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Energy Policy Western Australia
Level 1, 66 St Georges Terrace,
Perth, WA 6000

Sent via email to: energymarkets@dmirs.wa.gov.au.

PROPOSED CHANGES TO THE WEM, GSI AND PILBARA REGULATIONS – CIVIL PENALTIES AND REVIEWABLE DECISIONS

Alinta Energy appreciates the opportunity to provide feedback on the *Proposed Changes to the WEM, GSI and Pilbara Regulations – Civil Penalties and Reviewable Decisions*.

Alinta Energy supports an effective compliance monitoring and enforcement regime as a key part of a well-functioning market. Alinta Energy promotes a strong internal compliance culture which includes, among other things, self-reporting any breaches or suspected breaches that it becomes aware of.

From our experience applying this regime, Alinta Energy considers that a framework that incentivises self-reporting and promotes collaboration, transparency and good faith between the regulator and participants delivers the best compliance outcomes. Alinta Energy commends the ERA Market Compliance team for its work in supporting this culture within the WEM.

Alinta Energy recognises that a penalty for a breach should be proportionate to the risk created by the breach and sufficient to incentivise compliance. However, designing penalties requires balance, noting that introducing excessive and unnecessary risks for participants in reporting potential compliance issues may perversely disincentivise transparency, and undermine compliance outcomes.

Alinta Energy is concerned that there appears to be limited justification for several policy positions which go beyond what was outlined in the Taskforce's Monitoring and Compliance Framework in the Wholesale Electricity Market Information Paper from April 2020. Alinta Energy has outlined its issues and recommendations in response to the consultation paper for EPWA's consideration in appendix 1.

While not discussed in the consultation paper, Alinta Energy strongly recommends that EPWA implements the Taskforce recommendation for a compliance amnesty period¹ from market start to "enable participants to adjust and become familiar to the new WEM requirements without the threat of compliance action." The Information Paper also notes that a similar amnesty period was implemented for the introduction of the Balancing Market in 2012.

Since this Taskforce decision, EPWA has verbally communicated that an amnesty period will no longer apply, considering the delay to market start has given participants more time to prepare their systems and processes.

¹ [Monitoring and Compliance Framework in the Wholesale Electricity Market Information Paper 24 April 2020](#)

Alinta Sales Pty Ltd ABN 92 089 531 984

PO Box 8348, Perth BC, WA 6849

T +61 8 9486 3170 **F** +61 8 9266 4688 **W** alintaenergy.com.au

Alinta Energy considers that although the market start has been delayed, so have the finalisation of key technical specifications WEM Rules and Procedures. This means that despite the delay, participants must still develop and trial key systems and processes within a similar timeframe.

Given this, Alinta Energy considers that an amnesty period remains appropriate, whereby AEMO and ERA will still be required to monitor and record alleged breaches, and Rule Participants to self-report breaches, however, compliance responses will not be issued.

Summary of Proposal	Alinta Energy understanding of rationale in consultation paper	Implication and Alinta Energy position
<p>2.1.2</p> <p>Update schedule 1 so that ERA can apply up to the maximum amount for all Category A, B and C first breaches, subsequent breaches and daily amounts. This replaces the current arrangements where there can be different maximum amounts for different clauses within a category.</p>	<ul style="list-style-type: none"> - Simplify the maximum amounts within the categories (which 'vary widely') and allow more discretion to the ERA to apply up to the maximum amount. "This is particularly important given the ERA's expanded compliance and enforcement functions [...]"² - Maximum amounts have not changed since 2004, despite inflation, and "civil penalties should be sufficiently high as to outweigh the cost of non-compliance." However, legislative change to increase maximum amounts is not within the project scope. 	<p><u>Implication</u></p> <ul style="list-style-type: none"> - Rule participants would be exposed to the maximum category amount for any clause within that category. <p><u>Position</u></p> <ul style="list-style-type: none"> - Alinta Energy considers that the consultation paper does not include sufficient justification for why the ERA should have broader discretion to apply up to maximum amount for each category. For example, why having differing limits for certain clauses has presented potential issues or may not be fit for purpose in the new WEM. - Alinta Energy suggests that until ERA has provided guidance on the civil penalty categories that will apply to each civil penalty provision, and the new WEM Rules are finalised, it's reasonable to foresee that certain clauses within a category will never cause the same level of risk (e.g. in terms of health and safety, damage to plant and equipment, system security/reliability, WEM operation, and financial impacts) as others, and therefore that it is appropriate to limit the maximum amount for these less risky clauses. - Given this, Alinta Energy suggests that EPWA does not rule out the potential for different maximum amounts within each category until the following information is published: <ul style="list-style-type: none"> o The civil penalty provisions o ERA's decisions matrix on how it will determine penalties o The criteria for what must be taken into account when determining civil penalties <p>Until then, there is not enough information available to industry to determine whether it is reasonable for a clause within a category to have a penalty up to the maximum amount for that category.</p>

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Summary of Proposal	Alinta Energy understanding of rationale in consultation paper	Implication and Alinta Energy position
<p>Allow the ERA discretion to specify daily amounts for any civil penalty clause, rather than limit which rules may be subject to a daily amount penalty.</p>	<p>Only a small number of penalties have daily amounts.</p>	<p><u>Implication</u></p> <p>Rule participants would be exposed to daily amounts for any civil penalty provision, subject to ERA discretion.</p> <p><u>Position</u></p> <p>Alinta Energy considers the consultation paper does not justify why all civil penalty provisions should be subject to a daily amount. For example, why limiting which clauses are subject to daily amounts has had the potential to cause issues or will not be fit for purpose in the new WEM.</p> <p>Alinta Energy understands that the primary purpose of daily amount penalties is to incentivise compliance where a contravention may have not occurred during a discrete period and may be ongoing. Not having a daily amount to apply in this situation may limit the incentive for the participant to rectify the breach, as the contravention technically occurred once, despite it being ongoing, and can therefore only attract one civil penalty.</p> <p>Alinta Energy suggests that it may not be appropriate to apply daily amounts to where contraventions will always be for discrete periods, for example where obligations relate to a Trading Interval, as there would already be sufficient scope to apply sufficient penalties and daily amounts may cause excessive penalties.</p> <p>Finally, Alinta Energy considers that there is not sufficient information for industry to consider whether all new civil penalty provisions should be subject to a daily amount. It is difficult to assess the appropriateness of this without being able to review the draft schedule 1, the finalised new WEM Rules, and the proposed criteria that the ERA will weigh in deciding whether a daily amount should apply.</p> <p>Given this, Alinta Energy recommends that EPWA does not decide to allow daily amounts for all clauses until this information is published for consultation.</p>

² Alinta Energy has not grasped why this discretion will be important to ERA's expanded compliance and enforcement functions.

Summary of Proposal	Alinta Energy understanding of rationale in consultation paper	Implication and Alinta Energy position
<p>2.2.2</p> <p>EPWA proposes to amend the WEM Regulations to allow the ERA to redistribute financial penalty amounts to a party that is not a Rule Participant but that has been adversely impacted by the breach.</p>	<p>“This would seek to ensure that certain types of impacted parties may also be reimbursed, as and when it is appropriate.”</p>	<p><u>Implication</u></p> <p>Rule participants may need to compensate non-Rule Participants for any impacts they experience due to a breach of the WEM Rules.</p> <p>ERA would need to decide how to determine this compensation.</p> <p><u>Position</u></p> <p>While reasonable in theory, Alinta Energy questions where this would be appropriate and considers that this may be complex to operationalise. Given this, Alinta Energy suggests that EPWA provide an example of where a breach of a WEM Rule may impact a non-Rule Participant to the extent they require compensation via the WEM Rules and why this would not already be dealt with by existing laws.</p>

Summary of Proposal	Alinta Energy understanding of rationale in consultation paper	Implication and Alinta Energy position
<p>Allow ERA to make 'interim orders', obliging a participant to change their behaviour, before they complete their compliance investigation.</p>	<p>"EPWA considers there to be significant value in allowing the ERA to make an order which would intervene in conduct as it is happening, especially if it poses a risk to the market or to power system security and reliability."</p>	<p><u>Implication</u></p> <p>A Rule Participant would be required to change their behaviour (on pain of further breaches), before it is confirmed they have breached the rules.</p> <p><u>Position</u></p> <p>While Alinta Energy perceives potential merit in the ERA being able to make interim orders in very limited circumstances where there is a material and obvious breach, it perceives a risk that some interim orders may not be consistent with procedural fairness and could unduly expose a participant to commercial or operational impacts where it is subsequently found that no breach had occurred.</p> <p>Alinta Energy notes that a participant would have strong incentives to change their behaviour if they were alerted to a potential breach and an investigation, unless they were certain of their compliance, and further interim orders may be redundant.</p> <p>Alinta Energy considers that the consultation paper does not provide adequate justification for what issues interim orders may avoid in the new WEM and suggests that EPWA provide an example relating to the new rules where interim orders would be warranted.</p>

Summary of Proposal	Alinta Energy understanding of rationale in consultation paper	Implication and Alinta Energy position
<p>Give ERA the power to require participants to implement 'compliance programs' and 'remedies'.</p>	<p>N/A</p>	<p><u>Position</u></p> <p>While Alinta Energy broadly supports ERA having the ability to require further action following a breach to avoid the risk of future breaches, it considers that EPWA have not provided:</p> <ul style="list-style-type: none"> - sufficient detail on how these compliance programs or remedies would work and differ from the current 'orders', - the circumstances under which they can be issued, - what limits may be applied to ERA's powers to direct participants, and - what potential issue they are addressing in the current or new WEM Rules.

Summary of Proposal	Alinta Energy understanding of rationale in consultation paper	Implication and Alinta Energy position
<p>2.4</p> <p>Oblige the ERA to also publish the initiation of compliance investigations in the register</p>	<p>“To maximise transparency and inform participants what compliance actions the ERA is currently focusing on.”</p>	<p><u>Position</u></p> <p>Alinta Energy perceives a risk that this will lead to Rule Participants suffering significant and undue reputational damage where an investigation is published, but they are eventually cleared of any breaches.</p> <p>Additionally, Alinta Energy considers that this will conflict with the proposed self-report regime, as it could:</p> <ul style="list-style-type: none"> - dilute the benefit of self-reporting, with all investigations being made public regardless of whether the issue was self-reported. - Introduce risk that self-reports will result in reputational damage due to public investigations. <p>This would undermine the intent of the self-report regime to promote transparency and early identification and rectification of compliance issues.</p> <p>Alinta Energy suggests that these risks are not outweighed by the benefit of more transparency of the compliance actions ERA is focusing on (as suggested by the consultation paper) noting that the ERA already notifies participants of their focus in their 6 monthly reports, and that should a breach be found, participants would generally be notified of this via the register only shortly after they would have otherwise been notified, had the investigation initiation been published in the register.</p>

If you would like to discuss further, please contact me at oscar.carlberg@alintaenergy.com.au or on 0409 501 570.

Yours sincerely



Oscar Carlberg
Wholesale Regulation Manager