and AEMO for compliance with the Rules and the Procedures.

- GSI Rule 165A(2)

AEMO must co-operate with the IMO and facilitate any processes and systems put in place by the IMO under subrule 165(2), including by providing data and information necessary to enable the IMO to monitor Gas Market Participants' behaviour for compliance with the provisions of the Rules and the Procedures.

As demonstrated above, the GSI Rules were expressly amended to state that AEMO must provide data and information necessary to enable the IMO to monitor GSI compliance.

On 1 July 2016 the GSI Rules compliance function transferred from the IMO to the ERA. The

following rules were put in place on this date:

- GSI Rule 165(2)<sup>3</sup>

The ERA must ensure it has processes and systems in place to allow it to monitor the activities of Gas Market Participants, AEMO and the IMO for compliance with the Rules and the Procedures.

- GSI Rule 165A(2)

AEMO must co-operate with the ERA and facilitate any processes and systems put in place by the ERA under subrule 165(2), including by providing data and information necessary to enable the ERA to monitor Gas Market Participants' behaviour for compliance with the provisions of the Rules and the Procedures.

The GSI Rules clearly provide the IMO, and now the ERA, with the power to require data and information from AEMO for compliance monitoring. The drafting approach adopted in the GSI Rules should have also been used in the Market Rules when the compliance function was transferred to the ERA.

The practical effect of the information provision and access problems discussed above is that the ERA's ability to monitor compliance is not equal to that of the IMO's prior to function transfer.

The discussion above demonstrates that there was an oversight in the drafting of the Market Rules when the compliance function was transferred from the IMO to the ERA. The oversight means the Market Rules no longer reflect the historic underlying information access principles and approach for the Market Rules compliance function. This drafting oversight is, in the ERA's view, a manifest error and has resulted in the first two issues discussed below, and causes complexities for the third issue discussed below.

### ***Issue 1: Information provision***

The Market Rules require the ERA to monitor participants' compliance. The relevant clauses of the Market Rules are:

- 2.13.2. The Economic Regulation Authority must monitor other Rule Participants' behaviour (including AEMO's and System Management's behaviour) for compliance with the Market Rules and Market Procedures in accordance with the Monitoring Protocol.
- 2.13.3. The Economic Regulation Authority must ensure it has processes and systems in place to allow it to monitor Rule Participants' behaviour for compliance with the Market Rules and Market Procedures in accordance with the Monitoring Protocol.

Effective compliance monitoring for the market must include the review and analysis of market information held by the market operator to identify potential areas of non-compliance.

There are several clauses in the Market Rules that were amended on and after 1 July 2016 referring to AEMO providing support to the ERA for compliance. None of these clauses expressly require AEMO to provide the ERA with any information that the ERA requires for compliance monitoring. For example, clause 2.1A.2 states:

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<sup>3</sup> The reference to the IMO was removed from clause 165(2) in the version of the GSI Rules published on 28 April 2018.



- 2.1A.2. The WEM Regulations also provide for the Market Rules to confer additional functions on AEMO. The functions conferred on AEMO are—  
...
- (j) to support—
    - i. the Economic Regulation Authority's monitoring of other Rule Participants' compliance with the Market Rules;
    - ii. the Economic Regulation Authority's investigation of potential breaches of the Market Rules (including by reporting potential breaches to the Economic Regulation Authority); and
    - iii. any enforcement action taken by the Economic Regulation Authority under the Regulations and these Market Rules....

Sub-clause (j)i makes no reference to AEMO providing the ERA with the information it requires to monitor compliance. This contrasts with the drafting of AEMO's other functions specified in clause 2.1A.2 to support the ERA for its market surveillance, effectiveness and review functions. These provisions specify that it is a function of AEMO to provide the ERA with any market information. Clause 2.1A.2 states:

- 2.1A.2. The WEM Regulations also provide for the Market Rules to confer additional functions on AEMO. The functions conferred on AEMO are—  
...
- (k) to support the Economic Regulation Authority in its market surveillance role, including providing any market related information required by the Economic Regulation Authority;
  - (l) to support the Economic Regulation Authority in its role of monitoring market effectiveness, including providing any market related information required by the Economic; Regulation Authority
  - (IA) to contribute to the development and improve the effectiveness of the operation and administration of the Wholesale Electricity Market, by:
    - ...
    - iv. providing information to the Economic Regulation Authority as required to support the reviews carried out by the Economic Regulation Authority under the Market Rules...

The drafting inadequacies in clause 2.1A.2(j)i and other relevant clauses<sup>4</sup> means there is no power in the Market Rules for the ERA to require AEMO to provide it with market information for compliance monitoring, outside of the temporary and inadequate transitional provisions referred to earlier (clauses 1.14.1 and 1.16.1).

While the ERA can make a request to AEMO for information for use in compliance monitoring, there is nothing in the Market Rules requiring AEMO to comply with the request, outside of the

<sup>4</sup> See clauses 2.13.3A, 2.13.9A and 2.13.9B.

temporary transitional provisions. Importantly, there could be legal risk in AEMO voluntarily providing information to the ERA and/or the ERA using that information given the information use restrictions in clause 2.16.14 discussed later in this proposal.

AEMO may also have difficulties in recovering costs for providing the information in the absence of an express power as the Market Rules only provide for AEMO to recover costs for its functions under the Market Rules. This is a lesser concern as there should not be any material costs in AEMO providing information. This is because there are already arrangements in place for the ERA to access AEMO's data warehouse for the ERA's clause 2.16 functions.

The ERA could require the provision of information from AEMO using its powers under section 51 of the *Economic Regulation Authority Act 2003* to obtain information to assist the ERA in the performance of its functions. To date the ERA has not used this power to gather the relevant information because it considers that the more appropriate solution is to amend the Market Rules to address the problem. The use of section 51 would result in administrative costs for both the ERA and AEMO.

The proposed solution is to amend clause 2.13.3A. This clause requires AEMO to co-operate with the ERA and to facilitate processes and systems that the ERA puts in place to monitor compliance. The proposed amendment mirrors the drafting approach in GSI Rule 165A(2) referred to above to expressly state that AEMO's co-operation includes providing data and information necessary to enable the ERA to monitor compliance with the Market Rules and Market Procedures.

A corresponding minor amendment to clause 2.13.9B is also proposed to ensure that AEMO's processes to support the ERA's compliance function include providing data and information necessary for the ERA to monitor compliance.

At the MAC meeting on 8 August 2018 two related concerns were raised. One of these concerns was that individual requests for information should be made so that participants can be given the opportunity to provide additional context for the information being provided to the ERA for compliance monitoring. A further reason was so that the participant was aware of what the information was being used for.

At the compliance monitoring stage, the ERA will be seeking to identify non-compliant events that warrant further investigation. These events should be exceptions rather than norms. The ERA will analyse these events to determine if a formal investigation under clause 2.13.10 of the Market Rules is necessary. During this process, if required, the ERA will engage with the Market Participant and this will be the opportunity for the Market Participant to provide additional context. The ERA will not make a determination that a participant has breached the Market Rules without first carrying out an investigation and engaging with the participant<sup>5</sup>.

It is unnecessary and would be a costly burden on both the ERA and the Market Participant, if the ERA were required to consult with the Market Participant at the beginning of the compliance monitoring process, particularly where the expectation is that non-compliance will be the exception.

The other concern raised at the MAC meeting on 8 August 2018 was that the drafting of the proposed amendments was very broad, having no restrictions on the types of information that the ERA could require AEMO to provide for the purposes of compliance monitoring. There was also a question of whether there should be some specification of the routine types of information that AEMO may be required to provide to the ERA.

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<sup>5</sup> Refer to the investigation process in section 4.1 of the [Monitoring Protocol](#).

The information that the ERA is typically seeking includes data such as dispatch instructions, outage records, merit orders and participants' price-quantity bids. Other types of information may be required as the ERA continues to develop its compliance monitoring.

At the 8 August 2018 MAC meeting, it was suggested that the ERA establish categories of the types of information that it could access for compliance monitoring. It was suggested that these could be in the form of routine types of information required (for example dispatch information, balancing information and ancillary services information<sup>6</sup>).

The use of categories, including the specification of routine types of information, is unnecessary. It is not appropriate to restrict the types of market information held by AEMO that the ERA should have access to for compliance monitoring. To do so would be inconsistent with the longstanding design of the compliance framework under the Market Rules. Evidence of this design has been presented earlier in this proposal.

The risk with creating a specification of the information required from AEMO is that if non-specified information is required at a later stage another rule change would be necessary to amend the specification. Alternatively the ERA would need to use its powers under section 51 of the *Economic Regulation Authority Act 2003* to obtain the non-specified information. Establishing a permanent specification is also difficult because the ERA is still developing its compliance monitoring. The ERA's information needs are also likely to be dynamic and dependent on non-compliance trends in future.

Further mitigating the need for a specification is that there are already arrangements in place for the ERA to access AEMO's data warehouse to obtain routine transactional and operational information. Any requirements for non-routine types of information for compliance monitoring would be rare. If there is a requirement for non-routine information, the ERA will consult with AEMO to agree on the most efficient method to provide such information.

The ERA has considered whether there are any factors that would suggest a change to the historic design is needed. These factors include the potential misuse of information, unwarranted requests for information, unauthorised disclosure of information and/or participants unfairly penalised by the organisation enforcing compliance as a result of it having access to market information. There is no recent or historic evidence of any of these factors.

The ERA has not been presented with any information that would suggest the historic design should change and, as stated earlier, considers the information provision problem to be an oversight in the drafting of the Market Rules when the function was transferred.

The ERA also proposes an amendment to clause 2.13.9A, which refers to AEMO providing support to the ERA for compliance monitoring. This clause currently excludes certain clauses monitored by System Management under clause 2.13.9. In practice the support provided by AEMO does not exclude rules monitored by System Management. Clause 2.13.9A should be amended to remove this exclusion. System Management will still be required to monitor the clauses specified in clause 2.13.9.

For completeness, the ERA has considered whether there are any consequences of the proposed rule changes to AEMO's Monitoring and Reporting Protocol. The Market Rules require AEMO's Monitoring and Reporting Protocol to specify how it will implement its obligations to support the ERA monitoring compliance (clause 2.15.6B). AEMO's Monitoring and Reporting Protocol is currently under development. AEMO's draft protocol specifies that "AEMO maintains market data for the purposes of the WEM Rules that the ERA may access

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<sup>6</sup> Definitional problems arise with the use of categories. For example, the term 'dispatch' is not defined in the Market Rules.

via an online data warehouse or via other tools<sup>7</sup>. This drafting is consistent with the amendments to the Market Rules proposed in this Rule Change Proposal.

### ***Issue 2: Information use restriction***

In addition to the amendments discussed above a further amendment is required to remove an unnecessary restriction on the use of information that AEMO already provides to the ERA through the Market Surveillance Data Catalogue. This amendment is necessary because it mitigates legal and compliance risk for the ERA. However, this amendment alone is not sufficient to resolve the ERA's information access and provision problem because the data in the catalogue is only a subset of the data required by the ERA for compliance monitoring.

The Market Surveillance Data Catalogue includes operational and transactional data that AEMO must provide to the ERA for its market monitoring and effectiveness functions under clause 2.16.1 of the Market Rules. The list of catalogue items is published by AEMO on the [Market Website](#). The Market Surveillance Data Catalogue includes data that is directly relevant to a number of the ERA's functions under the Market Rules.

The ERA may also collect other information from participants under clause 2.16.6 and it sees no reason why there should be a restriction from using this information for its other functions.

Clause 2.16.14 of the Market Rules prevents any information collected by the ERA under clause 2.16 from being used for any other purpose outside of the ERA's functions contained in clause 2.16.

Clause 2.16.14 states:

- 2.16.14. The Economic Regulation Authority must use any information collected under this clause 2.16, including information provided to it by AEMO, only for the purpose of carrying out its functions under this clause 2.16...

The ERA's function under clause 2.16 of the Market Rules is to monitor the effectiveness of the market. The ERA has numerous other functions under other provisions of the Market Rules for which the information collected under clause 2.16 is relevant. For example, ancillary services data made available to the ERA under clause 2.16.1(a) is also relevant to the ERA's compliance functions under clause 2.13 and the ERA's other functions under the Market Rules. Access to ancillary services data will assist with the ERA's annual audit and approval of AEMO's ancillary services requirements under clauses 3.11.6 and 3.11.12 and the five-yearly review of ancillary services standards under clause 3.15 of the Market Rules.

The proposed solution is to amend clause 2.16.14 to remove the restriction on the use of information collected by the ERA under clause 2.16. The amended clause would make it explicit that any such information could be used by the ERA for the performance of any of its functions under the Market Rules.

In the absence of the amendment, if the ERA were to obtain information from AEMO under amended clause 2.13.3A or existing clause 2.1.A2(iA), that is the same as any of the information collected under clause 2.16, then there is a risk of a legal argument that the ERA has used information collected under clause 2.16 for another purpose. This is because the ERA is already in possession of the information and the argument would be that it already had knowledge of this information prior to seeking access to it under amended clause 2.13.3A or existing clause 2.1.A2(iA).

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<sup>7</sup> Refer to: [http://www.aemo.com.au/Stakeholder-Consultation/Consultations/AEPC\\_2018\\_01](http://www.aemo.com.au/Stakeholder-Consultation/Consultations/AEPC_2018_01)

Addressing this problem is important for the ERA's compliance function because the problem could affect the admissibility of evidence in legal proceedings. Amended clause 2.16.14 mitigates this risk.

### ***Issue 3: Enforcement issue***

Clause 2.16.9B of the Market Rules refers to the ERA finding that particular prices offered by a Market Generator may exceed the participant's reasonable expectation of the short run marginal cost of the relevant electricity where the behaviour relates to market power. This finding commences the process of investigation as the ERA is then required to, as soon as practicable, request an explanation from the Market Generator and investigate the identified behaviour.

In the version of the Market Rules in force immediately before 1 July 2016, the process of investigation under clause 2.16 differed as the ERA was only required to investigate the behaviour if the IMO concluded that the prices offered by a Market Generator may exceed short run marginal cost and the IMO considered that the behaviour related to market power. It was only if the ERA determined that the prices subject to the investigation exceeded the reasonable expectation of the Market Generator's short run marginal cost that the ERA was required to request that the IMO apply to the Electricity Review Board for an order for contravention, and the IMO was required to refer the matter to the Electricity Review Board.

These provisions have been deleted from the Market Rules due to the transfer of the IMO's compliance and enforcement functions to the ERA. There is no longer an explicit link between the ERA's investigation under clause 2.16.9B and an ability to bring proceedings before the Electricity Review Board. At the conclusion of its investigation the ERA must still publish the results and this concludes the clause 2.16 investigation process.

The ERA's enforcement powers exist in clause 2.13 of the Market Rules. Clause 2.13.18(b) of the Market Rules expressly provides the ERA with a power to bring proceedings before the Electricity Review Board, but only following an investigation referred to in clause 2.13.10(b). It does not extend to bringing proceedings following an investigation under clause 2.16.9B.

The ERA's power to investigate the behaviour under clause 2.16.9B is separate from the ERA's power to investigate alleged breaches under clause 2.13.10. This is because:

- clauses 2.13.10 to 2.13.14 set out a process of investigation into alleged breaches; and
- following on from such an investigation, clause 2.13.18 (where an alleged breach concerns a Category B or Category C Market Rule) provides the ERA with the ability to bring proceedings before the Electricity Review Board.

This means the ERA would need to complete an additional and separate investigation into the same behaviour as it pertains to the ERA's compliance function under clause 2.13.10 in order to apply to the Electricity Review Board. This is clearly inefficient and not only places an additional burden on the ERA, but also requires the Rule Participant to co-operate with a second investigation. The information restriction issue discussed above further complicates the investigation process as any information gathered in the clause 2.16 investigation cannot currently be used for the purposes of the investigation under clause 2.13 of the Market Rules (see Issue 2 above). The legal and compliance risk referred to in Issue 2 is also applicable.

The ERA's recommended solution is to insert a new clause 2.16.9G to the effect that the ERA may, following an investigation pursuant to clause 2.16.9B, bring proceedings before the Electricity Review Board where the ERA concludes the behaviour is in contravention of the Market Rules.

The proposed amendment better achieves the Market Objectives by only requiring one investigation, hence reducing the potential investigation costs for the ERA and the participant.

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## 2. Explain the reason for the degree of urgency:

Delays in addressing the problems set out in this Rule Change Proposal pose the following risks:

- the failure of the ERA to adequately perform and discharge its monitoring and compliance functions under the Market Rules; and
- increased administrative burden and costs to Market Participants where a second investigation is required to be performed by the ERA.

The MAC's Market Rules Issues List assigns the issues the subject of this proposal an urgency rating of Medium (3). The ERA agrees with the assigned rating.

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## 3. Provide any proposed specific changes to particular Market Rules: *(for clarity, please use the current wording of the rules and place a ~~strikethrough~~ where words are deleted and underline words added)*

### ***Proposed Market Rule Changes for Issue 1: Information provision***

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 data and information considered necessary by the Economic Regulation Authority to enable 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 and information under clause 2.13.3A).

### ***Proposed Market Rule Changes for Issue 2: Information use restriction***

2.16.14 The Economic Regulation Authority ~~must~~ may use any information collected under this clause 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 clause 2.16 as confidential and must not publish any of that information other than in accordance with this clause 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 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 2.16.

***Proposed Market Rule Changes for Issue 3: Enforcement issue***

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

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**4. Describe how the proposed rule change would allow the Market Rules to better address the Wholesale Market Objectives:**

This Rule Change Proposal seeks to address inefficiencies with the ERA's monitoring and compliance functions under the Market Rules. The compliance functions are essential to facilitating achievement of the Wholesale Market Objectives, particularly:

- (a) to promote the economically efficient, safe and reliable production and supply of electricity and electricity related services in the South West interconnected system; and
- (d) to minimise the long-term cost of electricity supplied to customers from the South West interconnected system.

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**5. Provide any identifiable costs and benefits of the change:**

There are no identifiable costs associated with the Rule Change Proposal for Rule Participants (including AEMO and the ERA).

This Rule Change Proposal will result in greater efficiencies in the performance of the monitoring and compliance functions of the ERA. The proposed amendments also have the benefit of reducing the ERA's and participants costs associated with investigations of short run marginal cost matters.

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