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**MARKET POWER MITIGATION AMENDING RULES EXPOSURE DRAFT**

Alinta Energy appreciates the opportunity to provide feedback on the draft market power mitigation amending rules.

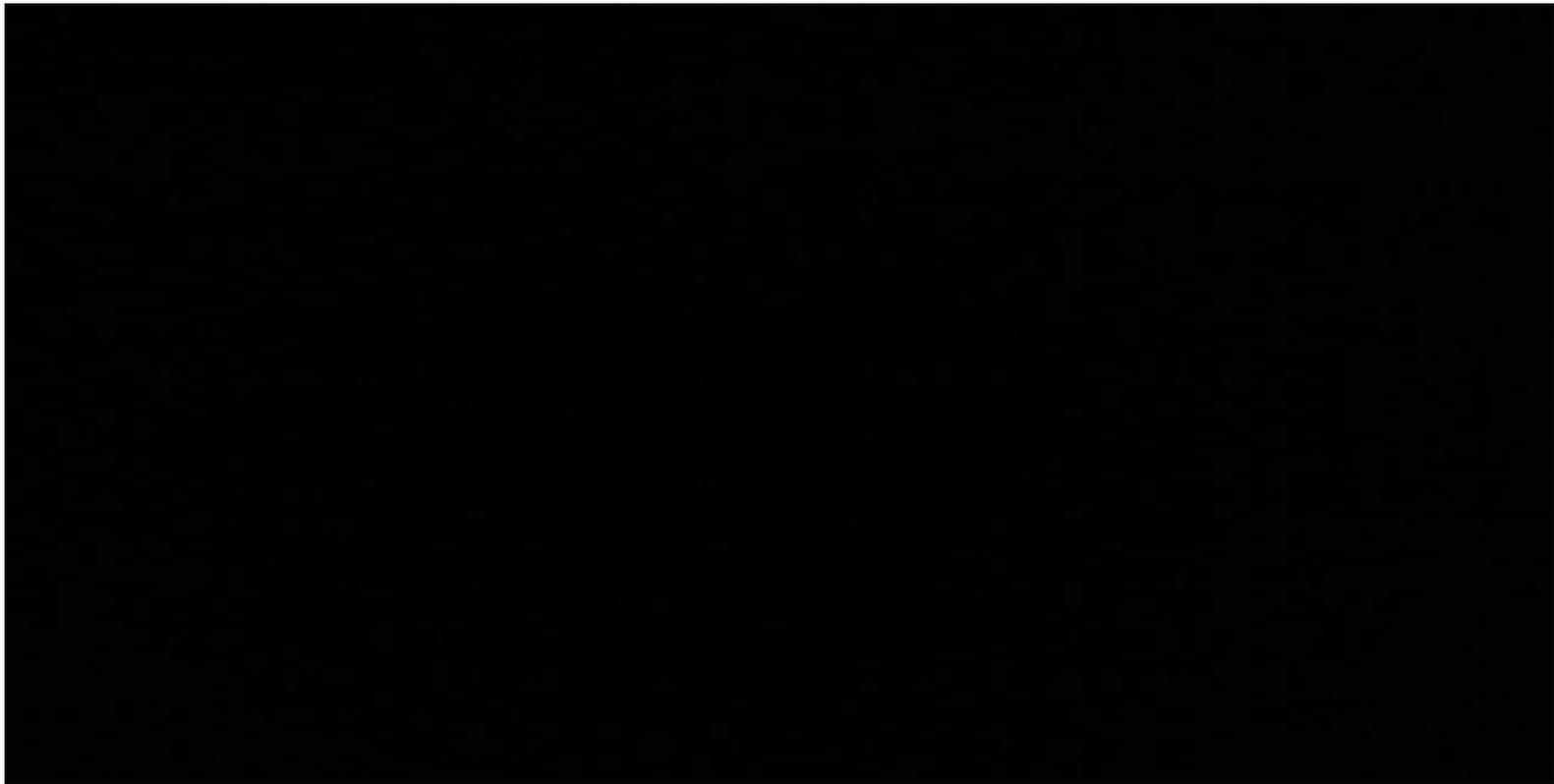
We provide the following comments and recommendations for EPWA's consideration.

If you would like to discuss this further, please contact me at [oscar.carlberg@alintaenergy.com.au](mailto:oscar.carlberg@alintaenergy.com.au) or on 0409 501 570.

Yours sincerely

**Oscar Carlberg**  
Wholesale Regulation Manager

Topic	Rule reference	Alinta Energy comment

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<sup>1</sup> The Brattle Group, [implementing recommended improvements to market power mitigation in the WEM](#), April 2020, p.13

Topic	Rule reference	Alinta Energy comment
General trading obligations	2.16A.2	<p>Alinta Energy questions whether 2.16A.2 is necessary in the WEM, noting that it:</p> <ul style="list-style-type: none"> <li>- <u>Replicates reforms targeted at the NEM, which, unlike the WEM, did not have SRMC bidding obligations. 2.16A.2 is based on s153G and s153H of the Competition and Consumer Act 2010, which were introduced as part of the Prohibiting Energy Market Misconduct (so called “big stick”<sup>2</sup>) legislation.</u></li> <li>- <u>Is based on reforms which were considered as being unnecessary even in the NEM and unrelated to the ACCC findings they were supposed to address.</u> Referring to the market misconduct triggers, Tony Wood, a director at the Grattan Institute, said “these are crazy and not things which the companies have been doing”. He continued, “This is virtue signalling – look tough and carry a big stick. I’m threatening you with stuff you’re not even doing, but I’m looking tough as a result of it.” Melbourne Business School dean and competition expert Ian Harper said reforms were unnecessary because s46 already gave ACCC “sufficient power to prosecute the misuse of market power by energy providers”.</li> <li>- <u>May increase ex-ante uncertainty without capturing conduct that is not already captured by 2.16A.1.</u></li> <li>- <u>Duplicates s153G and s153H of the Competition and Consumer Act 2010 which already applies nationwide.<sup>3</sup> The ACCC noted that it may investigate non-NEM jurisdictions if there are regulatory changes, or it becomes aware of conduct.</u></li> </ul>

<sup>2</sup> ABC, [The Federal Government's 'big stick' energy bill has been introduced, here's what it would do](#), Sep 2019.

<sup>3</sup> ACCC Guidelines on Part XICA - Prohibited conduct in the energy market, available here: [Guidelines on Part XICA - Prohibited conduct in the energy market | ACCC](#)

Topic	Rule reference	Alinta Energy comment
General trading obligations	2.16A.2	<p>If 2.16A.2 is retained, Alinta Energy strongly recommends that it should not omit the words, "<u>for the purpose of</u>" which are included in the CCA sections it replicates. Doing so would increase ex-ante uncertainty and the potential for undue penalties because participants can be perceived to be distorting or manipulative prices, even where this was not the purpose of their behaviour.</p> <p>Under the CCA, there are two elements that must be present for the prohibition to apply:</p> <ul style="list-style-type: none"> <li>• the behaviour of a generator in the spot market; and</li> <li>• the characterisation and/or purpose of that behaviour.</li> </ul> <p>The second element looks to whether the behaviour has a particular character or purpose:</p> <ol style="list-style-type: none"> <li>a) the corporation <b>has acted</b> 'fraudulently, dishonestly or in bad faith' in carrying out the behaviour</li> <li>b) the behaviour <b>has been carried out for the 'purpose of</b> distorting or manipulating prices' in the electricity spot market.</li> </ol> <p>Alinta Energy considers excluding the part that reflect the characterisation and/or purpose of that behaviour, i.e. "for the purpose of", significantly changes the operation of this clause in the WEM Rules. To avoid this, we recommend the following amendment:</p> <p>2.16A.2. A Market Participant must not engage in conduct in offering to supply or supplying, or in failing to offer to supply or supplying, a Market Service that:</p> <ol style="list-style-type: none"> <li>a) is false, misleading, or likely to mislead;</li> <li>b) is fraudulent, dishonest or in bad faith; or</li> </ol> <p><u>is for the purpose of distorting or manipulating</u> <del>distorts or manipulates, or is likely to distort or manipulate,</del> prices in the Wholesale Electricity Market.</p>

Topic	Rule reference	Alinta Energy comment
General trading obligations	2.16A.3(a)	<p>This clause allows the ERA to consider historical STEM or Real-Time market submissions when determining whether a participant has engaged in any conduct prohibited by clause 2.16A.2.</p> <p>Given the requirements imposed on STEM submissions are changing significantly from 1 October 2023, and that RTM submissions would not have existed prior to this, Alinta Energy considers that historical submissions may not be able to be compared on a like-for-like basis to identify a pattern of behaviour.</p> <p>As follows, Alinta Energy strongly recommends that the drafting of this clause be amended as follows:</p> <p>2.16A.3. In determining whether a Market Participant has engaged in any conduct prohibited by clause 2.16A.2, the Economic Regulation Authority may take into account:</p> <p>a) <u>from the New WEM Commencement Day</u>, historical STEM Submissions or Real-Time Market Submissions made by the Market Participant, including changes to STEM Submissions and Real-Time Market Submissions, in which there is, or there appears to be, a pattern of behaviour that may indicate such conduct was engaged in;</p>
Portfolio Assessment	2.16B and glossary	<p>“Portfolio” is defined in the Chapter 11 Glossary as:</p> <ul style="list-style-type: none"> <li>• Registered Facilities owned by the same entity (para (a) of the definition); or</li> <li>• Registered Facilities owned by the same entity and any related entity (para (b) of the definition); or</li> <li>• a Registered Facility (para (c) of the definition).</li> </ul> <p>Alinta Energy notes that this definition does not consider trading relationships, for example, where a market participant is the market intermediary or has contracted the trading rights of a facility's electricity but does not own the facility.</p>

Topic	Rule reference	Alinta Energy comment
Market Power Test	2.16C.3 (b) and (c)	<p>A Market Participant responsible for a Registered Facility within a Material Portfolio or a Material Constrained Portfolio is required to create and maintain certain records that may support investigations.</p> <p>While Alinta Energy supports this concept in principle, we are concerned with the requirement to be “adequate <u>detailed</u> records”. To ensure there is balance between maintaining sufficient records to allow a proper investigation to be held and minimising compliance risk and cost, Alinta Energy considers the word “detailed” should be deleted and that WEM procedure referred to in clause 2.16D.14 set out the level of detail required:</p> <p>2.16C.3. By no later than three months from the date of receipt of a notice from the Economic Regulation Authority under clause 2.16C.1 (c) (ii) or clause 2.16C.2(b)(ii), a Market Participant must, in accordance with the WEM Procedure referred to in clause 2.16D.14:</p> <ul style="list-style-type: none"> <li>a) maintain adequate records (that are capable of independent verification) of the internal governance arrangements the Market Participant has in place to comply with its obligations under clause 2.16A.1;</li> <li>b) maintain adequate <del>detailed</del> records (that are capable of independent verification) of the methods, assumptions and cost inputs the Market Participant used to develop the prices in the Portfolio Supply Curve offered in its STEM Submissions or Standing STEM Submissions, which must include, for each relevant Facility, the information referred to in clause 2.16D.1(a)(i); and</li> <li>c) maintain adequate <del>detailed</del> records (that are capable of independent verification) of the methods and cost inputs the Market Participant used to develop the prices offered, quantities and Ramp Rate Limits in its Real- Time Market Submissions, which must include, for each relevant Facility, the information referred to in clause 2.16D.1(a)(i).</li> </ul> <p>This maintains consistency with the current approach where the WEM ruleset the broad requirements and objectives, and the subsidiary documents contain the detail.</p>
Market Power Test	2.16C.3 2.16D.1.	<p>We suggest that it would not be reasonable to expect participants to record all their offer inputs and assumptions for each interval such that each offer can be perfectly replicated. Instead, we suggest that the standard should be that the records include inputs and assumptions that can be used to ‘approximate’ offers within a reasonable range. This is because offers can include cost inputs and assumptions which move within bands depending on a range of variables, real time decisions, risk perceptions and forecasts about increasingly uncertain factors which can be difficult to quantify ex-post - like how costs were expected to be amortised over an uncertain run.</p>

Topic	Rule reference	Alinta Energy comment
Market Power Test	2.16C.5 2.16C.6	We suggest that the ERA should not be required to investigate if it reasonably considers the irregular offers would not have caused outcomes that fail an appropriate effects test – for example, where impacts to customers or the market would have been immaterial. Otherwise, we consider this would not achieve the key objective of ensuring regulatory effort is proportionate to the risk being managed.
Market Power Test	2.16C.5(a) and 2.16C.5(b)	Alinta Energy questions why the standard for investigation should be broader than the bidding obligation requirement. Alinta Energy is concerned that these clauses would penalise a participant on the basis that a “similar” portfolios or facilities would be offered differently. Even nearly identical assets can have substantially different costs due to factors including fuel and transport contracts, environmental conditions, operation and maintenance costs, forecasting practices and opportunity costs. As follows we recommend removing references to the “same or similar facilities”.
Market Power Test	2.16C.6 2.16C.10	<p>This clause notes that, where the ERA has determined under clause 2.16C.5 that a Market Participant has made an Irregular Price Offer, the Market Participant will be deemed to be in breach of clause 2.16A.1. We consider that this clause should incorporate an effects test and reference 2.16C.6. Otherwise, the reputational damage caused by the alleged breach would likely outweigh the impact on the market. We would also suggest that an indiscernible or negligible market impact may indicate that whether the offer was in breach is more open to debate and could be appealed. It might also suggest the offer was due to a reasonable error that would not warrant the potential damage a public breach notice could cause.</p> <p>2.16C.10. Where the Economic Regulation Authority has determined under clause <del>2.16C.5</del> 2.16C.6 that a Market Participant has made an Irregular Price Offer, the Market Participant will be deemed to be in breach of clause 2.16A.1.</p>
Market Power Test	2.16C.6	We question whether an “inefficient market outcome” is a strong enough effects test to achieve the objective the consultation paper set for it – that is, ensuring regulatory effort is proportionate to the cost and the risk being managed. It does not outline the necessary scale of the impact caused by the inefficiency. Given that an ‘inefficient market outcome’ could conceivably result in immaterial impacts to the broader market or customers, we suggest a better test would be that the breach was likely to have caused material impacts to customers or the market.

Topic	Rule reference	Alinta Energy comment
Market Power Test and Irregular price offers – limited application of section 2.13	2.16C.10 and 2.16E.1	<p>We recommend that clause 2.16C.10 should be subject to 2.16E.1, otherwise a market participant would have already been investigated and deemed to be in breach under 2.16.10 regardless of whether it failed the effects test, even though 2.16E.1 aims to avoid this.</p> <p>2.16C.10. <b>Subject to clause 2.16E.1</b>, where the Economic Regulation Authority has determined under clause <del>2.16C.5</del> <b>2.16C.6</b> that a Market Participant has made an Irregular Price Offer, the Market Participant will be deemed to be in breach of clause 2.16A.1.</p> <p>We suggest that 2.13.36 and 2.13.37 should also be subject to the effects test and 2.16E.1</p>
Guidance, WEM procedures and Consultation Framework	2.16D.1(a)	<p>We suggest that the ERA ne required to outline how it will assess whether prices have an inefficient market outcome, or otherwise fails our suggested materiality effects to ensure the approach supports the objective of regulatory effort being proportionate to the risk. As such, Alinta Energy considers that this rule should include a new sub clause iv:</p> <p>iv. <u>Provide guidance to Market Participants on what the Economic Regulation Authority would consider to be an inefficient market outcome.</u></p>
Guidance, WEM procedures and Consultation Framework	2.16D.3	<p>To ensure that the consultation requirements are followed for any amendments to the Offer Construction Guideline and the trading conduct guidelines and for the avoidance of doubt Alinta Energy considers that this clause should also refer to clause 2.16.D2:</p> <p>2.16D.3. In making the guidelines to be developed and maintained under clause 2.16D.1, or any amendments to them <b>under clause 2.16D.3</b>, the Economic Regulation Authority must publish on its website:</p>
Guidance, WEM procedures and Consultation Framework	2.16D.5	<p>It is unclear what is “is responsible for” refers to: it could be operating responsibility, trading responsibility or contractual responsibility. It is also inconsistent with the how the gateway test is applied to portfolios which only considers ownership as noted above. We suggest this clause be amended like the 2.16B and glossary to ensure all clauses are consistent and clearly captures the appropriate Facilities and Market Participants.</p>

Topic	Rule reference	Alinta Energy comment
Guidance, WEM procedures and Consultation Framework	2.16D.6 to 2.16D.13	<p>Alinta Energy notes that the ERA's current Compliance Framework and Strategy<sup>4</sup> and its Compliance Monitoring Protocol states that:</p> <p>The ERA's approach is aimed at encouraging compliance by Rule Participants with the Market Rules and Market Procedures with the target of achieving high levels of compliance. Under this approach the ERA will seek to:</p> <p>(a) assist Rule Participants to understand their obligations, noting that the responsibility for meeting compliance obligations rests with the individual participant.</p> <p>Alinta Energy is concerned clauses 2.16D.6 to 2.16D.13 adds unnecessary prescription to the process for seeking guidance and that by requiring the formulaic responses within set timeframes, the rules would undermine the opportunity for Market Participants and the ERA to build collaborative, transparent and good faith working relationships which are critical to compliance outcomes. Alinta Energy commends the ERA Market Compliance team for its work in supporting this culture within the WEM and suggests removing the prescription to avoid hampering opportunities to build on this in the new market.</p>
Guidance, WEM procedures and Consultation Framework	2.16D.1(a)iii and 2.16D.14(b)	<p>Clause 2.16D.1(a)iii requires the ERA, in its offer construction guidelines, to "provide guidance...on the records required to be maintained...and the manner in which they may be recorded and verified".</p> <p>Clause 2.16D.14(b) requires the ERA to document in a WEM procedure "the types, format and extent of information to be maintained or recorded by a Market participant".</p> <p>We suggest that the overlap of these rules may case compliance risk for participants and that Clause 2.16D.1(a)iii should be deleted.</p>
Conducting a Review of a Market Price Limit	2.26.2	<p>We suggest that 2.26.2 also note that the price ceiling should be based on the shortest feasible run of the highest cost generating unit.</p> <p>Noting that the bidding obligation considers the opportunity cost of fuel, and that it is proposed the limit is reviewed every three years rather than annually (like it is now), we also suggest that the fuel input be based on the maximum fuel price which may reasonably occur during the three-year period, considering the forecast supply and demand balance.</p>

<sup>4</sup> [Compliance Framework and Strategy \(erawa.com.au\)](http://erawa.com.au)

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Conducting a Review of a Market Price Limit	2.26.3	<p>Clause 2.26.3 removes the five-yearly review of the price limit methodology due to the “more comprehensive three-yearly review process”.</p> <p>However, clauses 2.26.1, 2.26.2A and 2.26.2E all just refer to the ERA undertaking a review of “the appropriateness of the value” of the relevant price limit (not the underlying methodology).</p> <p>While Alinta Energy agrees that there is no need for both a three-year and a five-year review, we do not consider that the three-yearly review process, as drafted, is sufficient to identify underlying methodology changes that may be required.</p> <p>Alinta Energy considers that clauses 2.26.1, 2.26.2A and 2.26.2E should all be modified to refer to:</p> <p style="text-align: center;">...the appropriateness of the <b>methodology and the value</b>” ...</p>
Supplementary Essential System Service Mechanism	3.15A.2A	<p>We strongly question the need for these benchmarks, and we are concerned they will become a de facto price limit, triggering investigations or the SESSM. We continue to strongly oppose the trigger for the SESSM based on efficient market outcomes, especially considering this extensive market power mitigation framework, and ERA’s findings highlighting the uncertainty and revenue gaps facing new storage capacity and how new entrants in the FCESS market dramatically reduces revenue for incumbents, further undermining the incentive to invest.</p>
Real-time market submissions: Obligations and meaning	7.4.26 and 7.4.27	<p>Refer to our comments on clause 2.16C.3.</p> <p>Specifically, Alinta Energy supports the record keeping concept in principle. However, we are concerned with the requirement to be “adequate <u>detailed</u> records”. To ensure there is balance between maintaining sufficient records to allow a proper investigation to be held and minimising compliance risk and cost, Alinta Energy considers the word “detailed” should be deleted.</p> <p>The level of detail required should then be detailed in a WEM procedure (which could be the same procedure referred to in clause 2.16C.3). This approach upholds the desire for the WEM rules to set the objectives and the subsidiary documents to contain the detail.</p>