



Draft Rule Change Report
Title: Removal of ERA Time Limit to
Publish Investigation Results

Ref: RC_2009_15
Standard Rule Change Process

Date: 07 July 2009

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DOCUMENT DETAILS

IMO Notice No.: RC_2009_15
Report Title: Draft Rule Change Report: Removal of ERA Time Limit to Publish
Investigation Results
Release Status: Public
Confidentiality Status: Public domain

http://www.imowa.com.au/Attachments/RuleChange/RuleChange_2009_15.html

Published in accordance with Market Rule 2.7.6

Independent Market Operator

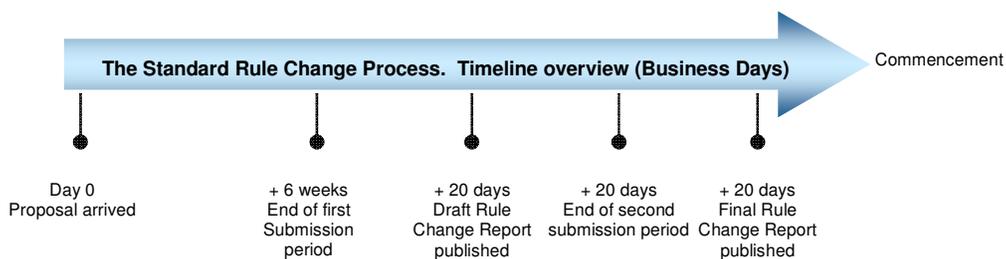
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1. INTRODUCTION

On 25 March 2009 the Economic Regulation Authority (ERA) submitted a Rule Change Proposal regarding the amendment of clause 2.16.9F of the Wholesale Electricity Market Rules (Market Rules).

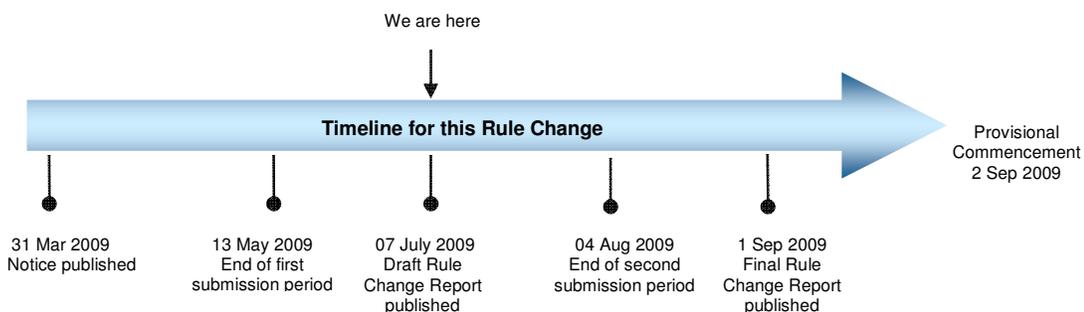
This Rule Change Proposal is being processed using the Standard Rule Change Process, described in Section 2.7 of the Market Rules.

The standard process adheres to the following timelines:



In accordance with clause 2.5.10 of the Market Rules the IMO extended the timeframe for preparing this Draft Rule Change Report until 7 July 2009. An extension notice, under clause 2.5.12, was published on the IMO website on 4 June 2009.

The key dates in processing this Draft Rule Change Report, as amended in the extension notice, are:



Please note that the Commencement Date is provisional and may be subject to change in the Final Rule Change Report.

The IMO's draft decision is to accept the Rule Change Proposal, as modified in section 4.4. The detailed reasons for the IMO's decision are set out in section 5 of this report.

In making its draft decision the IMO has taken into account:

- the Wholesale Market Objectives;
- the practicality and cost of implementing the proposal;
- the views of the Market Advisory Committee (MAC); and
- the submissions received.

All documents related to this Rule Change Proposal can be found on the IMO website: http://www.imowa.com.au/Attachments/RuleChange/RuleChange_2009_15.html.

2. CALL FOR SECOND ROUND SUBMISSIONS

The IMO invites interested stakeholders to make submissions on this Draft Rule Change Report. The submission period is 20 Business Days from the publication date of this Report. Submissions must be delivered to the IMO by 5pm, **Tuesday 4 August 2009**.

The IMO prefers to receive submissions by email to marketadmin@imowa.com.au using the submission form available on the IMO website:

http://www.imowa.com.au/10_5_1_b_rule_change_proposal.htm

Submissions may also be sent to the IMO by fax or post, addressed to:

Independent Market Operator

Attn: Manager Market Administration and System Capacity
PO Box 7096
Cloisters Square, PERTH, WA 6850
Fax: (08) 9254 4399

3. THE RULE CHANGE PROPOSAL

3.1 Submission Details

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Organisation:	Economic Regulation Authority
Address:	Level 6, Governor Stirling Tower, 197 St George's Terrace
Date submitted:	25 March 2009
Urgency:	High
Change Proposal title:	Removal of ERA Time Limit to Publish Investigation Results

3.2 Details of the Proposal

In its Rule Change Proposal, the ERA submitted that as a part of its role in monitoring the effectiveness of the market, it must publish the results of its investigations, in accordance with clause 2.16.9F, within 20 business days of receiving advice from either the IMO under clause 2.16.9.B.(b) (behaviour that may affect market power) or from a Rule Participant under clause 2.16.8 (behaviour that may reduce the market effectiveness).

The ERA contended that there is no benefit in applying a time frame to an investigation for the regulator, and this could have negative impacts if the matter is not properly investigated due to a time constraint. The ERA submitted that any incentive to delay or stall the investigation would be in the interest of the entity suspected of the breach not the market regulator.

The ERA submitted that to be effective and ensure the market is able to appropriately deal with anomalous behaviour, the time limit for the ERA to conduct an investigation and publish the results within 20 business days needs to be removed. The ERA noted

that every report will be unique and will have its own complexities which will affect the time taken to complete the investigation.

In its submission the ERA noted that other similar jurisdictions take significantly longer periods of time (than 20 business days) to complete any investigations. In the case of the Australian Energy Regulator (AER), on examination of the five electricity investigations published on its web site¹ the average time taken to complete an investigation (from event occurrence to report or notice publication) is approximately 200 business days (note, these investigations appear to have been investigated pursuant to section 15 of the *National Electricity Law*).

The AER and the Market Surveillance Administrator (Alberta Canada), both similar regulatory authorities to the ERA, that also have investigative powers with respect to the interactions of market participants and key stakeholders do not have set time limits for the conclusion of such investigations.

The ERA proposed to remove the time limit on the completion of investigations carried out by the ERA, in response to a report of possible inappropriate and anomalous market behaviour in accordance with clause 2.16.9.(b), which is currently contained in clause 2.16.9.F of the Market Rules.

3.3 The Proposal and the Wholesale Market Objectives

The ERA submitted that the proposed changes will allow the Market Rules to better address market objective (b):

“to encourage competition among generators and retailers in the South West interconnected system, including by facilitating efficient entry of new competitors.”

ERA contended that, by removing the time limit for publication of investigation results, competition in the South West interconnected system (SWIS) will be encouraged. In particular the proposed changes will remove a current impediment created by the Market Rules which potentially could restrict the ERA in successfully prosecuting an identified breach of the Market Rules. This proposal will potentially ensure that any anomalous behaviour is effectively discouraged in the market and will send clear signals to the market against any anticompetitive behaviour. The ERA submitted that this proposal will remove a potential barrier to entry and ensure that a competitive market is promoted.

The ERA also submitted that the proposed changes will allow the Market Rules to better address market objective (d):

“to minimise the long-term cost of electricity supplied to customers from the South West interconnected system.”

ERA considered that the proposal will assist in minimising the long term cost of electricity by promoting fair and open competition within the market and ensuring that any anomalous behaviour is actively discouraged.

The ERA considered that the proposed changes were consistent with the other market objectives.

¹ <http://www.aer.gov.au/content/index.phtml/itemId/656186>

3.4 Amending Rules proposed by the ERA

The ERA proposed the following amendments to the Market Rules (~~deleted text~~, added text):

- 2.16.9F The Economic Regulation Authority must publish the results of its investigations ~~within 20 Business Days from receiving the~~ in response to IMO advice under clause 2.16.9B(b) or from receiving a notification from a Rule Participant under clause 2.16.8.

3.5 The IMO's Initial Assessment of the Proposal

The IMO decided to proceed with the proposal on the basis of its preliminary assessment, which indicated that the proposal was consistent with the Wholesale Market Objectives.

4. FIRST SUBMISSION PERIOD

The first submission period for this Rule Change Proposal was between 1 April 2009 and 13 May 2009.

4.1 Submissions received

The IMO received submissions from Alinta and Landfill Gas & Power (LGP). The submissions are summarised below, and the full text is available on the IMO website.

4.1.1 Submission from Alinta

In its submission, Alinta notes that it is prepared to support the Rule Change Proposal.

Alinta contends that:

- if the ERA concludes after investigation that prices in the Portfolio Supply Curve were not consistent with reasonable expectations of the short run marginal cost, remedial action would be limited to seeking a civil penalty for a breach of clause 6.6.3 of the Market Rules. This amount would be distributed amongst Market Customers based on proportions of market fees;
- any potential civil penalty does not amount to the compensation for additional costs that may be incurred by individual Market Customers due to the potentially longer investigation time period;
- it is also possible that market behaviour, which subsequently may be found to be in breach of clause 6.6.3, may continue after a request from the IMO for an explanation from the Market Generator. This Rule Change Proposal may extend the period over which Market Customers incur additional costs; and
- while the ERA may conclude its investigations as quickly as possible (due to market scrutiny and incentives), this expectation should be monitored, should an investigation under clause 2.16.9B(b) or a notification under clause 2.16.8 be initiated.

The Rule Change Proposal and the Wholesale Market Objectives

Alinta considered that there was no evidence to suggest that RC_2009_15 would be inconsistent with the Market Objectives.

4.1.2 Submission from LGP

In its submission, LGP supported the Rule Change Proposal on the grounds that the principal objective of investigations conducted by the ERA should be that they are conducted properly rather than towards a deadline.

LGP submitted that:

- issues vary in complexity and it is not practicable for the ERA to conclude all investigations within the 20 Business Days currently prescribed in the rules;
- the application of such a timeline potentially places the ERA in breach of the Market Rules or compromises the integrity of the investigation (and also potentially the ERA itself); and
- if the ERA finds against a Market Participant, it is important that it should be able to demonstrate that it has followed due process. The alternative is for adversely affected participants to claim that the conclusion is erroneous due to unreasonable time pressure. In addition to negating the intent of the time limit, this would also undermine the integrity of the ERA in general.

The Rule Change Proposal and the Wholesale Market Objectives

LGP supports the ERA's contention that the Rule Change Proposal furthers market objective (a). LGP specifically notes that the proposal will also facilitate the governance of competitive behaviour and discourage anomalies.

4.2 Public Forums and Workshops

No public forums or workshops were held in relation to this Rule Change Proposal.

5. THE IMO'S ASSESSMENT

In preparing this Draft Rule Change Report, the IMO must assess the Rule Change Proposal in light of clauses 2.4.2 and 2.4.3 of the Market Rules.

Market Rule 2.4.2 outlines that the IMO "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, when deciding whether to make Amending Rules, the IMO must have regard to the following:

- Any applicable policy direction from the Minister regarding the development of the market;
- The practicality and cost of implementing the proposal;
- The views expressed in submissions and by the MAC; and

- Any technical studies that the IMO considers necessary to assist in assessing the Rule Change Proposal.

The IMO notes that there has not been any applicable policy direction from the Minister in respect of this Rule Change Proposal.

This IMO's assessment is outlined in the following sections.

5.1 Wholesale Market Objectives

The IMO considers that the Market Rules as a whole, if amended, will be consistent with the Wholesale Market Objectives.

Wholesale Market Objective	Consistent with objective
(a) to promote the economically efficient, safe and reliable production and supply of electricity and electricity related services in the South West interconnected system	Yes
(b) to encourage competition among generators and retailers in the South West interconnected system, including by facilitating efficient entry of new competitors	Yes
(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	Yes
(d) to minimise the long-term cost of electricity supplied to customers from the South West interconnected system	Yes
(e) to encourage the taking of measures to manage the amount of electricity used and when it is used	Yes

Further, the IMO considers that the Market Rules if amended would not only be consistent with the Wholesale Market Objectives but also allow the Market Rules to better address the Wholesale Market Objectives:

Impact	Wholesale Market Objectives
Allow the Market Rules to better address objective	b, d
Consistent with objective	a, c, e

The IMO's assessment against market objective (b) is as follows:

- (b) *to encourage competition among generators and retailers in the South West interconnected system, including by facilitating efficient entry of new competitors.*

The proposed changes support this market objective as they:

- remove a current impediment created by the Market Rules which potentially could restrict the ERA in successfully prosecuting an identified breach of the Market Rules; and

- will allow the ERA to carry out investigations of anomalous market behaviour in a thorough manner.

This will ensure potentially anomalous market behaviour is more effectively discouraged, and assist in sending clear signals against any anticompetitive behaviour. The IMO considers that this will remove a potential barrier to entry and ensure that a competitive market is promoted.

The IMO's assessment against market objective (d) is as follows:

- (d) *to minimise the long-term cost of electricity supplied to customers from the South West interconnected system.*

The proposed changes support this market objective by assisting in minimising the long term cost of electricity through the promotion of fair and open competition within the market and by ensuring that any anomalous behaviour is actively discouraged.

5.2 Practicality and Cost of Implementation

The proposed changes do not require any change to the Wholesale Electricity Market Systems operated by the IMO.

There have been no additional costs identified with the implementation of this Rule Change Proposal.

5.3 Market Advisory Committee

The MAC was advised of the proposed rule change at its meeting on 11 March 2009. At this meeting the MAC noted concerns with regards to removing the timeframes for investigations carried out by the ERA. It was noted that the longer the investigation, the longer the anomalous market behaviour could occur, and the more detrimental the possible impact on the market. MAC members agreed that the right balance needs to be achieved between conducting an efficient, comprehensive investigation and safeguarding the financial interests of conscionable Market Participants.

Members agreed that a rushed investigation was against the interests of all stakeholders however some stakeholders did not feel comfortable with a complete removal of a binding timeframe.

After considerable discussion, the MAC agreed that the pre-rule change discussion paper ERA proposed should progress as worded.

5.4 Views expressed in submissions

The submissions received during the first submission period supported the proposition that the current 20 days allowed under the Market Rules for the ERA to carry out an investigation is not sufficient. There was however some reticence to allowing the time period to be open-ended.

5.5 Analysis into time frames used in similar investigations

There was concern expressed at the 11 March 2009 MAC meeting regarding the complete removal of a binding timeframe. The submissions received were in support of the proposal, however Alinta noted that while the ERA may conclude its investigations

as quickly as possible (due to market scrutiny and incentives) this expectation should be monitored. Due to the concerns expressed the IMO extended the timeframe for publishing the Draft Rule Change Report and, after discussions with the ERA, undertook a further assessment into what time periods other jurisdictions and industries allow for investigations. The details of the analysis carried out can be found in Appendix One of this report.

The analysis showed that there is no standard time limit for regulatory agencies to conduct investigations in the jurisdictions studied. Of the eight regulatory agencies considered, five had no time limits and three had limits varying between 90 days and two years.

The IMO considers that there is sufficient evidence from other jurisdictions to show that the time an investigation can take is usually well in excess of 20 days, and depending on the complexity of the issues, could take a considerable amount of time. This supports the ERA's contention that "to be effective and ensure the market is able to appropriately deal with anomalous behaviour, the time limit for the ERA to conduct an investigation and publish the results within 20 Business Days needs to be removed".

The IMO agrees that the 20 Business Day requirement should be removed from the Market Rules, however, the IMO considers that some boundaries are required. Based on this analysis which showed most investigations were completed within six to twelve months, the IMO recommends that the Amending Rules be changed to:

- include a duration of six months for the investigation;
- include the provision for an extension of six months, if required (there are no set limits on the number of times the ERA can extend); and
- if extension(s) are required, the ERA is to notify the IMO who will publish an extension notice to inform Market Participants on the Market Web Site. The notice will be published without identifying information to maintain confidentiality.

This solution will allow the ERA's ability to undertake a full and proper investigation, while providing the industry with some visibility of the investigation process timeframes.

5.6 Additional Amendments

Following the first submission period the IMO considered that some changes to the proposed Amending Rules were required to incorporate the timeframe of six months determined as an outcome of the IMO's investigation (outlined above).

These changes are as follows (~~deleted text~~, added text):

2.16.9F Subject to clause 2.16.9A, the Economic Regulation Authority must publish the results of its investigations in response to within six months from receiving the IMO advice under clause 2.16.9B(b) or from receiving a notification from a Rule Participant under clause 2.16.8. If that day is not a Business Day, then the next Business Day following that six month period will apply

2.16.9FA Subject to clause 2.16.9FB, the Economic Regulation Authority may extend the timeframe for an investigation under clause 2.16.9E for a period of up to six months, to the nearest Business Day following that six month extension period. Where the Economic Regulatory Authority makes such an extension it

must notify the IMO and the IMO must publish a notice of the extension on the Market Web Site within one Business Day of receiving the notification. The Economic Regulation Authority may extend the timeframe for an investigation more than once.

2.16.9FB For investigations of matters notified under clause 2.16.8, a notice of extension must not include any information identifying the Market Participant under investigation.

6. THE IMO'S DRAFT DECISION

The IMO's draft decision is to accept the proposed amendment to clause 2.16.9F of the Wholesale Electricity Market Rules as proposed in the Rule Change Proposal and modified in section 5.6.

6.1 *Reasons for the decision*

The IMO has made its decision on the following basis:

- The Amending Rules:
 - Will allow the Market Rules to better address the Wholesale Market Objectives (b) and (d);
 - Are consistent with the remaining Wholesale Market Objectives;
 - Have no identified costs associated with implementation; and
 - Have the support of both the MAC and participants providing submissions during the first submission period.

Additional detail outlining the analysis behind the IMO's reason is outlined in Section 5 of this Draft Rule Change Report.

The wording of the relevant Amending Rules is presented in Section 7 of this report.

7. PROPOSED AMENDING RULES

The IMO proposes to implement the following amendments to the Market Rules (added text, ~~deleted text~~):

2.16.9F Subject to clause 2.16.9A, the Economic Regulation Authority must publish the results of its investigations within 20 Business Days six months from receiving the IMO advice under clause 2.16.9B(b) or from receiving a notification from a Rule Participant under clause 2.16.8. If that day is not a Business Day, then the next Business Day following that six month period will apply.

2.16.9FA Subject to clause 2.16.9FB, the Economic Regulation Authority may extend the timeframe for an investigation under clause 2.16.9E for a period of up to

six months, to the nearest Business Day following that six month extension period. Where the Economic Regulatory Authority makes such an extension it must notify the IMO and the IMO must publish a notice of the extension on the Market Web Site within one Business Day of receiving the notification. The Economic Regulation Authority may extend the timeframe for an investigation more than once.

2.16.9FB For investigations of matters notified under clause 2.16.8, a notice of extension must not include any information identifying the Market Participant under investigation.

APPENDIX ONE: INVESTIGATION TIME LIMITS ANALYSIS

The analysis was initiated to determine what time limits are used in similar investigations by regulatory authorities in other jurisdictions and related industries. This was in response to concerns raised during the submission period regarding the complete removal of the time limit for investigations carried out by the ERA under the clause 2.16.9F of the Market Rules.

Summary of Information found for time limits for other Regulatory A

Table 1 – Investigation time limits for other Regulatory Bodies

Regulatory Body	Country	Regulation/ Rules/ Guidelines	Time Limit	Comments
Australian Stock Exchange (ASX)	Australia	Guidance on Compliance Investigations	No time limit	
Australian Securities and Investments Commission (ASIC)	Australia	Regulatory Guide 52 - Enforcement Action Submissions	12 months	
Australian Energy Regulator (AER)	Australia	Compliance and Enforcement – Statement of Approach	No time limit	
Competition Commission	United Kingdom	Guidance - General Advice and Information	Two years maximum	Market investigations: two years maximum (though it is expected that some investigations will be completed in a shorter time, probably 12 to 15 months).
Federal Energy Regulatory Commission (FERC)	United States Of America	Statement On Market Monitoring Units	90 days	
Office of Economic Competition	Hungary	Annual Report 2002	180 days	Time limit can be extended twice by the same period.
Commerce Commission	New Zealand	Acts Commerce Act Corporations (Investigation and Management) Act	No time limit	
Ontario Electricity Act	Canada	Act	No time limit	

Summary of Information found in the Investigation of Timelines

Table Two shows examples of timeframes for a number of investigations in other jurisdictions. This demonstrates that the time needed to carry out similar investigations can vary a lot depending on the complexity of the issues involved and varies between three months and four years.

Table 2 – Actual Investigation Timelines

Name	Investigation	Date of Occurrence	Date of Publication	Approx. Duration	Comment
Ofgem UK	National Grid Frequency response investigation	May-08	Feb-09	8 months	
	Probe into Gas Pricing	Nov-03	Jan-09	approx 4 years	
AER	Compliance with Dispatch Instructions	Nov-08	Jan-09	14 months	
	Investigation into Derating of the Heywood Interconnector	Dec-07	Dec-08	12 months	
	Investigation into Events on 16 Jan 2007	Jan-07	Sep-07	9 months	Investigation into transmission failure in Victoria affecting around a quarter of users in the state.
	Investigation into events on 22 Mar 2006	Mar-06	Jul-06	4 months	Investigation into AGL Hydro Partnership over its use of the inflexibility and re-bidding provisions of the National Electricity Rules with respect to its MCKAY1 generating unit.
	Investigation into events on 31 Oct 2005	Oct-05	Oct-06	12 months	Investigation into the response of Market Participants to a major transmission line failure and subsequent events.
	Investigation into events on 14 Mar 2005	Mar-05	Nov-05	8 months	Investigation into NRG Flinders and Pelican Point Power Ltd who failed to satisfy the technical requirements for generator performance under the Rules.

Public Domain

Name	Investigation	Date of Occurrence	Date of Publication	Approx. Duration	Comment
CRE (France)	Investigation into High Electricity Price Peaks on Power Next Day Auction	Oct-Nov 07	Apr-08	5 months	
Ontario Energy Board (Canada)	Market Surveillance Panel Report on Bruce Power Unit G6 Outage	Aug-02	Jan-03	5 months	
Public Utility Commission Texas	Market & Reliability Issues related to Extreme Weather Event on Feb 24-26 2003 (Investigation into Possible Manipulation of ERCOT Market)	Feb-03	May-03	3 months	
NZ Electricity Commission	Stream Information - Report on breaches of Rules concerning with compliance with the code of practice for metering installations	Apr-May 08	Oct-08	5 months	
	Carter Holt Harvey, System Operator, TrustPower and Meridian - Settlement Report on failure to comply with dispatch instructions	Jul-07	Jul-08	12 months	

Table 3 – References used in Analysis

<p><i>Australian Securities and Investments Commission (ASIC)</i> From 'Guidance on Compliance Investigations' http://www.asx.com.au/supervision/rules_guidance/asxl/asx_gn25_monitoring_compliance_investigations.PDF</p>
<p><i>Australian Stock Exchange (ASX)</i> From 'Regulatory Guide 52 - Enforcement Action Submissions' http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps52.pdf/\$file/ps52.pdf</p>
<p><i>Australian Energy Regulator (AER)</i> From 'AER Compliance and Enforcement – Statement of Approach' http://www.aer.gov.au/content/item.phtml?itemId=714582&nodeId=86ee130ebf5c5789a62af56779c6a4db&fn=Compliance%20and%20enforcement%20statement%20of%20approach.pdf From – 'Investigations' http://www.aer.gov.au/content/index.phtml/itemId/656186</p>
<p><i>Commission de Regulation de L'Energie (CRE)</i> From Monitoring deliberations and reports http://www.cre.fr/en/marches/surveillance_des_marches_de_gros/deliberations_et_rapports#a1</p>
<p><i>Hungary – Office of Economic Competition</i> From '2002 Annual Report' http://www.gvh.hu/domain2/files/modules/module25/pdf/GVH_OGy_beszamolo_2002_a.pdf</p>
<p><i>NZ Government:</i> From 'Commerce Act 1986' http://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87623.html?search=ts_act_commerce+act_rese&sr=1 From 'Corporations (Investigation and Management) Act 1989' http://www.legislation.govt.nz/act/public/1989/0011/latest/DLM144264.html?search=ts_all%40act%40bill%40regulation_Corporations+(Investigation+and+Management)+Act_rese&sr=1 <i>NZ Electricity Commission:</i> Compliance Settlements http://www.electricitycommission.govt.nz/rulesandregs/compliance/settlements</p>
<p><i>UK Office of the Gas and Electricity Markets (Ofgem)</i> From 'Investigations and Reporting' http://www.ofgem.gov.uk/Markets/WhlMkts/CompanEff/InvestigReport/Pages/InvestigtnReport.aspx</p>
<p><i>Ontario Energy Board (Canada)</i> From 'Ontario Electricity Act 1998' http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98e15_e.htm From 'Market Surveillance Panel' http://www.oeb.gov.on.ca/OEB/Industry+Relations/Market+Surveillance+Panel/Market+Surveillance+Panel+Reports</p>
<p><i>Public Utility Commission – Texas</i> Market and Reliability Issues Related to the Extreme Weather Event on February 24-26, 2003 http://www.puc.state.tx.us/wmo/documents/special/weather_event.pdf</p>
<p><i>UK Competition Commission</i> From 'Guidance - General Advice and Information' http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc4.pdf</p>
<p><i>United States of America - Federal Energy Regulatory Commission (FERC)</i> From 'Policy Statement on Market Monitoring Units' (27 May 2005) http://www.ferc.gov/177a/177ad9d64b610.pdf</p>