

CHAPTER 8

Amendments to Chapter 8 of the NER

8. Administrative Functions

Part J Trial waivers, trial Rules and trial projects

8.13 Purpose

- (a) The purpose of this Part J is to make provision for:
 - (1) the granting of *trial waivers* by the *AER* to enable *trial projects* to be carried out;
 - (2) the information that is required to be provided to the *AEMC* in an application for the making of a *trial Rule*; and
 - (3) oversight and monitoring by the *AER* of *trial projects* that are carried out under *trial waivers* or *trial Rules*.
- (b) For the purposes of this Part J:
 - (1) **explicit informed consent** to participating in a *trial project* is given by a *retail customer* to a person carrying out, or involved in the carrying out, of a *trial project* where:
 - (i) the person, or another person acting on behalf of that person, has clearly, fully and adequately disclosed all matters relevant to the consent of the *retail customer*, including each specific purpose or use of the consent; and
 - (ii) the *retail customer* gives consent to participating in the *trial project*:
 - (A) in writing signed by that customer;
 - (B) by electronic communication generated by that customer; or
 - (C) verbally, so long as the verbal consent is recorded in such a way that it can be verified and made the subject of a record under subparagraph (2).
 - (2) Whenever a person is required to obtain explicit informed consent of a *retail customer* under this Part or under the *Trial Projects Guidelines*, the person must:
 - (i) create a record of each explicit informed consent in such format and including such information as will enable:
 - (A) the *AER* to verify the person's compliance with the relevant requirements under this Part or under the *Trial Projects Guidelines* relating to explicit informed consent; and

- (B) the person to answer enquiries from a *retail customer* relating to the customer's explicit informed consent;
 - (ii) retain that record for at least 2 years; and
 - (iii) on request by a *retail customer* and at no charge, provide the customer with access to a copy of the record of any explicit informed consent given by that customer.
- (3) It is established that the required explicit informed consent is not obtained if:
- (i) the *retail customer* raises the issue with the trial applicant either by asserting that the consent was not obtained or by requesting production of a record of the consent;
 - (ii) the issue is so raised within 12 months after the date of commencement of the *trial project*; and
 - (iii) the trial applicant either admits that the consent was not obtained or does not produce a satisfactory record of the informed consent as soon as practicable, but in any event within 10 business days, after the issue is so raised.
- (4) References to *retail customer* include a customer of an exempt seller (as defined under the *National Energy Retail Law*).

8.14 The Trial Projects Guidelines

- (a) The *AER* must make and *publish Trial Projects Guidelines* that specify:
- (1) the approach the *AER* proposes to follow in considering and granting *trial waivers*, including:
 - (i) the timeline within which the *AER* will determine applications for *trial waivers*;
 - (ii) the *AER's* proposed approach to assessing whether the applicant has satisfied the *information requirements* and the *eligibility requirements*;
 - (iii) consumer protection measures that the *AER* may require as a condition of granting a *trial waiver*; and
 - (iv) reporting obligations required by the *AER* as a condition of granting a *trial waiver*, which may include a requirement for the applicant to publicly report on *trial project* outcomes;
 - (2) the approach that the *AER* proposes to follow in overseeing the conduct and outcomes of *trial projects*;
 - (3) each of the other matters required or permitted under this Part to be specified in the *Trial Projects Guidelines*;
 - (4) any matters required or permitted under the *National Energy Retail Rules* or the *National Gas Rules* to be specified in the *Trial Projects Guidelines*; and

- (5) any other matter that the *AER* considers appropriate in relation to the grant of *trial waivers* and the monitoring of *trial projects* conducted under *trial waivers* or *trial Rules*.
- (b) The *AER*:
 - (1) must develop and make the *Trial Projects Guidelines*; and
 - (2) may amend the *Trial Projects Guidelines* from time to time, in accordance with the *Rules consultation procedures*.
- (c) The *AER* may make minor or administrative amendments to the *Trial Projects Guidelines* under paragraph (b)(2) without complying with the *Rules consultation procedures*.

8.15 Trial waivers

8.15.1 Application for a trial waiver

- (a) An application for the grant of a *trial waiver* must be made to the *AER* in the form (if any) prescribed in the *Trial Projects Guidelines*.
- (b) An application must contain the following information (the ***information requirements***):
 - (1) details of the particular sections of the *Law* and/or provisions of the *Rules* in respect of which the person seeks a *trial waiver*;
 - (2) identification of the *trial project confidential information*; and
 - (3) any other information specified in the *Trial Projects Guidelines*.
- (c) After receiving an application for the grant of a *trial waiver*, the *AER* may, by notice in writing, request the applicant to provide, by a specified date, such further information as the *AER* may require in connection with the proposed *trial project* and the requested *trial waiver*.
- (d) For the purposes of Part 3 Division 6 of the *Law*, information provided by an applicant to the *AER* in, or in connection with, an application for a *trial waiver* that is not identified as *trial project confidential information* is not information given to the *AER* in confidence. Disclosure of such information by the *AER* is authorised use and disclosure for the purposes of section 44AAF(2) of the *Competition and Consumer Act 2010*.

8.15.2 Initial consideration of a proposed trial waiver

- (a) Subject to paragraph (b), after receiving an application for the grant of a *trial waiver*, the *AER* may terminate its consideration of the application at any time if:
 - (1) the *AER* considers that the application does not comply with the information requirements;
 - (2) the applicant does not respond to a request for further information under clause 8.15.1(c) by the specified date, or the *AER* considers that the applicant has not provided a sufficient response to such a request;

- (3) the *AER* considers that the proposed *trial project* can be carried out satisfactorily without a *trial waiver*; or
 - (4) the *AER* otherwise considers that the application is misconceived or lacking in substance.
- (b) If, having regard to the matters set out in paragraph (a), the *AER* considers that it should terminate its consideration of an application, the *AER*:
- (1) must notify the applicant in writing that it has, and the reasons why it has, formed that view, and invite the applicant to make submissions or to provide further information within 7 days; and
 - (2) must take account of any submissions or information so provided by the applicant before deciding to terminate its consideration of the application.

8.15.3 Consultation regarding a proposed trial waiver

- (a) Subject to paragraph (c), the *AER* must carry out public consultation in relation to a proposed *trial waiver*, unless it is satisfied that the proposed *trial waiver* and *trial project*:
- (1) is unlikely to have an impact on other *registered participants*; and
 - (2) is unlikely to have a direct impact on *retail customers* other than those who provide explicit informed consent to participate in the *trial project*.
- (b) The *AER* must consult *AEMO* in relation to any potential impact of a proposed *trial waiver* and *trial project* on *AEMO*'s operation of the *power system* and the *market*.
- (c) The *Trial Projects Guidelines* must specify the procedures by which the *AER* will carry out public consultation in relation to a proposed *trial waiver*.

8.15.4 Eligibility requirements

- (a) The *AER* may only grant a *trial waiver* if it is satisfied that, in addition to the matter specified in section 16A(2) of the *Law*:
- (1) the *trial project* is genuinely innovative;
 - (2) the *trial project* has the potential to lead to better services and outcomes for consumers;
 - (3) the *trial project* is unable to be conducted without a *trial waiver*;
 - (4) the *trial waiver* will be appropriately limited in time, scope and scale;
 - (5) adequate consumer protections will be maintained in connection with the *trial project*; and
 - (6) that any other eligibility requirement specified in the *Trial Projects Guidelines* has been satisfied,
- (the *eligibility requirements*).
- (b) In considering whether to grant a *trial waiver*, the *AER* must have regard to:

- (1) whether the carrying out and monitoring of the *trial project* is likely to contribute to the development of regulatory and industry experience;
 - (2) whether the *trial project* may have an adverse effect on the safety, reliability or security of supply of electricity and the measures that the applicant will take to avoid or mitigate such risks;
 - (3) whether the *trial project* may have an adverse effect on *AEMO's* operation of the *power system* and *market*, and the measures that the applicant will take to avoid or mitigate such adverse effects; and
 - (4) whether the extent and nature of the *trial project confidential information* claimed by the applicant may impair:
 - (i) the *AER's* ability to provide appropriate public transparency in relation to the conduct and outcomes of *trial projects*; or
 - (ii) the appropriate development of regulatory and industry experience arising from the *trial project*.
- (c) In considering whether to grant a *trial waiver*, the *AER* may have regard to any other matter it considers relevant, including (but not limited to) any relevant consideration that may be specified in the *Trial Projects Guidelines*.

8.15.5 Extension or variation of a trial waiver

- (a) The *AER*, having regard to the matters set out in clauses 8.15.4(b) and (c), may extend a *trial waiver* for a further specified period if the *AER* remains satisfied of:
 - (1) the matter specified in section 16A(2) of the *Law*; and
 - (2) the *eligibility requirements*.
- (b) The *Trial Projects Guidelines* may provide for any additional mandatory requirements and any relevant considerations for the extension of a *trial waiver*.
- (c) The *AER* may:
 - (1) prior to the scheduled expiry of a *trial waiver*, impose such further conditions, or modify the existing conditions, of the *trial waiver* with the agreement of the applicant; or
 - (2) if it extends a *trial waiver*, impose such further conditions, or modify or retain the existing conditions of the *trial waiver*, as it considers appropriate.

8.15.6 Evidence of a trial waiver

- (a) A certificate signed by a person (or persons) authorised by the *AER* certifying that a person named in the certificate has been granted a *trial waiver*, and setting out:
 - (1) the extent and duration of the *trial waiver*; and
 - (2) any conditions subject to which the *trial waiver* was granted,

is evidence of the *trial waiver*.

- (b) The *AER* must establish, maintain and *publish* a register of all certificates issued under paragraph (a).

8.16 Request for a trial rule

- (a) For the purposes of section 96B(3)(a) of the *Law*, a request for the making of a *trial Rule* must contain the following information:
 - (1) the name and address of the person making the request;
 - (2) a detailed outline of the proposed *trial project*;
 - (3) an explanation of how the proposed *trial project* will or is likely to lead to the achievement of the national electricity objective;
 - (4) an explanation of the expected benefits and costs of the *trial project* for consumers and other market participants and the innovation that it may lead to;
 - (5) a description of the proposed *trial Rule*;
 - (6) a summary of the person's previous engagement with the *AER*, *AEMO* or any *jurisdictional regulator* in relation to the *trial project*;
 - (7) an explanation of why the *trial Rule* is needed in order to conduct the *trial project*;
 - (8) an explanation of how consumer protections will be maintained under the *trial Rule*, including whether and how the explicit informed consent of *retail customers* participating in the *trial project* will be obtained;
 - (9) the applicant's approach to consumer engagement and dispute management;
 - (10) an explanation of how risks to the safety, reliability and security of the supply of electricity will be avoided or mitigated;
 - (11) an explanation of whether the *trial project* may have an adverse effect on *AEMO's* operation of the *power system* and the *market*, and if so, how such adverse effects will be avoided or mitigated;
 - (12) evidence that the person has the operational and financial ability to carry out the *trial project*;
 - (13) identification of the *trial project confidential information*;
 - (14) an explanation of how the *trial Rule* is likely to contribute to the development of regulatory and industry experience; and
 - (15) an outline of the trial closure process, and how participating *retail customers* will revert to their pre-existing supply arrangements after closure of the *trial project*.
- (b) For the purposes of section 24 of the *Australian Energy Market Commission Establishment Act 2004* (SA) (as applied by section 31 of the *Law*), information provided by an applicant to the *AEMC* in, or in connection with,

a request for the making of a *trial Rule* that is not identified as *trial project confidential information* is not information given to the *AEMC* in confidence.

8.17 Monitoring of trial projects

8.17.1 Application

This Rule applies in relation to *trial projects* conducted under *trial waivers* and *trial Rules*.

8.17.2 Compliance monitoring

- (a) A person to whom a *trial waiver* is granted must comply with all conditions upon which the *trial waiver* is granted.

Note

The AEMC recommends to the COAG Energy Council that this clause be classified as a civil penalty provision under the National Electricity (South Australia) Regulations.

- (b) A person who applies for the making of a *trial Rule* must comply with the *trial Rule*.

Note

The AEMC recommends to the COAG Energy Council that this clause be classified as a civil penalty provision under the National Electricity (South Australia) Regulations.

- (c) The *AER* must monitor compliance with:
- (1) any conditions on which a *trial waiver* is granted; and
 - (2) the provisions of a *trial Rule*.

8.17.3 Early termination and opting out of trial projects

The *Trial Projects Guidelines* must provide for processes by which and grounds upon which:

- (1) a *retail customer* participating in a *trial project* may apply to the *AER* to opt out of a *trial project*;
- (2) the *AER* may:
 - (i) terminate a *trial waiver* before its scheduled expiry; or
 - (ii) recommend to the *AEMC* that the *AEMC* repeal a *trial Rule* before its scheduled expiry,including provision for the *AER* to do so either on its own motion, or upon application by the trial applicant, a *retail customer* or *Registered Participant* affected by the *trial project*, or *AEMO*; and
- (3) a person to whom a *trial waiver* is granted must allow a *retail customer* to opt out of a *trial project*.

Amendments to Chapter 10 of the NER

10. Glossary

eligibility requirements

The requirements for grant of a *trial waiver*, as specified in clause 8.15.4(a).

information requirements

The information that is required to be contained in an application for a *trial waiver* in accordance with clause 8.15.1(b).

National Gas Law

Means the *National Gas Law* set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia.

National Gas Rules

Has the same meaning as in the *National Gas Law*.

trial project

Has the same meaning as in the *National Electricity Law*.

trial project confidential information

Information regarding a *trial project* and submitted to:

- (a) the *AER* in, or in connection with, an application for a *trial waiver*; or
- (b) the *AEMC* in, or in connection with, a request for the making of a *trial Rule*, that is identified by the applicant as being confidential.

Trial Projects Guidelines

Guidelines made and published by the *AER* under rule 8.14.

trial Rule

A Rule made by the *AEMC* under section [96B] of the *National Electricity Law*.

trial waiver

A waiver granted by the *AER* under section [16A] of the *National Electricity Law*.