

3 October 2024

Economic Regulation Authority
Level 4, Albert Facey House
469 Wellington Street
PERTH WA 6000

Submitted via: publicsubmissions@erawa.com.au

Procedure Change Proposal: Monitoring Protocol

Alinta Energy appreciates the opportunity to provide feedback on the proposed changes to the ERA's Monitoring Protocol.

We strongly oppose the proposed removal of the requirement to notify a Market Participant where an investigation commences.

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.

We consider that the proposal to remove notification of where an investigation commences undermines the opportunity for Market Participants and the ERA to build collaborative, transparent and good faith working relationships which are critical to compliance outcomes. We note that it also undermines procedural fairness and could result in breaches being unnecessarily prolonged.

The following table provides our detailed feedback on the proposed amendments.

Monitoring Protocol

Reference/Issue	Feedback
Interchangeable use of the terms 'alleged breach' and 'suspected breach' throughout the document	<p>While the terms 'alleged breach' and 'suspected breach' are both used in the WEM Rules, they do not appear to be used in an interchangeable manner. The specific term 'suspected breach' is only used in clause 2.13.23 and 2.15.3(c) in reference to notification of a breach or suspected breach by a Rule Participant to the ERA. All other references throughout clause 2.13 and 2.15 use the term 'alleged breach'.</p> <p>Generally, the term 'suspected breach' refers to a situation where there is a reasonable belief that a breach has occurred, but it has not yet been confirmed while an 'alleged breach' is a claim or assertion that a breach has occurred.</p> <p>The interchangeable use of the terms throughout sections 4 and 5 is confusing, particularly the assessment and risk rating processes set out under paragraph 4.5, where it is noted that ERA must determine whether an 'alleged breach' is a 'suspected breach' as the associated WEM Rules only use the term 'alleged breach'.</p> <p>As the terms are used separately in the WEM Rules and have different meanings/connotations at law, we recommend that the use of the terms in the Monitoring Protocol should be amended to be consistent with the WEM Rules.</p>
The risk-based approach including risk ratings and the WEM Monitoring Priorities	Section 2.2 of the Monitoring Protocol sets out the ERA's risk-based approach, introducing the concepts of Baseline Risk, Breach Risk and Final Risk.

	<p>Paragraph 2.2.5 sets out that the baseline risk ratings have been used to determine a list of risk-based monitoring priorities and these are published on the ERA's website.</p> <p>As the ERA's baseline risks should underpin its compliance activities and areas of focus, all market participants should be informed, by way of notice, of any changes to the WEM Monitoring Priorities as a result of a reassessment of the baseline risk ratings. Notification to market participants should be reflected in section 2.2.6.</p> <p>There appears to be no relationship between the baseline risk rating (ie the determined WEM Monitoring Priorities) and the determination of a breach risk rating in any of the Risk Framework (Tables at Appendix 1), the process for assessing suspected breaches (paragraphs 4.5.1 and 4.5.5), or the process for assigning the breach risk rating (paragraph 4.5.7).</p> <p>If the consequence and likelihood rating tables used to determine the baseline risk rating are different to those in Appendix 1, we recommend that they are included in the Monitoring Protocol for completeness.</p> <p>It is not clear which of the three priority monitoring categories the determined and published WEM Monitoring Priorities are derived from. This should be transparent to market participants (ie mandatory or risk-based or trend based).</p> <p>Without fettering the ERA's discretion, we consider that it should be clear in the Monitoring Protocol (or otherwise in its publication of the monitoring priorities) how the ERA is monitoring Rule Participants to identify potential breaches within the monitoring priorities. For example, at a high level, what data or analyses it will use as indications of potential breaches. This transparency may help Rule Participants improve their own self-monitoring processes.</p> <p>The Risk Framework and investigation process should require ongoing reassessment of the initial breach risk rating throughout an investigation as material facts and circumstances come to light. If the breach risk rating falls below the investigation threshold, this should be reason to close an investigation under section 5.4, rather than suspend (see paragraph 5.4.3).</p>
<p>Matters the ERA must take into account that will determine whether the alleged breach is required to be investigated (clause 2.15.3(d))</p>	<p>While the Monitoring Protocol sets out the process to assign a risk rating to each alleged breach, it does not clearly set out the matters the ERA will take into account, that <u>will</u> determine whether the alleged breach <u>is required</u> to be investigated, as required by clause 2.15.3(d).</p>
<p>3.2.7</p>	<p>It is not clear if an investigation commenced by the ERA into an alleged breach or other matter (as identified in paragraph 4.5.6) will follow the same assessment and investigation processes set out in sections 4 and 5 of the Monitoring Protocol.</p>
<p>Section 4.5</p>	<p>This section should distinguish between an 'alleged breach' and a 'suspected breach' and align with the relevant WEM Rules including Compliance Investigation clause 2.13.27.</p> <p>In accordance with clause 2.13.27(b), if the ERA becomes aware of an alleged breach of the WEM Rules or WEM Procedures, it <u>must investigate</u> the alleged breach in accordance with the risk rating assigned to the type of alleged breach in the WEM Procedure.</p> <p>We note that only alleged breaches are required to be recorded and investigated under 2.13.27, subject to the risk rating applied under 2.15.1.</p>
<p>4.5.6</p>	<p>All matters that the ERA must investigate should be included here, including Irregular Price Offers, as required by clause 2.16C.5</p>
<p>4.5.7</p>	<p>It is not clear how the baseline risk ratings the ERA has assigned to all WEM Rules and the determined/published WEM Monitoring Priorities influence the assignment of risk ratings to individual alleged breaches and ultimately the priority order assigned for the purposes of investigation.</p> <p>The specifics of the criteria used in the process for determining the investigation priority order should be included. More clarity should be provided about how alleged breaches that are assessed as Moderate will be determined for</p>

	<p>investigation or otherwise. Are there aspects of the consequence rating or likelihood rating that would distinguish an alleged breach for investigation?</p> <p>To ensure that responses to breaches are proportionate to the circumstances, the ERA should consider applying a public interest type test – of which the individual breach risk rating would be one component. This would enable consideration of the alleged breach in the context of the broader market, the individual circumstances as well as the importance of the investigation in the context of other matters that the ERA has on foot at any point in time. This will assist in ensuring resources are always focused on the right matters at the right time.</p>
Investigations	<p>It is not clear how the key principles guiding the investigations process, as set out in the Compliance Framework and Strategy (Compliance, Fairness, Consistency, Timeliness, and Transparency), are implemented through this process.</p> <p>There should be a difference between alleged and suspected breaches to align with the relevant WEM Rules.</p>
5.1.6	It should be made clear that the suspension of the timeframe for the ERA to make certain determinations only applies to investigations under 2.16C.6, Irregular Price Offers.
5.2.1	The Monitoring Protocol does not specify how investigations will commence in accordance with its priority. The Protocol only indicates that the risk rating will be used to determine if it will be investigated not how the priority order will be determined.
5.2.2	<p>If the ERA commences an investigation, the rule participant alleged to be in breach should be notified on commencement of the investigation in <u>all</u> instances. This would align with the key investigation principles of transparency and procedural fairness.</p> <p>It is unclear how notification can prejudice an investigation as 'just cause' for the investigation should have already been established as there should be reasonable evidence that the breach has occurred for it become alleged and therefore progress to the investigation stage.</p> <p>If the conduct or breach is continuing, notification is necessary to prevent the continuation of harm, as the breach is likely to have a risk rating of significant or extreme to progress to the investigation stage.</p>
5.2.8	<p>The standard timeframes have not been provided in the protocol and do not appear to be published. The target/standard timeframes should be specified in the Protocol.</p> <p>It should be clear that the suspension of determination timeframes only relates to investigations under 2.16C.6, Irregular Price Offers.</p>
5.2.13	The Monitoring Protocol should specify how investigation outcomes will be determined, particularly where delegations may be used. Who is making decisions with regard to investigation outcomes is important for the purposes of transparency.
Notification of outcomes	As a general principle, the rule participant who is alleged to have breached a WEM Rule or WEM Procedure as well as the rule participant who reported the suspected breach, if applicable, should be kept informed of the progress of the matter and provided with as much information as is appropriate as the matter progresses through all stages of the reporting, assessment, investigation and outcome processes.
Irregular Price Offers and Determination of Inefficient Market Outcomes	<p>It is not clear how AEMO's obligations to monitor and report alleged breaches will be used by ERA to determine a breach of 2.16C.5.</p> <p>It is not clear if the focus on monitoring compliance with WEM Rule clause 2.16C.5 is on the identification of inefficient market outcomes and or on the identification of irregular price offers.</p> <p>Prices should not be considered distorted or manipulated merely because they are changed as a result of a market participant's behaviour. The clearing price for all services should reflect the forces of supply and demand in the market..</p>

	<p>It should not be the intention to interfere with behaviour which is <u>genuine</u> commercial behaviour as intended by the design of the market, including strategies undertaken by market participants to optimise their operation and the economic rationing of capacity.</p> <p>Courts apply tests of whether the person had knowledge, belief or intent, without fettering discretion, consideration should be given to how such tests will be applied by the ERA in determining the enforcement action it will take in circumstances where the ERA determine that a breach has occurred.</p>
--	--

Thank you for your consideration of Alinta Energy's submission. Should you wish to discuss this further please contact me at [REDACTED]

Yours sincerely

[REDACTED]
[REDACTED]