

# Decision on the Australian Energy Market Operator's Monitoring and Reporting Protocol

Wholesale Electricity Market Rules

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Economic Regulation Authority

WESTERN AUSTRALIA

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## 1.1 Determination

The Australian Energy Market Operator (AEMO) is required to develop a Monitoring and Reporting Protocol that states how AEMO will implement its obligations to support the compliance function under the Wholesale Electricity Market Rules (clauses 2.15.6A and 2.15.6B).

The Economic Regulation Authority is responsible for the compliance function under the Market Rules. AEMO must seek the ERA's approval of the Monitoring and Reporting Protocol under clause 2.15.6A of the Market Rules.

The ERA has approved AEMO's Monitoring and Reporting Protocol. The ERA determined that the protocol stated how AEMO will implement its obligations under clause 2.15.6B of the Market Rules and specified:

- AEMO's processes for assisting the ERA to monitor and assess compliance, as required by clause 2.15.6C(a) of the Market Rules.
- AEMO's processes for the provision of alleged breach information to the ERA, as required by clause 2.15.6C(b) of the Market Rules.

## 1.2 Background

On 30 November 2015, the market operations function under the Market Rules transferred from the Independent Market Operator (IMO) to AEMO. The IMO retained the compliance function under the Market Rules.

The amendments to the Market Rules for the transfer of function introduced new clauses 2.15.6A, 2.15.6B and 2.15.6C. These clauses required AEMO to develop a Monitoring and Reporting Protocol stating how it would implement its obligations to support the IMO's compliance function. Transitional provisions were included in the Market Rules to ensure the continuation of certain compliance processes until the development and approval of the protocol, as discussed later in section 1.6.

On 1 July 2016, responsibility for the compliance function was transferred from the IMO to the ERA. Clauses 2.15.6A, 2.15.6B and 2.15.6C of the Market Rules were amended to require the Monitoring and Reporting Protocol to state how AEMO would implement its obligations to support the ERA's compliance function. AEMO must obtain the ERA's approval of the protocol.

AEMO's Monitoring and Reporting Protocol is a Market Procedure pursuant to clause 2.15.7 of the Market Rules. It is the only Market Procedure required to be approved by the ERA. For all other Market Procedures, the approval authority rests with the organisation responsible for producing the procedure.

To develop the draft Monitoring and Reporting Protocol, AEMO followed the Procedure Change Process under the Market Rules. AEMO held an additional round of public consultation and consulted with the ERA during the development of the draft protocol.

On 15 March 2019, AEMO submitted the draft Monitoring and Reporting Protocol to the ERA for approval together with its draft Procedure Change Report. The report explains the reasons for the procedure and AEMO's assessment of participants' submissions. AEMO's draft protocol and report are available on AEMO's [website](#).

The ERA has assessed AEMO's Monitoring and Reporting Protocol against the Market Rules and the Market Objectives. To undertake this assessment, the ERA considered the information in AEMO's draft Procedure Change Report as well as participants' submissions to the draft protocol.

### 1.3 Assessment against the Market Rules

Clauses 2.15.6B and 2.15.6C of the Market Rules state the following purpose and content requirements of the Monitoring and Reporting Protocol:

- 2.15.6B. The purpose of AEMO's Monitoring and Reporting Protocol is to state how AEMO (including in its capacity as System Management) will implement its obligations under these Market Rules to support the Economic Regulation Authority's monitoring of Rule Participants' behaviour for compliance with the Market Rules in accordance with clauses 2.13.9A and 2.13.6, and with Market Procedures (including the Power System Operation Procedures) developed by AEMO.
- 2.15.6C. AEMO's Monitoring and Reporting Protocol must specify—
- (a) AEMO's processes (including in its capacity as System Management) for assisting the Economic Regulation Authority in monitoring and assessing compliance with the Market Rules and Market Procedures by Market Participants; and
  - (b) AEMO's process for the provision of information about breaches or other information the Economic Regulation Authority may request to the Economic Regulation Authority.

The Monitoring and Reporting Protocol states how AEMO will implement its obligations under clauses 2.15.6B and 2.15.6C as follows:

- Section 1 of the protocol provides details of the Market Rule requirements.
- Section 2 of the protocol states AEMO's processes for supporting the ERA with monitoring compliance. This includes "direct monitoring" processes whereby AEMO will, through its own tools and systems, monitor participants' compliance, identify alleged breaches and report these to the ERA.
- Section 2 also includes AEMO's processes for providing the ERA with "support for monitoring". This includes processes for providing information or documents to assist the ERA to monitor and investigate participants' compliance.
- Section 3 states how AEMO will notify the ERA of an alleged breach, including the information that it will provide.<sup>1</sup> The section also states how AEMO will provide information to the ERA when assisting it carry out an investigation.

The ERA is satisfied that the protocol contains the information and processes required by clauses 2.15.6B and 2.15.6C of the Market Rules.

<sup>1</sup> The information required to be provided when reporting an alleged breach is specified in section 3.1.2 of the ERA's [Monitoring Protocol](#). AEMO's Monitoring and Reporting Protocol includes the specified information.

## 1.4 Assessment of AEMO's responses to participants' submissions

During the first consultation period in February 2018, AEMO received submissions from Synergy, Alinta Energy, Perth Energy and Western Power.<sup>2</sup>

Synergy said that section 2.2 of AEMO's protocol did not adequately specify AEMO's processes for assisting the ERA to monitor compliance under clause 2.15.6C. Synergy's submission stated:

Rather than specifying AEMO's "processes", the relevant section 2.2 of the Monitoring Protocol simply restates AEMO's obligations as they exist under the WEM Rules.

Synergy stated that AEMO's protocol should provide details on the information exchanged with the ERA and associated processes to provide transparency and promote market efficiency.

AEMO did not make any material changes to section 2.2 in response to Synergy's feedback. AEMO explained that it considered it had met the requirements of clause 2.15.6C.

The ERA considers that section 2.2 of AEMO's protocol sufficiently sets out AEMO's processes for assisting the ERA to monitor compliance. Section 2.2 includes details of AEMO's "direct monitoring" processes whereby AEMO will, through its own tools and systems, monitor participants' compliance, identify alleged breaches and report these to the ERA. Section 2.2 also includes processes for providing information or documents to assist the ERA to monitor and investigate participants' compliance.

Alinta's submission stated that references to additional clauses should be included in the Procedure Overview section of the protocol. Alinta was also concerned that section 2.2.3(a) of the protocol may capture information that AEMO may receive that was not expressly required to be provided under the Market Rules. Alinta recommended that section 2.2.3(a) be amended to protect participants from AEMO using any information that it receives for the purposes of monitoring compliance.

Alinta also considered that further detail was necessary on the information sources and tools used by AEMO to monitor participant compliance referred to in section 2.2.3(b) of the protocol.

AEMO made several changes in response to Alinta's first submission including:

- Adding additional clause references where appropriate to the Procedure Overview section.
- Clarifying in section 2.2.3(d) of the protocol, that AEMO will only provide the ERA with information that is relevant to an alleged breach.
- Providing examples of the tools and information sources that AEMO uses to monitor compliance in a footnote to section 2.2.3(b).

Perth Energy's submission stated that AEMO should include the process that it would follow and the criteria it will apply to assess whether an event should be considered an alleged breach. Perth Energy recommended that this include a materiality test. Perth Energy's view was that in the absence of that test, AEMO may interpret its obligations under the Market

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<sup>2</sup> Refer to 'Submissions' published on AEMO's [website](#)

Rules to report all non-compliance to the ERA and this may be an inefficient and unnecessary use of AEMO's and the ERA's time.

AEMO did not make any changes in response to Perth Energy's first submission. AEMO explained that it must report any alleged breach under the Market Rules and that it has no discretion to apply a materiality threshold for its breach reporting obligations.

The ERA's assessment is that clauses 2.13.6A and 2.13.9 of the Market Rules both state that AEMO must inform the ERA where it becomes aware of an alleged breach. AEMO does not have discretion to determine whether to report an alleged breach that it identifies.

Western Power's first round submission stated that it supported the new protocol on the basis that it clarified AEMO's compliance monitoring and reporting processes.

In the second consultation phase in January 2019, Alinta and Perth Energy made submissions.<sup>3</sup> These submissions raised a common concern on the requirement for AEMO to co-operate with an ERA investigation under clause 2.13.13 of the Market Rules.

Alinta and Perth Energy stated that the term co-operating did not extend to requiring AEMO to disclose a third party's confidential or commercial information to the ERA under clause 2.13.13. Alinta and Perth Energy were of the view that the Monitoring and Reporting Protocol should cover how AEMO would manage a participant's confidential and commercial information under clause 2.13.13, suggesting that this information should not be disclosed to the ERA.

AEMO explained that the Market Rules did not qualify the information the ERA may request from AEMO under clause 2.13.13. AEMO did not make any changes in response to Alinta's and Perth Energy's second submissions.

Alinta's and Perth Energy's submissions provided two reasons for AEMO not to provide a participant's confidential and commercial information under clause 2.13.13 to the ERA as follows.

### Procedural fairness

Clause 2.13.13 of the Market Rules states:

Rule Participants must cooperate with an investigation into an alleged breach of the Market Rules or Market Procedures, including:

- (a) providing the Economic Regulation Authority with information requested under clause 2.13.12 relating to the alleged breach in a timely manner; and
- (b) allowing reasonable access to equipment for the purpose of an inspection carried on under clause 2.13.12.

Alinta and Perth Energy stated that if AEMO provided a participant's confidential and commercial information to the ERA under clause 2.13.13 then there was no opportunity afforded to the participant to raise concerns about the disclosure of that information. This was not consistent with the concept of procedural fairness.

The ERA is of the view that a participant in the above circumstances would be afforded procedural fairness. Procedural fairness requires a fair and proper process to be used by a decision-maker. The decision-maker for an investigation under the Market Rules is the ERA.

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<sup>3</sup> Refer to 'Updated Submissions' published on AEMO's [website](#)

The ERA will not use information received under clause 2.13.13 from AEMO to determine non-compliance without first informing the relevant participant of the preliminary findings of its investigation and providing the participant with the opportunity to respond to those findings. Any information provided by the participant will be taken into consideration when finalising the investigation. This process is contained in section 4.1.7(b) of the ERA's [Monitoring Protocol Market Procedure](#). The ERA's investigation process affords the participant procedural fairness.

#### Section 51 of the *Economic Regulation Authority Act 2003*

Alinta's and Perth Energy's submissions also suggested that if the ERA wished to obtain confidential or commercial information it should use its statutory powers under the *Economic Regulation Authority Act 2003* (that is, under section 51). Alinta and Perth Energy stated that confidential and commercial information gathered in this way provided statutory protections to the party owning the information.<sup>4</sup>

The ERA is of the view that, where it is carrying out an investigation of a market participant under the Market Rules, it should use the powers available to it under the Market Rules, including clauses 2.13.12 and 2.13.13, to gather information necessary for the investigation.

These clauses do not exclude the ERA from gathering confidential and commercial information. Any such information received by the ERA under clause 2.13.13 is subject to the confidentiality classes assigned by AEMO to that information in its confidentiality status list.<sup>5</sup>

Where the information provided under clause 2.13.13 is not classified in AEMO's confidentiality status list, then it will have the status of Rule Participant Market Restricted as specified in section 1.7.1(k) of the Market Procedure: Information Confidentiality. This means the information can only be shared with the specific Rule Participant, AEMO and a small number of other parties including the Rule Change Panel and the Electricity Review Board.

As a matter of practice, the ERA would not share information received under clause 2.13.13 unless it was necessary for the purposes of its investigation (for example, in proceedings before the Electricity Review Board) or where an authorised party under a relevant rule or other law was seeking the information.

Alinta and Perth Energy also said that information provided by AEMO to the ERA, pursuant to the processes in the Monitoring and Reporting Protocol, should not extend beyond records required to be kept by AEMO under the Market Rules and Market Procedures. Alinta raised a similar concern in its first-round submission. As previously mentioned, AEMO added step 2.2.3(d) in response to Alinta's first submission, to specify that it would only provide the ERA with information or data that was relevant to the specific breach.

The ERA agrees with AEMO's amendment because where the ERA is undertaking a specific investigation of an alleged breach, it should be provided with all the relevant information necessary for a determination.

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<sup>4</sup> For example, section 53 of the Act states that information provided by an individual under section 51 cannot be used against that individual in any civil or criminal proceedings. Section 54 of the Act states that a person is not liable for any loss, damage or injury suffered by another person because of information provided by the first person in good faith to the ERA under section 51. Section 55 also prohibits the ERA from disclosing confidential or commercial information gathered under section 51 to a third party except in certain circumstances.

<sup>5</sup> Clause 10.2.2 of the Market Rules sets out the confidentiality status classes of information. AEMO's [information confidentiality status list](#) assigns confidentiality statuses to information types.



## 1.5 Assessment against the Market Objectives

Efficient processes for monitoring and enforcing compliance with the Market Rules are important for achieving the Market Objectives.

The Market Rules require AEMO to monitor participant compliance and report alleged breaches of the Market Rules to the ERA. The ERA is required to monitor participants' compliance and investigate any alleged breaches that are reported to it or that it may identify itself.

To assess whether AEMO's protocol meets the Market Objectives, the ERA has considered whether the processes described in the protocol will enable AEMO and the ERA to efficiently carry out their compliance activities. The ERA is satisfied of this because the Monitoring and Reporting Protocol:

- Requires AEMO to prioritise the reporting of alleged breaches by considering their materiality (sections 3.1.6 and 3.2.3 of the protocol).
- Provides for AEMO to send batch non-compliance reports at agreed times in circumstances where it is more efficient to do so (section 3.2.1 of the protocol).
- Contains processes that allow efficient access to information (for example, through the online data warehouse referred to in section 2.2.5 of the protocol)
- Does not contain any unnecessary processes or restrictions that may hinder the ERA's compliance function.

The Monitoring and Reporting Protocol also supports the Market Objectives by providing transparency to participants on compliance processes so that when read in conjunction with the ERA's [Monitoring Protocol](#) and the relevant Market Rules, participants have sufficient information to understand:

- how their compliance will be monitored
- how breaches may be alleged and investigated
- the possible consequences of non-compliance.

## 1.6 Expiry of transitional provisions in the Market Rules

Clause 1.14.1 of the Market Rules states:

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 Economic Regulation Authority under clause 2.15.6A—
  - i. AEMO must provide to the Economic Regulation Authority 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 Economic Regulation Authority; and
  - iii. clause 2.13.9C does not apply to AEMO;

...

Clause 1.16.1 of the Market Rules states:

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;

...

The ERA's approval of AEMO's Monitoring and Reporting Protocol means that clauses 1.14.1 and 1.16.1 of the Market Rules no longer have effect. These clauses contain similar requirements.

The first requirement is set out in transitional clauses 1.14.1(e)ii and 1.16.1(e)ii. This requirement refers to AEMO notifying the ERA of alleged breaches that it becomes aware of. This obligation will continue despite the approval of the Monitoring and Reporting Protocol because it is expressly required by Market Rules 2.13.8 and 2.13.9C as referred to in step 3.1.1 of AEMO's Monitoring and Reporting Protocol. Clauses 2.13.8 and 2.13.9C commence operation from the ERA's approval of AEMO's Monitoring and Reporting Protocol (clauses 1.14.1e(iii) and 1.16.1e(iii)).

The second requirement concerns transitional clauses 1.14.1(e)i and 1.16.1(e)i that require AEMO to provide the ERA with all records held by AEMO under the Market Rules. This transitional provision ceases, and in contrast to the earlier transitional clauses was not replaced by the commencement of any other clause or clauses. The ERA submitted a rule change proposal seeking to resolve the problems that may arise due to the expiry of the transitional provisions.<sup>6</sup>

## 1.7 Conclusion

The ERA approves AEMO's Monitoring and Reporting Protocol. In making its determination the ERA has concluded that the protocol:

- Complies with the Market Rules and is consistent with the Market Objectives.
- Contains processes that assist the ERA to monitor and investigate non-compliance efficiently.
- Contains processes to ensure that the ERA will be adequately notified of alleged breaches.
- Contains processes to ensure that the ERA is provided with all relevant information when reporting an alleged breach.

<sup>6</sup> Refer to [Rule Change Proposal RC\\_2018\\_05: ERA access to market information and SRMC investigation process](#)