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Energy Policy WA
1/66 St Georges Terrace
PERTH WA 6000

Dear EPWA

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

Synergy welcomes the opportunity to provide feedback on EPWA's consultation paper regarding the proposed changes to the WEM, GSI and Pilbara Networks Regulations. Our comments are addressed **below** with corresponding sections of the consultation paper ("**Paper**").

<u>Overview</u>

At a high-level, Synergy notes that EPWA's proposed regime will result in the ERA assuming the functions of both investigator and, at least in the first instance, judge or decision-maker. The ERA's functions include interpreting the WEM Rules, assessing participants' compliance with those rules and imposing penalties and orders where it considers a breach of those rules has occurred. This regulatory design is inconsistent with one of the fundamental principles of procedural fairness; that is, that a decision-maker should be independent and impartial, not having any interest in the matter to be decided.

Synergy considers that such an approach is contrary to well established principles of natural justice and is particularly inappropriate for:

- more serious breaches; and
- in areas where the ERA will also be setting out its interpretation of the requirements of the WEM rules in published materials, such as the 'guidelines' the ERA prepare under EPWA's proposed Market Power Mitigation regime. In such cases, the ERA will have effectively already considered the scope and interpretation of the relevant provision without reviewing relevant submissions of an affected part. Therefore the risk of the ERA having pre-judged (or bias) the issue is high.

The current requirement for the ERA to investigate any alleged breaches, but an independent third party (the ERB) deciding any matters where material non-compliance has been alleged, imposes a discipline on the ERA's exercise of its power to allege breaches and a built-in mechanism where penalties and orders are only imposed once an impartial decision has been made. This naturally limits the number of cases that are brought before the ERB. Synergy considers the proposed regime will incentivise the ERA to issue more penalty and breach notices, and consequently, incentivise participants to appeal the ERA's decisions.

In addition, Synergy is concerned about the practicalities associated with the ERA having the proposed unilateral power to investigate non-compliance with the WEM rules, and impose penalties and 'orders' (including 'interim orders') on any participants it deems non-compliant. Some examples include the following. For example, if a participant appeals the ERA's decision to the ERB, are the penalties and orders stayed or suspended during the period between the ERA imposing the penalty or order and the time the ERB decides the case? If not, in cases in which there are significant financial penalties for breach, the payment of the penalty may have serious adverse impact on the participant's ability to operate in the market in circumstances where there has not yet been any independent review of the reasonableness of the ERA's decision on liability or penalty. Similarly with corrective orders made by the ERA, which are subsequently overturned on appeal.

Synergy is also concerned that the scope of what the ERA can require in any 'orders' or 'interim orders' it issues is unclear. Synergy considers that the scope of any orders that can be issued by the ERA should be very clearly prescribed and limited. Synergy considers the regime could then allow for the ERA to apply to the ERB for the imposition of more onerous orders after an independent assessment of the ERA's allegations.

We set out **below** some more detailed comments and issues on other aspects of the enforcement regime proposed in the Paper. These comments and issues generally relate to how the proposed regime may be implemented and do not in any way detract from Synergy's overarching concern with the proposed new enforcement regime (as outlined above).

<u>2.1 Civil Penalty Framework and 2.2 New Functions of the ERA</u>

2.1.2 Proposed Changes and Amnesty period

Synergy understands that the proposed changes are intended to commence with the new market start in October 2023. This introduces changes to the categorisation of civil penalties under the WEM Regulations, and the expanded ability of the ERA to issue Category B and Category C civil penalties without seeking ERB approval and generally introduces a right to issue 'orders' to participants it considers to be non-compliant.

To assist market participants with their transition to the new civil penalty regime, we suggest EPWA consider introducing an amnesty period at new market commencement Synergy would like to understand if this matter is to be considered here or if it will be considered under the transitional arrangements work that is still being undertaken. Synergy notes that the Energy Transformation Taskforce publication "*Monitoring and Compliance Framework in the Wholesale Electricity Market*"[1] recommended that an amnesty period is implemented and states:

> *"An amnesty period is required beginning from market start (or a short time before to cover pre-market activities) to enable participants to adjust and become familiar to the new WEM requirements without the threat of compliance action"[2].*

We suggest that during the amnesty period, civil penalty notices and orders be issued without enforceable financial penalties, but include an *indication* of the penalty amount that the breach would otherwise attract. This may assist participants to prepare and/or rectify their compliance processes during the transitional period. Additionally, we suggest EPWA consider a longer amnesty period for certain types of breaches,

[1] Monitoring and Compliance Framework in the Wholesale Electricity Market (www.wa.gov.au)
[2] Refer to section 3.6 of the publication Monitoring and Compliance Framework in the Wholesale Electricity Market (www.wa.gov.au)

ERA Enforcement Action

Synergy understands that the ERA is currently reviewing and amending the Monitoring Protocol Market Procedure ("**Protocol**") as part of the proposed MPM Framework. As the amended Protocol has not been released for consultation at this date, Synergy is unable to fully assess the integration of the proposed WEM Regulations changes and the Protocol. Synergy also notes that the ERA is reviewing the *WEM Rules – Companion Version as at 1 February 2022*"[3] **(Companion Rules)** in relation to the Protocol and will provide EPWA with a list of new provisions for inclusion as civil penalty clauses. Synergy suggests that consultation is needed following ERA's review of the civil penalties clauses to ensure that the penalties are appropriately proportionate to the seriousness of the breach.

We note that the Companion Rules clause 2.13.42 specifies that the ERA must have regard to all relevant matters before issuing a civil penalty notice or making an order. Additionally, clause 2.15.3(j) specifies that the ERA's Protocol must contain the processes the ERA is to follow and matters and circumstances it may have regard to when issuing these.

Nonetheless, it would be of assistance to have an indication of the ERA's approach to issuing civil penalty notices and orders. Particularly, the level of prescriptiveness that the ERA will use when issuing such notices and orders, and the discretion applied when issuing fines between civil penalty Categories. It is also unclear how the ERA will address events with multiple civil penalty breaches.

The proposed changes to the WEM Regulations allow for a daily penalty amount to be issued for all Categories of civil penalty breaches. We appreciate EPWA's proposed prescribed additional factors for the ERA or ERB to consider when applying a daily amount. We anticipate that the ERA will also consider all relevant matters including those specified in clause 2.13.42 of the Companion Rules.

Orders

Synergy notes EPWA's proposal to remove infringement notices as an enforcement action under the WEM Rules and replace it with a power for the ERA to provide the following orders:

- Order for conduct to cease;
- Order for contravention to cease;
- Order for a contravention to be remedied;
- Implementation of a compliance program;
- Impacted party redress order; and
- Interim orders.

The ERA's new powers to make orders are significant and can result in significant market participant cost and reputational impact. Accordingly, in Synergy's view there should be a hierarchy of compliance enforcement action. An order should take precedence over a financial penalty. In other words, if a market participant contravenes the WEM rules it should be first issued with an ERA order and then a financial penalty if the order is not complied with.

The issuance of an order and a financial penalty simultaneously is regulatorily excessive. Synergy expects a rectification order issued by the ERA will be sufficient to enforce compliance. In support of this position, Synergy cites the three-stage compliance approach

[3] WEM Rules – Consolidated Companion Version (www.wa.gov.au)

for electricity generation, distribution, transmission, and retail licensing (administered by the ERA) that consists of:

Stage 1 – serving a notice of contravention.

Stage 2 – applying penalties for failure to comply with a notice of contravention.

Stage 3 – amending or cancelling a licence.

In the case of electricity licensing the serving of a notice of contravention has proved to be a sufficient mechanism for compliance remedy. Synergy is not suggesting financial penalties are not imposed, but given the ERA's proposed significant powers to issue a range of orders, penalties should be a last resort, not a first.

Interim orders

The consultation paper suggests that the ERA will be permitted to make interim orders before concluding breach investigations. In our view, it is unfair and in breach of the principles of natural justice to penalise parties unless a breach has been properly determined on reasonable evidence following an investigation process and after the participant has had an opportunity to respond to any proposed adverse findings. At the very least a market participant should be informed prior to the ERA issuing an interim order as to the reasons why the ERA seeks to impose the order and the participant be given an opportunity to respond prior to the order (or its details) being published. We also seek clarity on the ERA's decision-making process in issuing interim orders, and whether there is any remedy for participants if no breach is found at the conclusion of an investigation. Orders can significantly impact market participant behaviour and operations and could, in the extreme, conceivably negatively affect a participant's financial viability.

Court enforceable undertakings

Synergy considers that Court enforceable undertakings may be an appropriate action in specific circumstances where a party self-reports a breach and agrees to provide an undertaking to remedy the breach. However, in circumstances where a breach has not been properly determined and requires further investigation, Synergy is unable to see the merits in using enforceable undertakings. Synergy would like further information from EPWA clarifying the circumstances in which these undertakings would be issued.

Expansion of public breaches register

Synergy holds concerns with the publication of identifying information relating to current investigations. Negative press can be extremely damaging to a market participant's reputation, even if the investigation finds that no breach occurred. Synergy would like to further understand if naming and shaming participants for breaches is expected to have meaningful outcomes for the market and understand the benefits (if any) given the large risk to participants. Alternatively, EPWA may consider adding a provision for the participant not to be named, and instead only publish the current areas of investigative focus.

In this regard, we note that the ACCC's Media Code of Conduct prohibits the ACCC from commenting on its enforcement investigations unless it is in the public interest. This is because of the potential detrimental effect that public commentary can have on the reputation of the parties under investigation. In circumstances where the public interest supports public comment, this will ordinarily be limited to confirming the existence of an investigation until the investigation is concluded.

Synergy also notes there is a significant difference in the approach proposed to be undertaken in the WEM relative to electricity licensing in relation to confidentiality. One of the ERA's utility licence enforcement principles is:

> "Confidentiality: unless there are exceptional circumstances, investigations into suspected contraventions will be conducted confidentially and the Authority will not publicly comment on matters that it is investigating until a decision has been made." [4]

There is no evidence of significant market failure that warrants such a markedly different compliance approach in relation to WEM market participants and electricity licensees, noting many industry stakeholders are both WEM participant and electricity licensee.

Impacted party redress

How will the financial penalty amount be distributed to impacted parties, and on what factors would this be based? Would the ERA be expressly required to consider factors such as energy share, IRCR share, capacity MW share?

Synergy agrees with the intent of EPWA's proposal to distribute penalty amounts to materially adversely affected non-Rule Participants. In the event there is no evidence of material detriment, then the penalty amount should be provided to AEMO explicitly for the purpose of reducing its market operation costs. We also suggest that there should be a credible connection between penalty and impact. We wish to clarify whether the reverse applies in other related areas – for example, will redress apply to breaches in the gas market rules that impact the energy market?

EPWA decision matrix

EPWA is developing a decision matrix, including suitable criteria, to assist in categorising new civil penalty provisions. Whilst stakeholders will have the opportunity to comment on the revised Schedule 1 when the draft amending WEM Regulations are published for consultation later in the year it is not clear whether the decision matrix is to be also published. Synergy recommends this occurs.

To provide guidance to EPWA from a WEM market participant's perspective the decision matrix criteria should include whether:

- material detriment to customers has occurred;
- material detriment to market participants has occurred;
- material detriment to market operation has occurred;
- material detriment to the supply of electricity has occurred;
- the non-compliance involved a deliberate disregard for the WEM Rules;
- the non-compliance was self-identified, reported and remedied by the affected market participant;
- the market participant has a history of previous contraventions;
- a failure to act will result in further detriment; and
- the market participant obtained none, limited or material advantage from the non-compliance.

[4] ERA compliance enforcement policy page 3

Aligning regulatory heads of power

It is unclear how changes to the WEM rules result in expanding the ERA's functions in the GSI Regulations, and the changes appear unrelated to the Energy Transformation Strategy. Clarification on the reasoning behind these changes, and what they aim to achieve would be of assistance. Are these changes anticipated to provide benefits to the market and cost savings for participants? Nonetheless, if EPWA is seeking approval to draft amending regulations across the WEM Regulations and GSI Regulations, it may be more effective for all related changes to be released in one package for stakeholder consultation.

Other matters

Many WEM participants also hold one or more electricity licences issued, administered and enforced by the ERA. The proposed WEM compliance enforcement approach differs significantly from utility licensing – interim orders is one example. From a market participant's and licensee's perspective the more divergence that exists between WEM and licence compliance approaches the more complexity and cost will be involved for market participants as well as posing challenges to establishing effective compliance management frameworks for both. Synergy advocates EPWA in conjunction with the ERA reviewing how the two compliance regimes interact and as far as practical, ensuring consistency.

Thank you for considering Synergy's comments in this consultation. Should you have any queries, please contact Genevieve Teo at genevieve.teo@synergy.net.au.

Yours sincerely,

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