



EnergyAustralia

LIGHT THE WAY

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Former COAG Energy Council Secretariat
Department of Industry, Science, Energy and Resources
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Dear Secretariat,

Regulatory Sandbox Legislation Consultation

EnergyAustralia welcomes the opportunity to respond to the Secretariat's Consultation paper on the Regulatory Sandbox legislation (Consultation paper).

EnergyAustralia is one of Australia's largest energy companies with approximately 2.5 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. We also own and operate a multi-billion-dollar energy generation portfolio across Australia, including coal, gas, and wind assets with control of over 4,500MW of generation in the National Electricity Market (NEM).

EnergyAustralia commends the Secretariat for the fast development of the Regulatory Sandbox Legislation and Draft Rules following the Australian Energy Market Commission's (AEMC) Final Report and decision on the Draft Rules. EnergyAustralia continues to strongly support the overall direction of the Regulatory Sandbox. In our view, the Regulatory Sandbox is an important tool that will potentially address regulatory barriers to the development of innovative technologies and business models, for the overall benefit of energy customers.

Our submission largely relates to changes to the drafting of the *Statutes Amendment (National Energy Laws) (Regulatory Sandboxing) Bill 2020* (the Bill) and Draft Rules which are intended to ensure that the use of the Trial Waiver and Trial Rules is not overly limited. The key points in our submission relate to:

- Changes to the drafting of the Trial Principles that are used by the Australian Energy Regulator (AER) and AEMC to determine "genuinely innovative" Trial Projects (for the purposes of granting Trial Waivers and the making of Trial Rules). We set out potential drafting issues where provisions may be unduly restrictive (meaning less Trial Projects are able to use the Trial Waiver and Trial Rules) and may be inappropriate for the AEMC and AER to assess.
- Promoting the protection of information about a Trial Project – in the context of public consultation requirements and the register of Trial Waivers. Further, we question whether the AER should have regard to the extent and nature of the Trial Project confidential information when deciding to grant a Trial Waiver.
- Changes to clarify drafting around the AER being prevented to grant a Trial Waiver where a Trial Rule has been made for a materially similar Trial Project, and provisions which provide for a similar effect in the reverse. The drafting does not appear to reflect the intent of the Consultation Paper.
- Identifying sections in the *National Electricity Law*, *National Gas Law* and *National Energy Retail Law* (National Energy Laws) which are not covered by the AER's Trial Waiver power and for which a Trial Waiver applicant might seek an exemption.

If you have any questions in relation to this submission, please contact me (Selena.liu@energyaustralia.com.au or 03 8628 1548)

Regards,

Selena Liu
Regulatory Affairs Lead

Submission

1. “Genuinely innovative” and Innovative Trial Principles

EnergyAustralia supports the addition of Innovative Trial Principles (Trial Principles) in the Bill. This will assist the AEMC and AER in determining whether a Trial Project is “genuinely innovative” when considering granting a Trial Waiver and when making a Trial Rule. This is a significant improvement to previous recommendations by the AEMC to not define genuinely innovative. It will support consistent decisions by the AEMC and AER, and assist industry in understanding the Trial Projects that will likely be successful in an application for a Trial Waiver or request for a Trial Rule.

Our comments on the drafting of the Trial Principles relate to ensuring that the drafting is not unduly limiting.

Section 7B(a) contains the principle of whether the Trial Project is “focused on developing new or materially improved approaches” to the relevant topic. The topics depend on the relevant National Energy Laws. e.g. For the *National Electricity law*, the topic is focused on developing new or materially improved approaches to the supply of, or demand for, electricity.

The terms “materially improved” could preclude Trial Projects that could deliver substantial benefits to customers but not necessarily implement a “step change” in the supply of or demand for electricity or involve indirect improvements to the supply or demand for electricity. As drafted, this could have the effect of potential applicants self-assessing the materiality of their Trial Project’s improvement and deciding to not use the Trial Waiver and Trial Rules.

Section 7B(c) contains the principle of whether the Trial Project is able to demonstrate a reasonable prospect of giving rise to materially improved services and outcomes for consumers of electricity, which:

- inherently requires a level of pre-judgement by the AER and AEMC which will be difficult to assess in practice. For similar reasons discussed above, we suggest the word “materially” be removed.
- could require a consideration of the commerciality of the services and uptake by and usefulness of the services to customers. We question whether it is appropriate for the AER and AEMC to assess these matters when they have limited experience in commercial innovation markets and customer experience. The AER has itself recognised that the Trial Guideline and Trial Waiver process will expand the AER’s remit to innovation which is distinct from its current focus on economic regulation and compliance and enforcement.¹
- is different to the National Energy Law objectives² and it is unclear how the principle and objective will interact. The National Energy Law objectives have different variations across the National Energy Laws, but in summary they focus on the promotion of efficient energy services for the long term interest of consumers with respect to price, quality, safety, reliability and security of supply of energy. We suggest the differences and interactions should be further explored in notes in the legislation or in the explanatory memorandum to the Bill.

2. Effect of rule as barrier to a Trial Project

The Bill provides that the AEMC must not take any action in relation to the making of a Trial Rule, if the Trial Rule requested is:

- unnecessary to enable the trial project to be undertaken (including, for example, because the trial project could be undertaken under a trial waiver); or
- is unlikely to enable the trial project to be undertaken.³

¹ AER submission available here: https://www.aemc.gov.au/sites/default/files/2019-08/Rule%20Change%20SubmissionEPR0068%20-%20AER%20-%2020190808_0.PDF, p 7

² The National Electricity Objective, National Gas Objective or National Energy Retail Objective.

³ Section 249(2)(b)(ii), Section 301(2)(b)(ii), of the Bill.

A similar provision exists in the Draft Rules which specifies the AER may terminate its consideration of the application for a Trial Waiver if it considers that the proposed trial project can be carried out satisfactorily without a trial waiver.⁴

In practice, a rule may present a barrier to a Trial Project progressing, in two ways:

- The rule may prohibit an activity that a Trial intends to undertake. For example, a Trial Project might wish to test a proof of concept for an energy plan which does not provide a Feed in tariff (FiT) in exchange for other value provided to the customer. A regulation that requires the mandatory payment of a FiT would prevent this trial. This is a real world example [Confidential].

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- The rule may not explicitly prohibit the activity but achieving compliance with the rule involves a level of cost which is prohibitive and commercially unfeasible, and therefore is in effect a barrier for that trial. This is likely to impact many trials today, particularly in respect of retail regulation where compliance is often carried out via retailer systems, and where system changes to ensure compliance can involve very high cost.

In both scenarios there is an effective barrier to the Trial Project and the resulting benefits to customers will not be realised. We consider that both scenarios should and would not be prevented by the above sections in the Bill and Draft Rules. E.g. A Trial Rule would be necessary to enable the trial or it will likely enable the Trial Project. To eliminate any ambiguity over whether both scenarios are covered, the drafting could be changed to add examples, or this could be explained in the explanatory memorandum.

3. Publication of Trial details

There are several provisions in the Bill and Draft Rules (which set out the amendments to the National Energy Retail Rules, National Electricity Rules, and National Gas Rules (National Energy Rules)) that aim to balance knowledge sharing and contribution to the development of regulatory and industry experience, with the protection of confidential information and intellectual property of the proponent. We consider that the latter protections should be strengthened and highlight specific issues below.

Trial Waiver eligibility requirements regarding confidential information

Under the Draft Rules, the Trial Waiver eligibility requirements provide that in considering whether to grant a Trial Waiver,

“the AER must have regard to whether the extent and nature of the Trial Project confidential information claimed by the applicant may impair, the AER’s ability to provide appropriate public transparency on the conduct and outcomes of Trial Projects; or the appropriate development of regulatory and industry experience arising from the Trial Project.”⁵

EnergyAustralia disagrees with the AER having regard to this matter when deciding to grant a Trial Waiver. Not all trials will deliver a shift in developing the industry more broadly. Some trials would involve a registered participant testing the commercial feasibility of a pilot where the benefits of these trials are primarily received by that participant and their customers. These trials would not always be focussed on developing the industry or contributing to the broader efficiency of the market. Accordingly, there is limited benefit from knowledge sharing with industry for these types of Trial

⁴ 176(1)(c) Draft *National Energy Retail Rules*, and corresponding Rules in the National Electricity Rules and National Gas Rules.

⁵ Rules 8.15.4(a)(4) National Electricity Rules, 178(1)(d) National Energy Retail Rules, 135MC(1)(d) National Gas Rules.

Projects and requiring the ACCC to consider the extent and nature of confidential information when granting a Trial Waiver, would have little relevance.

We make similar comments on the additional Trial Principles set out in the *National Energy Retail Regulations*, *National Electricity Regulations* and *National Gas Regulations* – which require the AEMC to consider “whether the trial project will provide for public sharing of knowledge, information and data resulting from the trial project”.⁶

Public consultation on Trial Waivers

The Bill specifies that before granting a Trial Waiver, the AER must undertake consultation in accordance with the Rules. The Draft Rules in turn require the AER to carry out public consultation on a proposed Trial Waiver, unless it is satisfied that the proposed Trial Waiver:

- is unlikely to have an impact on other registered participants; and
- is unlikely to have a direct impact on retail customers other than those who provide explicit informed consent to participate in the Trial Project.

In relation to the first dot point, EnergyAustralia proposes that the rules should allow for partial consultation instead of full public consultation where impacted registered participants can be identified. This again recognises that not all trials will affect the industry more broadly and therefore public consultation may not serve a purpose and may have the unintended consequence of deterring innovation. Allowing partial consultation would afford the proponent protection around information about their trial by avoiding unnecessary information sharing, but also ensure that impacted participants are consulted.

We also highlight that the meaning of “impact on other registered participants” could capture very remote or indirect impacts on other registered participants. We submit that the drafting be narrowed to “a direct and material impact on other registered participants”.

Register of Trial Waivers

The Draft Rules require a certificate for granted Trial Waivers and that the AER must establish, maintain, and publish a register of all certificates. To protect confidential information relating to the trial, information reported on this register should be limited to the applicant’s name, the duration of the Trial Waiver and the relevant rules. This is especially important for Trial Waivers that are not subjected to public consultation. We submit this should be explicit in the Draft Rules or addressed in the AER’s Trial Guidelines.

4. Restrictions on AER granting Trial Waivers and AEMC in making Trial Rules

In the Bill, there are proposed sections for the National Energy Laws which prevent the AER granting a Trial Waiver if it reasonably considers that the Trial Project is materially similar to a Trial Project for which a Trial Rule has been made or is requested to be made.⁷

Similarly, the AEMC must also consider whether a request for a Trial Rule appears to relate to the subject matter of a Trial Waiver granted by the AER, or an application for a Trial Waiver received by the AER.⁸ If after considering this matter, the AEMC considers that it should not take any action in relation to the request, the AEMC has to make a decision not to take action.

This appears to prevent a Trial Waiver being made for a Trial Project, if there is a Trial Rule made for a materially similar Trial Project. A similar effect applies in the reverse for the making of Trial

⁶ Regulation 5B(c) *National Gas (South Australia) (Regulatory Sandboxing) Variation Regulations 2020*, and corresponding sections in *National Energy Retail (Regulatory Sandboxing) Variation Regulations 2020*, and *National Electricity (South Australia) (Regulatory Sandboxing) Variation Regulations 2020*

⁷ Section 18ZS(1)(a) *National Electricity (South Australia) Act 1996*, and corresponding sections in *National Gas (South Australia) Act 2008* and *National Energy Retail Law (South Australia) Act 2011*

⁸ Section 301(1)(d) *National Gas (South Australia) Act 2008*, and corresponding sections in *National Electricity (South Australia) Act 1996*, and *National Energy Retail Law (South Australia) Act 2011*

Rules. This drafting also appears to apply across different Trial Projects and different proponents/applicants. However, the Consultation Paper states:

It is not the policy intent that a Trial Project simultaneously be the subject of a Trial Waiver and a Trial Rule. As such the Draft Bill requires that the AER not make a Trial Waiver for a Trial Project which is materially similar to a Trial Project for which a Trial Rule has been made or that is the subject of a request for the making of a Trial Rule.⁹

The drafting of the Bill does not appear to reflect this intent, which appears to target the same Trial Project by the same proponent/applicant.

EnergyAustralia would generally agree with the intent (which would prevent forum shopping), but we consider the drafting should be more focussed to where the Trial Waiver and Trial Rule relate to the *same aspect* of the Trial Project. This would address the possibility that a Trial Project might entail various aspects which separately require a Trial Project and Trial Waiver. For example, a trial may need a waiver from the National Energy Retail Rules' obligation which requires specific contents of a bill, and a rule change for interruption of supply notifications.

There is also another restriction to prevent the AER from granting a Trial Waiver where the Trial Project is unlikely to be carried out.¹⁰ Similarly, under the Bill, the AEMC cannot take any action for a Trial Rule request if the associated Trial Project is unlikely to be carried out or offers no reasonable prospect of leading to better services and outcomes for consumers.¹¹ This could be aimed at addressing applications that lack substance, but for same reasons detailed above, these restrictions are inappropriate as it could require a level of pre-judgement. It is also unclear what matters are intended to be considered i.e. whether the reason it will not be carried out is because it is not commercially feasible, the applicant lacks the necessary capability etc. Examples of these matters could be added to the drafting to make it clearer.

5. Coverage of Trial Waiver

The AEMC also requests stakeholders to consider and provide feedback on any provisions across the National Energy Laws that the AER may need the ability to waive under its Trial Waiver power. As drafted, the Trial Waiver is limited to the National Energy Rules, except for section 12 of the National Electricity Law.

There are many substantive obligations in the National Energy Laws which could conceivably form a barrier for Trial Projects and which Trial Projects may need an exemption from. This is particularly the case for the National Energy Retail Law. We list the sections for each of the National Energy Laws which are likely to be relevant in the attachment.

We also submit that the AEMC review the drafting of the Bill to ensure that it can provide an exemption from AER guidelines that are made under the National Energy Laws.

6. Draft rules

The Draft Rules provide that the Trial Projects Guidelines must provide for processes by which and grounds upon which a retail customer participating in a Trial Project may apply to the AER to opt out of a Trial Project.¹² This does not appear to be appropriate nor practical, the customer should be contacting the Trial Project service provider to opt out.

We also ask that the Draft Rules provide that the AER provide reasons for not granting a Trial Waiver if after consultation it decides not to grant it. Currently the Draft rules only require the AER

⁹ <http://www.coenergyCouncil.gov.au/sites/prod.energyCouncil/files/publications/documents/Regulatory%20Sandboxing%20-%20Consultation%20Paper%20Final.pdf>, p 6

¹⁰ Section 182S (1)(b) *National Electricity (South Australia) Act 1996*, and corresponding obligations in *National Gas (South Australia) Act 2008*, and *National Energy Retail Law (South Australia) Act 2011*

¹¹ Section 94(2)(b)(B) *National Electricity (South Australia) Act 1996*, and corresponding obligations in *National Gas (South Australia) Act 2008*, and *National Energy Retail Law (South Australia) Act 2011*

¹² Rule 8.17.3(1) Amendments to National Electricity Rules, and corresponding obligations in *National Gas (South Australia) Act 2008*, and *National Energy Retail Law (South Australia) Act 2011*

to provide draft reasons if it decides to terminate an application after its initial consideration of a Trial Waiver.¹³

¹³ 8.15.2 (b) Amendments to National Electricity Rules , and corresponding obligations in *National Gas (South Australia) Act 2008*, and *National Energy Retail Law (South Australia) Act 2011*

Attachment

National Energy Retail Law

- 23 Standing offer prices
- 24 Presentation of standing offer prices
- 34 Minimum requirements for market retail contracts
- 36 Market retail contract to be consistent with minimum requirements of the Rules
- 37 Presentation of market offer prices
- 38 Requirement for explicit informed consent for certain transactions
- 39 Nature of explicit informed consent
- 40 Record of explicit informed consent
- 41 No or defective explicit informed consent
- 53 Energy Marketing Rules
- 64 Large customer consuming energy at premises
- 88—Requirement for authorisation or exemption (the equivalent to section 12 of the National Electricity Law, Registration or exemption of persons participating in national electricity market, which the Trial Waiver is currently drafted to cover)

National Electricity Law

- Obligations under Part 2A—Retailer Reliability Obligation

National Gas Law

- 91BJ Registration required for market participation (Declared wholesale gas market)
- 91BRD Registration required for market participation (Short Term Trading markets)