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Contact Officer: **Olivia Boyd**
Contact Phone: **02 6243 1248**

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Mr Alex Oeser
Australian Energy Market Commission
PO Box A2449
SYDNEY SOUTH NSW 1235

Dear Mr Oeser

Regulatory sandbox arrangements to support proof of concept trials

The Australian Energy Regulator (AER) thanks you for the opportunity to comment on the AEMC's Draft Rules for the *Regulatory sandbox arrangements to support proof-of-concept trials* review.

In 2019 we provided extensive input into the sandbox arrangements review, including a proposal to create a 'sandbox waiver', to be governed by the Trial Projects Guideline. We also provided input on the scope of the innovation enquiry service.

We recognise, as did a number of other submissions, that the introduction of regulatory sandbox arrangements marks an important change to the AER's role, and look forward to implementing the recommendations in the AEMC's final report. We will work collaboratively with stakeholders to develop a sandbox waiver process that is focused on supporting a better process for reform in the long-term interests of customers.

We support the AEMC's draft proposed rules and consider that these largely give effect to the policy intent of the AEMC's final report of September 2019. We have provided more specific comments on the AEMC's draft proposed rules at Attachment A.

Yours sincerely



Sarah Proudfoot
General Manager, Consumers and Markets

Attachment A

Trial project guideline

We consider that the drafting of the rules for establishing the trial projects guideline strikes the right balance between setting clear principles without overly constraining the AER's administrative processes. Allowing sufficient flexibility for the AER to design the waiver application, assessment and monitoring and reporting processes will be important for the success of the sandbox arrangements. In particular,

- We consider that the design of the sandbox waiver process would benefit from additional, targeted stakeholder consultation through a guideline development process.
- As sandboxing is a regulatory experiment in and of itself, we expect that the waiver process will likely evolve over time based on the AER's and stakeholders' experiences.
- Ofgem has found that the sandbox 'innovation enquiry service' and sandbox application process requires significant dedicated resourcing. The AER may need to adapt sandbox waiver processes to our resource availability.

Knowledge sharing and compliance monitoring by the AER

Clause 8.17.2(c) of the draft proposed rules requires that the AER monitor compliance with waiver conditions and the provisions of a trial Rule.¹ We suggest that the AEMC consider whether the final rules should contain an additional power for the AER to report on the outcomes of a trial project under a trial waiver or trial rule, and to compel information from waiver recipients for the purposes of reporting on the outcomes of a trial project under a trial waiver or trial rule.

Treatment of confidential information

We suggest that the AEMC make some amendments to strengthen the treatment of confidential information in the draft proposed rules. We agree that it is important to ensure that the onus of identifying confidential information is placed on applicants as part of the application process.

We recommend that an additional power should be added to the draft rules to enable the AER to disclose confidential information both publicly, and privately to particular persons (such as the AEMC), in order to ensure that the outcomes of trials can be adequately reported. We consider that information generated in the course of the trial will be important in assessing the implications of the trial for consumers and potential reform of energy regulations. We consider that an additional power to disclose confidential information about a trial and trial outcomes will support sharing of information to ensure that sandboxed trial projects provide benefits for all customers.

Early termination of a trial projects waiver and opting out of trials

¹ Note that any comments in this submission on draft proposed rules in the NER also apply where the draft proposed rule is replicated in the NERR and NGR.

We agree with the approach set out by the AEMC in draft clause 8.17.3(2) with respect to terminating trials. In addition, we suggest that the draft rules should include an ability for the AER to vary the conditions of a waiver, in addition to the existing drafting which allows the AER to terminate a waiver. We consider that this will provide the AER with more flexible options to respond to any unforeseen circumstances in connection with a sandboxed trial project.

We consider that the provision allowing a retail customer participating in a trial project to apply to the AER to opt out of a trial project could be strengthened. The ability to apply to the AER to opt out of a trial project under clause 8.17.3(1) is currently limited to ‘retail customers’. We suggest that this could be extended to include customers in embedded networks, and any other customers of exempt sellers, who are not customers of authorised retailers.

Explicit informed consent

We support defining a clear explicit informed framework in the energy rules for sandboxed trial projects that are carried out under a waiver or trial rule change.

We suggest that the existing framework for explicit informed consent in the NERL and NERR is broadly sufficient, and defining a separate explicit informed consent section of the NERR to apply to trial projects may not be necessary. Sections 39, 40 and 41 of the NERL specify explicit informed consent provisions. Section 38(d) of the NERL allows explicit informed consent laws to apply to any other transactions specified in the NERL or NERR. This is how explicit informed consent requirements have been applied to aggregation of premises of small business customers under r. 5(3) of the NERR, bill smoothing under r. 23(2), frequency of bills under r. 24(2), direct debit arrangements under r. 32(3)(b) and customer transfers under r. 57(1)(a). We suggest that a similar approach to explicit informed consent for trial projects in the NERR would be preferable to recreating a separate explicit informed consent framework in the NERR.

With respect to the NER and NGR, we agree with establishing a new rule that replicates the explicit informed consent framework in the NERL. However, we note that this framework under the draft proposed cl. 8.13(b) of the NER and Part 15E s. 135L of the NGR only seems to replicate sections 39 and 40 of the NERL. We suggest that the further provisions in section 41 of the NERL, which addresses arrangements where explicit informed consent was *not* obtained, would also be appropriate in order to provide additional protection for customers.

Definition of ‘retail customer’ in the NERR

The AEMC proposes to introduce a new definition of ‘retail customer’ under the draft proposed section 174(c) of the NERR. We suggest that the defined term ‘customer’ in section 5 of the NERL may be a more appropriate term. This encompasses both existing customers of retailers and potential customers of retailers (i.e. someone who “proposes to purchase energy for premises from a retailer”). We consider this will capture both existing and potential customers in areas of the draft proposed rules where the term ‘retail customer’ is currently used, such as explicit informed consent (NERR draft proposed cl. 174), and consultation regarding a proposed trial waiver (NERR draft proposed cl. 177).

We note that cl.10 of the NER defines a ‘retail customer’ as a ‘small customer’ or a ‘large customer’, which in turn are defined as having the meaning given in section 5 of the NERL.

Therefore, the use of the defined term ‘retail customer’ in the NER would be consistent with use of the defined term ‘customer’ in the NERL.

As per our comments on opting out, above, we suggest that any rights of retail customers under the draft proposed rules should be extended to include customers in embedded networks, and any other customers of exempt sellers, who are not customers of authorised retailers.

Definition of ‘consumer organisation’

We suggest that the AEMC further consider the definition of a ‘consumer organisation’ under Chapter 10 of the draft proposed rules. In particular, we note that the definition of a consumer organisation under part (a) of the draft proposed definition might include organisations that represent generators and network businesses. These would not usually be thought of as ‘consumer organisations’. We also note that the definition under (b) of the draft proposed definition could be read to exclude organisations that have a broader organisational objective or purpose, of which advocacy for energy consumers is only one component. For example, a number of organisations focus on poverty and social justice as their primary objective, but also provide valuable services to the community by representing the interests of energy consumers as part of those broader social objectives. More broadly, we note that part (a) refers to representing and promoting the interests of ‘members’. We consider that the final definition of a ‘consumer organisation’ should encompass organisations that act in the interests of consumers, without necessarily requiring those consumers to be ‘members’ of the organisation.

Civil penalties for compliance with waiver and trial rules conditions

The AEMC has recommended that compliance with the conditions of a trial projects (sandbox) waiver should be subject to civil penalties. We strongly support this recommendation as providing an appropriate mechanism for enforcing those conditions. We consider that civil penalties for non-compliance with waiver conditions are an important component of the sandbox waiver framework.

Other aspects of the AER’s waiver power

We agree with the rules drafting regarding guideline information requirements, assessment timeframes, public consultation, eligibility requirements and knowledge sharing. More specifically, we consider that the provisions made in the draft rules for the AER to terminate waiver applications will support the administrative efficiency of the sandbox waiver application process. We also support the AEMC’s proposed rules requiring the AER to consult on waiver applications under certain circumstances. In practice, the AER would consult publicly on most waiver applications.