

8 August 2019



Mr Owen Pascoe
Australian Energy Market Commission
PO Box A2449
Sydney South, NSW, 1235

Dear Mr Pascoe,

DRAFT REPORT: REGULATORY SANDBOX ARRANGEMENTS TO SUPPORT PROOF-OF-CONCEPT TRIALS, 11 JULY 2019

Endeavour Energy appreciates the opportunity to provide feedback to the Commission on the regulatory sandbox arrangements draft report. The electricity industry is entering a period of significant and prolonged technological change. In promoting the NEO, it will therefore become increasingly important for the regulatory framework to be flexible and responsive to these changes.

The regulatory sandbox arrangements outlined in the Commission's draft report are a positive and necessary addition to the rules. We are broadly supportive of a regulatory sandbox that will provide trial proponents with:

- an innovation inquiry service;
- a new AER regulatory waiver power to address barriers presented by existing rules; and
- a new AEMC trial rule change process that can temporarily change existing rules or introduce new rules of limited application.

We expect the inquiry service will be the tool used most frequently by innovators. The arrangements outlined in the draft report for this service are suitably informal and flexible to facilitate honest and direct feedback on complex regulatory matters.

The AER waiver power and AEMC trial rule change process represent more formal stages available to proponents to address specific regulatory barriers for a defined period and purpose. In our view, the AER waiver power is particularly useful and should be the primary tool relied upon.

The trial rule change option is subject to more conditions and is, relatively speaking, a more administratively burdensome process. This is appropriate given the regulatory knowledge of the participants who are likely to access this tool and its place in the sandbox hierarchy. In our view, the trial rule change option provides more value to the Commission as a way of trialling rule changes where the Commission wishes to better understand the potential impact or to trial differing solutions compared to the value it will provide proponents seeking to trial a specific project.

This highlights the importance of having a clear delineation between the regulatory waiver and trial rule change tools. In applying the rules as drafted we would expect a flexible and pragmatic approach to be taken in relation to the scope of the AER regulatory waiver powers that discourages an overreliance on the trial rule change process.

Our response to the questions in the consultation paper are provided in Attachment 1. If you have any queries or wish to discuss this matter further please contact Patrick Duffy, Regulatory Strategy Manager at Endeavour Energy on (02) 9853 4375 or via email at patrick.duffy@endeavourenergy.com.au.

A handwritten signature in black ink, appearing to read "Jon Hocking".

Jon Hocking
Manager Network Regulation

Attachment 1: Responses to questions in the draft report

QUESTION 1: INNOVATION INQUIRY SERVICE

Will the proposed design of the innovation inquiry service improve the level of guidance available to proof-of-concept trial proponents?

Yes. The inquiry service provides a flexible and suitably informal mechanism for innovators to obtain direction and/or feedback. We agree with the Commission's view, and Ofgem's experience, that this service will be the most common.

QUESTION 2: AER SANDBOX WAIVERS SCOPE OF POWER

(a) Do you agree with the proposed extension of the powers of the AER to grant regulatory relief to innovative trials facing a regulatory barrier?

Yes. This extension would provide an appropriate level of authority to the AER regarding its enforcement of the Rules and provide the requisite transparency and certainty to allow impacted parties to proceed.

(b) Do you agree the waiver power should encompass the National Gas Rules? Why or why not?

N/A

QUESTION 3: REGULATORY WAIVERS IMPLEMENTATION

(a) Should there be a time-limit on the waiver application process, if so, what time-frame would be appropriate?

Yes we agree with the Commission that a relatively short time limit is appropriate.

While the inquiry service is suitably informal and flexible in nature, the regulatory waiver stage of the sandbox will likely involve well-informed innovators with technical issues of defined scope. We acknowledge that it is important to balance the resourcing demands on the AER and the need to support commercial innovation that benefits customers. Subject to additional information requirements or mutual agreement we consider a timeline in the order of 4-6 weeks would be appropriate.

(b) Should the AER be able to extend regulatory waivers to allow successful trials to become fully compliant with the rules?

Yes.

(c) Are the proposed provisions made in the regulatory waiver framework sufficient to protect customers from unintended consequences of participating or being impacted by the conduct of a trial?

Yes. We support the conditions set out by the Commission:

the trial applicant has:

- obtained explicit and informed consent from consumers that are interacting directly with a trial where reasonably practical*
- provided consumers with a process that enables them to request the AER terminates a trial in respect of that customer in circumstances of poor performance by the trial conductor or poor outcomes*

- *put into place provisions for consumers to be reverted to arrangements similar to pre-existing arrangements during or at the end of the trial.*

We would suggest that these conditions are expanded to address a scenario where the trial proponent as not yet engaged with impacted customers (for example and opt-in campaign). Under such a scenario an agreed process for obtaining consent could be agreed to instead.

We also note the Commission states that consumers should be "no worse off" when participating in a trial. We support this principle with respect to consumer protections noting that price and service quality outcomes can be uncertain under a trial.

(d) Is the proposed process of stakeholder consultation sufficient to allow market participants and consumers and their representatives to fully engage with the AER as part of the waiver application process?

Yes.

QUESTION 4: TRIAL RULE MAKING PROCESS

(a) Is the proposed process necessary and appropriate for a trial rule change?

Yes. There may be scenarios where a proponent requires new rules to conduct a trial, most likely in conjunction with a waiver from existing rules.

(b) Should there be an opportunity to make submissions or for other prospective participants to join the trial? Why or why not?

Yes. While it is important to support innovation, there should be an opportunity for impacted parties to make suggestions or raise concerns with a proposal. However, we would expect there to be a relatively higher evidentiary burden on respondents seeking to materially modify (or reject) a proposal if a proponent has met the pre-conditions and satisfied the Commission's rule making tests.

We would also expect proponents to have engaged with impacted parties prior to lodging a trial rule change request to limit such occurrences.

We are also supportive of there being an opportunity for interested parties to join a trial provided this does not delay the process outlined by the Commission in the draft report. Consideration will need to be given to how the final determination could be tailored to each trial proponent where it is necessary to vary the scope, conditions, information requirements or consumer protections that apply.

Consideration should also be given to whether an opportunity is provided for interested parties to join a trial rule change post final determination. This would be limited to long-running trials or instances where significant time is required to make a full rule change. This opportunity could potentially be provided at the time of considering an extension to a trial rule.

QUESTION 5: NATIONAL GAS RULES

Do you agree that the trial rule making process should encompass the National Gas Rules? Why or why not?

N/A.

QUESTION 6: RULE MAKING TESTS

Do you agree that the existing rule making tests are the most appropriate test for trial rule changes? Why or why not?

Yes. Innovation is necessary for promoting economic efficiency over the long term and therefore trials are likely to satisfy the rule-making test. We support the Commission's view that the rule-making test would be applied to the trial itself, rather than the potential outcome of the trial. It is important that a lower threshold applies to assessing trials given the uncertainty associated with them. In our view, the mere potential of a trial to produce a positive benefit to customers satisfies the "promotes" aspect of the NEO.

QUESTION 7: LODGING A TRIAL RULE CHANGE PROPOSAL

Do you agree with the Commission's draft recommendation that any person should be able to submit a trial rule change proposal? Why or why not?

Yes. We do not consider it appropriate to restrict the trial rule change proponents to the AER and AEMO. This restricted scenario would put the onus on the AER and AEMO to commit resources to removing barriers on the innovators behalf. As noted by the Commission, forum shopping can be dealt with through preconditions requiring rule change proponents to demonstrate that its proposed trial cannot be dealt with through an AER waiver or through AEMO procedures.

QUESTION 8: RULE LODGEMENT PRECONDITIONS

Are the existing rule change request requirements appropriate? Should additional requirements, such as demonstrating that the trial cannot otherwise be carried out, be met prior to a rule change process commencing?

Yes the existing rule change request requirements should apply along with the additional requirements specified in section 5.4, specifically:

A trial rule change is the most substantive option for facilitating a trial, and should therefore only be made if a trial is unable to be carried out in a reasonable manner, either under the existing rules or through the AER's proposed new waiver power.

We agree with the Commission's view that a "genuinely innovative" precondition is not required as it would be duplicative with the rule making tests that a proponent must satisfy.

QUESTION 9: APPLICABILITY OF THE TRIAL RULE CHANGE PROCESS

Should the trial rule change process be restricted to a time limited trial, where the trial has a reasonable prospect of delivering a material benefit to consumers and where consideration of a permanent rule change would otherwise be hampered through inadequate information or experience? Why or why not?

Trials should be time limited, otherwise there will be no incentive to make permanent improvements to the rules. The wording of this question "reasonable prospect of delivering a material benefit" suggests a higher standard than the criterion outlined in Question 8 above in conjunction with the existing rule change request requirements. Terms like "reasonable" and "material" could present additional hurdles and disputes through differing interpretations. We consider the criterion discussed in Question 6 and 8 are appropriate.

QUESTION 10: TRIAL RULE SCOPE

Should a trial rule be restricted to a particular participant in a manner similar to participant derogations or should it accessible to other parties conducting similar trials? Does it depend on the circumstances? Why or why not?

A trial rule should be available to multiple participants where substantively similar trials are being conducted requiring similar additions to the rules. We note that the conditions, information and

reporting requirements and consumer protections that apply to each participant may need to be bespoke and separate.

QUESTION 11: INFORMATION REQUIREMENTS

What additional information requirements should attach to the trial rule change process? Why?

The information listed in section 5.5 of the draft report is appropriate. A flexible approach should be adopted acknowledging there may be instances where additional (or less) information is required.

QUESTION 12: TRIAL RULE CHANGE CONDITIONS

Should the AEMC have the ability to impose conditions on the use of the trial rule and the trial proponent? Why or why not?

Yes.

QUESTION 13: PROCESS TERMINATION

Should the Commission have the ability to terminate a trial rule change process that is in progress? If so, what criteria should apply?

Yes. A termination could be triggered in the circumstances outlined in section 5.6.2 of the draft report.

QUESTION 14: PATHWAY TO RULE CHANGE

Do the current rule change process options (standard, fast-track and expedited) provide an appropriate pathway for successful trials to lead to full rule change? Is there another appropriate pathway for trials to lead to rule changes?

Yes. Following a successful trial rule the existing rule change processes provide sufficient pathways to making a permanent rule change.

QUESTION 15: TRIAL RULE CHANGE FEES

Should the Commission recover some or all of its costs through a fee paid by trial rule change proponent?

Yes, in the circumstances described in 5.6.4 of the draft report.

QUESTION 16: CONSUMER CONSENT REQUIREMENTS

Will consumer consent requirements unduly inhibit trials that may otherwise be worthwhile? If so, what alternative arrangements would be preferred and why?

It is unlikely that consumer consent will present a material barrier to trials. In cases where trial participants must perform certain actions (or inactions) and/or provide property access for the housing of trial related equipment explicit consumer consent will be required for the trial to proceed or function. More broadly, it is in the interests of innovators to obtain consent to mitigate the risk of reputational damage.

Therefore, consumer consent, particularly for those directly impacted by a trial, should be a critical consideration in whether a trial rule is implemented.

