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Economic Regulation Authority
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Dear ERA

Draft – Procedure Change EEPc_2023_01 – Monitoring Protocol Wholesale Electricity Market (WEM) Procedure

Synergy welcomes the opportunity to provide feedback to the Economic Regulation Authority (ERA) in relation to the above procedure change.

Synergy supports the majority of the proposed amendments to the revised WEM Procedure (**Protocol**) and the intention to provide greater transparency and procedural fairness under the WEM Rules, but also has a number of improvement suggestions as detailed in this submission.

Synergy is supportive of a Protocol that encourages a culture of compliance by Rule Participants by adopting a risk-based approach to assess and manage the compliance risk under the WEM Rules and/or WEM Procedures.

Synergy has assessed the procedure change proposal for consistency with the WEM Objectives and the WEM Rules. As an overarching comment Synergy considers where the ERA performs a function or forms a view under the Protocol, the ERA must give regard to the WEM Objectives¹ to ensure the operation of the Protocol is consistent with WEM Rules clause 2.9.3.

Synergy suggests that this intent should be drafted in a new section of the Protocol². Including an explicit reference to the WEM Objectives in the Protocol provides regulatory certainty for all Rule Participants that the WEM Objectives are taken into consideration for any decision formed by the ERA in determining outcomes of investigations or deciding that a matter requires an investigation.

¹ For example, WEM Procedure Monitoring Protocol 1 October 2023 cl 5.2.2, 5.2.3, 5.2.4, 5.2.5

² WEM Procedure Monitoring Protocol 1 October 2023 cl 1.1 and 1.2

Synergy considers some of the procedural elements in the Protocol would benefit from the provision of timeframes³ in relation to notifications by the ERA to Rule Participants. It is important to note that investigations carry an administrative burden and cost on affected Rule Participants and defined timeframes would minimise long-term costs, provide the ERA and Rule Participants with regulatory certainty, consistent with the intent of the amendments in supporting greater transparency and procedural fairness under the WEM Rules. Synergy notes that timeframes have been specified in the Protocol for some activities required to be performed by Rule Participants.

Further to the comments outlined above, Synergy has proposed a number of suggestions for ERA's consideration to improve the proposed Protocol as detailed in the attached table.

Please contact Rebecca Cant, Networks Regulation and Compliance Analyst on 6282 7216 should you have any queries in relation to this submission.

Yours sincerely



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HEAD OF REGULATION AND COMPLIANCE

³ For example, WEM Procedure Monitoring Protocol 1 October 2023 5.3.5, 5.3.6, 5.3.8, 5.4.4(a)

Section	Issue
New	<p>Synergy recommends a new sub-section, outlined below, is added to the Protocol to ensure the operation of the procedure is consistent with WEM Rules clause 2.9.3:</p> <p>“The ERA and Rule Participants must have regard to the WEM Objectives when performing an obligation under this Procedure, whether or not the provision under which they are performing refers expressly to the WEM Objectives.”</p>
1.1.1	<p>For regulatory clarity, Synergy recommends the Protocol include a definition of:</p> <ul style="list-style-type: none"> • alleged breach • breach • contravention • incident and • suspected breach. <p>The following illustrates why there is a need for this:</p> <ul style="list-style-type: none"> • under sub-section 4.3.4, the current wording suggests batch reporting is limited to alleged breaches and not self-reported breaches or suspected breaches • under sub-section 5.5.1 the current wording suggests investigation suspension is limited to alleged breaches and not self-reported breaches or suspected breaches. <p>As the above terms are used throughout the Protocol it would be beneficial to Rule Participants if definitions can be included in the Protocol so that the different concepts are clear in intent and that different provisions relating to different concepts can be easily identified.</p>
1.2.1	<p>It is not clear from the Protocol whether the <i>Electricity Industry (Wholesale Electricity Market) Regulations 2004</i> are within the Protocol's scope. Synergy assumes it is not.</p>
2.1.1	<p>Synergy notes the ERA's Compliance Framework and Strategy for WEM and GSI Rules November 2018 (Framework) requires updating given the proposed substantive changes to the Protocol. Synergy's preference is for the Framework to be updated prior to 1 October 2023 to enable the Framework to be read in conjunction with the Protocol, once effected.</p>
2.2.4	<p>Synergy notes the ERA has performed a risk assessment of WEM obligations to rate the compliance risk. From this baseline risk assessment the ERA has determined its risk-based monitoring priorities. Synergy recommends the ERA publishes its baseline risk assessment of WEM obligations in the Framework (in addition to the monitoring priorities) as this would be a useful reference point for Rule Participants when undertaking their own risk assessments for matters such as establishing and maintaining control registers.</p>
3.1.2	<p>It would be useful for each of the Protocol requirements listed in sub-section 2.15.3 of the WEM Rules to be cross referenced to the relevant sections within the Monitoring Protocol (in tabular form) in addition to including links. This would assist document use</p>

Section	Issue
	<p>where hard copies of the Protocol are used. The following illustrates this suggestion (underline added for emphasis): “(c) The form that may be used by Rule Participants to report a breach, or suspected breach, of the WEM Rules or WEM Procedures by the Rule Participant to the ERA in accordance with sub-section 2.15.3(b). <u>Refer sub-section 4.3.2 of this document.</u>”</p>
3.2.1	<p>The Protocol should require the ERA to publish on its website matters (a)-(c) at the time of the Protocol takes effect and whenever the ERA’s WEM monitoring priorities change as this will assist Rule Participants to align their individual compliance priorities with the ERA’s focus. (Synergy recommends the Framework would be a suitable document for publishing this.)</p>
3.2.2(c)	<p>The Protocol states the ERA will monitor Rule Participants’ compliance performance using various methods including targeted reviews. However, the Monitoring Protocol provides no detail or guidance on how the ERA will undertake a targeted review. Consistent with Market Rule 2.15.3(a) the Protocol should specify the process in which the ERA will undertake or require a targeted review.</p>
3.2.5	<p>Sub-section 3.2.5 should be drafted to include a requirement that the ERA notify a Rule Participant in a timely manner prior to the ERA requesting and obtaining information from AEMO in relation to a Rule Participant. Providing Rule Participants with a reasonable period of notice is consistent with the WEM Objectives and provides clarity for procedural purposes.</p>
3.2.6	<p>Synergy suggests this paragraph be moved to Protocol section 5.</p>
3.2.7	<p>WEM Rule 2.15.3 (a)(i) requires the Protocol must specify a process for notice to be given by the ERA to a Rule Participant that identifies the alleged breach to be investigated by the ERA. Protocol sub-section 3.2.7 is inconsistent with the WEM Rule requirement as it provides for Rule Participant notification after the ERA has commenced its investigation. Sub-section 3.2.7 should also be drafted to provide for Rule Participant notification by the ERA in a timely manner prior to an investigation commencing.</p>
3.3 and 3.4	<p>WEM Rules sub-clause 2.15.3(l) requires that the ERA’s WEM Procedure must specify: “The processes it will require the Australian Energy Market Operator (AEMO) and Network Operators to implement to assist the ERA in monitoring and assessing Rule Participants’ compliance with the WEM Rules and WEM Procedures.” The proposed Protocol does not include a process as per the WEM requirement but reiterates the various applicable WEM Rule requirements. Synergy recommends the matter be addressed in the Protocol.</p>

Section	Issue
4.2.2	<p>Synergy recommends sub-section 4.2.2 should clarify that “likely” should be determined in accordance with the Likelihood Rating Table in Appendix 1. In addition, sub-section 4.2.2 should delineate between a major/catastrophic event that has occurred and an event “likely” to occur. Including specifying different time frames for each scenario. Synergy recommends the timeframes for early advice should be;</p> <ul style="list-style-type: none"> • 5 business days for an event that had occurred with major/catastrophic consequences; and • 10 business days for an event “likely” to have major/catastrophic consequences. Where “likely” is to be determined in accordance with the Likelihood Rating Table in Appendix 1 of the procedure.
4.2.4	Reference to “paragraph 4.2.5” in paragraph 4.2.4 is incorrect.
4.3	The heading should be amended to; “Processes for Reporting Breaches, Alleged Breaches or Suspected Breaches”
4.3.3	The form of notification that a Rule Participant is required to advise the ERA of an alleged breach should be specified in the Protocol in addition to the existing website link.
4.3.4	Reference to “breach” should be included in addition to “alleged breaches”. Also refer section 1.1 comment.
4.3.5	Synergy recommends sub-section 4.3.5 is drafted to state clearly that the marked information provided is protected from “unauthorised use or disclosure.”
4.3.7	Reference to “breach” should be included in addition to “alleged breaches”. Also refer section 1.1 comment.
4.3.8	<p>Sub-section 4.3.8 provides the ERA with discretion in providing anonymity to a party alleging a breach. In exercising this discretion Synergy considers that the ERA must consult with the party alleging the breach before disclosing to the Rule Participant the identity of the party reporting the breach to avoid any unintended consequences of disclosure.</p> <p>Reference to “Section 7” should be “Section 5”.</p>
4.4.1	This sub-section should be deleted on the basis of regulatory duplication given the matter is covered under AEMO’s WEM Procedure: Generator Monitoring Plans established under Chapter 3A of the WEM Rules.
4.5.4	This sub-section should specify who it applies to i.e: the ERA.
4.5.4 and 4.5.5	<p>Synergy notes both sub-sections apply to an alleged breach but not a breach (e.g. Rule Participant self-identified breach.) Synergy queries how the ERA will assess the investigation priority for a breach (opposed to an alleged breach) and recommends the matter be specified in the Protocol. Also refer section 1.1 comment.</p>
4.5.5	The ERA should have an obligation to notify a Rule Participant of an investigation risk rating within a timely manner of the ERA assigning a risk rating.

Section	Issue
4.6.1	The ERA should have an obligation under this sub-section to have due regard to a Rule Participant's submission, if provided.
4.6.2	Synergy recommends there should be a requirement for the ERA to provide an automated response acknowledging receipt of the email to the Rule Participant so that the Rule Participant can confirm or follow-up proper receipt of its submission or make other arrangements in the event of an internet communications outage.
5.1.2	There should be a reasonableness test applied to any ERA request for information under this sub-section in terms of the extent of a request. Synergy's experience in responding to the ERA's information requests is that they can be extensive in coverage, broad in nature and have requested timeframes that may not take into account the organisational impost of providing the information.
5.1.3	It is unreasonable for the Protocol to specify a five business day information response when the nature and extent of such information requests are likely to differ depending on each event circumstance. The proposed 5 business day requirement to provide requested information should be deleted and replaced with "in a timely manner" consistent with WEM Rule 2.13.30 and Protocol sub-section 5.1.4(a) respectively. Further sub-paragraph 5.1.7 should apply to sub-paragraph 5.1.3. Also refer sub-section 5.1.2 comment.
5.1.8	Synergy considers in the interest of the investigation process an appointed person should be independent and suggests additional drafting be included in sub-section 5.1.8 to ensure that the appointed person is not conflicted in relation to the matter being investigated. Synergy considers this is necessary in the interest of regulatory certainty and procedural fairness.
5.2.2	Reference to "section 4" should be "section 5".
5.2.8 (b)(i)	Synergy recommends sub-section 5.2.8 (b)(i), where the ERA is required to record the investigation on a public register on an anonymised basis, is drafted to ensure that the information is recorded in such a way that the identity of the Rule Participant is not identified.
5.2.8(b)(iv)	<p>Synergy recommends that the provision should be redrafted to clarify the standard for evidence recording, storage and disposal. Synergy recommends the following amendments below:</p> <p style="padding-left: 40px;"><u>"(iv) The evidence gathered will be recorded and stored and disposed appropriately in order to ensure no unauthorised use or disclosure;"</u>⁴</p>

⁴ Strikethrough words to be deleted and underlined words to be added.

Section	Issue
5.2.8 (c) (ii), (iv) and (v)	In the interest of regulatory certainty Synergy recommends that the ERA specifies a minimum timeframe or require the ERA to respond “in a timely manner” when both recording the outcome of the investigation and notifying the Rule Participant of the outcome.
5.2.9	WEM Rule 2.15.3(e) requires the ERA must specify in the Protocol the processes for investigations of alleged breaches of the WEM Rules or WEM Procedures whereas sub-section 5.2.9 purports that the ERA can exercise its discretion to determine the most appropriate method to investigate any alleged breach. Synergy considers the ERA is required to investigate an alleged breach consistent with the WEM Rules requirements and the Monitoring Protocol.
5.2.10	<p>Synergy understands that sub-section 5.2.10 delineates matters that are minor and major. That is, sub-section 5.2.10 contemplates that only “major” are matters are particularly complex. Therefore, in the interest of regulatory certainty Synergy recommends sub-section 5.2.10 be amended as outlined below:</p> <p>“5.2.10 For matters of a minor nature and/or that need to be dealt with expediently, a less formal approach may be used to investigate the matter (e.g. telephone enquiries) and potentially resolve the issues. For particularly complex <u>and major</u>⁵ matters, a formal detailed investigation approach may be applicable.”</p>
5.2.11	Please refer Synergy’s comment on sub-section 5.2.9.
5.3.5, 5.3.6, 5.3.8, 5.4.4(a), 5.5.4	A reasonable timeframe for notification when an investigation is concluded, suspended, or closed should be included in sub-sections 5.3.5, 5.3.6, 5.3.8 and 5.4.4(a). Open investigations create cost and an administrative burden for Rule Participants. A reasonable timeframe is consistent with sub-sections 1.2.1(a) and (d) of the WEM Objectives and provides important procedural clarity for all Rule Participants and the ERA in relation to the investigation process.
6.2.4, footnote 30	Noting that the clause 2.13.42 of the WEM Rules, referred to in this section, does not refer to the concept of the ERA “issuing an infringement notice” nor to the ERA “making an order”, the references to these concepts should be removed from this footnote.
6.2.4(e), footnote 31	Given the delays in the publication of the final Offer Construction Guideline and Trading Conduct Guideline publication, and in the absence of an enforcement amnesty period, Synergy suggests the relative inexperience of Rule Participants’ in dealing with the new arrangements should be made a mandatory consideration during the first 6 months after the New WEM Commencement Day.
6.2.5	This section refers to the undefined concepts of “financial penalty” and “redress order”. Synergy suggests replacing these concepts

⁵ Underlined words to be inserted

Section	Issue
	with the WEM Rules defined concept “Civil Penalty Amount”.
6.2.6	The discretion to impose a civil penalty daily amount is already dealt with in sub-section 6.2.4(g) (in determining whether to issue a civil penalty) and sub-section 6.2.7(b) (in the context of the total amount of the financial penalty). Consequently, Synergy suggests sub-section 6.2.6 is redundant and should be deleted.
5.5.5	A provision similar to sub-section 5.5.4 should be included in sub-section 5.5.5.
7.1.1	Synergy suggests "release" should be changed to "publish".
7.1.1	The ERA should also publish summary details where it has conducted an investigation and concluded a Rule Participant was not in breach of the WEM Rules.
7.1.2	There is a typo (“WEMt”) in the last line of the sub-section.
8.1.5	The ERA’s notification to an affected Rule Participant of a breach or contravention to be recorded in the public register should be provided prior to the Rule Participant to the contravention being made public.
8.21	A provision similar to sub-section 8.1.5 should apply to sub-section 8.2.1.