



EnergyAustralia

LIGHT THE WAY

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Commissioners
Australian Energy Market Commission
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Submitted electronically: <https://www.aemc.gov.au/contact-us/lodge-submission>

Dear Commissioners,

Draft Rules to implement regulatory sandboxes

EnergyAustralia welcomes the Australian Energy Market Commission's (AEMC's) consultation on the Draft Rules to implement the regulatory sandboxes.

EnergyAustralia is one of Australia's largest energy companies with ~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).

Overall, we are a supporter of the regulatory sandbox arrangements. Our specific comments on the Draft Rules to implement regulatory sandboxes (Draft Rules) are set out in detail below.

In summary, our key points are:

- The eligibility criteria for Trial Waivers should only require one of "genuinely innovative" and "lead to better services and outcomes for consumers" to be met (not both).
- The terms "genuinely innovative" and "lead to better services and outcomes for consumers" which are eligibility criteria for Trial Waivers and included in the Trial Rule making test, require more definition. The final rules should require this to be a matter covered in the Australian Energy Regulator's (AER) Trial Projects Guidelines (Guidelines).
- The Guidelines should also cover governance arrangements and in particular any boundaries imposed on Trial Waiver applications and prioritisation approaches.

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

Regards,

Sarah Ogilvie
Industry Regulation Leader

1. The meaning of terms “genuinely innovative” and “lead to better services and outcomes for consumers”

The eligibility criteria for a Trial Waiver is set out in the Draft Rules: for a Trial Project to be eligible for a Trial Waiver it must be “genuinely innovative”, and have “the potential to lead to better services and outcomes for consumers” (among other criteria).

EnergyAustralia contends that a Trial Project should be eligible for a Trial Waiver if either of these two criteria are met (along with the other criteria), rather than both criteria having to be met.

The AER submitted that in the context of Trial Rules:

‘a suitable definition of “genuinely innovative” could be that: “The AER must be satisfied that the trial will have a reasonable prospect of delivering material benefits to customers, where consideration of a rule change would otherwise be hampered through inadequate information or experience’.¹

This suggested definition of “genuinely innovative” appears to focus on the second criteria (“better services and outcomes”) and if so, may be an alternative way of specifying that a Trial Project should be eligible for a Trial Waiver when there are better outcomes for customers regardless of whether the trial is ground-breaking in other ways. This would tend to support the need to only satisfy one criterion (“better services and outcomes”) rather than both.

Separately, we also note that the two terms are undefined. We ask that the AEMC make final rule/s that require definitions to be included for these two terms in the Guidelines made by the AER. This would provide an opportunity for industry to provide feedback via the AER’s consultation on the Guidelines and allow for the definitions to evolve in the future as appropriate.

While the Guidelines mainly deal with Trial Waivers, it would also be consistent if the definitions and other guidance on the two terms also applied in the context of Trial Rules given that the same terms are used in the Trial Rule making test.

In relation to the specific definition of the term “genuinely innovative”, the Office of Gas and Electricity Markets’ (UK) (Ofgem) definition of “genuinely innovative” may be a useful example and is aligned to its ordinary meaning. Ofgem’s definition is: “the product or service is not already being offered in the market or the business model being used to deliver the service or product is new and sufficiently different”.²

Further, the definition of “genuinely innovative” should not assess the commerciality or financial viability of a Trial Project. To do so would pre-judge the outcome of the Trial and could easily serve to inhibit innovation.

With regard to the definition of “better services and outcomes for consumers”, we suggest this should show how this criterion is different to the assessment of the relevant energy objective (National electricity objective, national energy retail objective or national gas objective, as applicable).

¹ AEMC’s Final report Regulatory Sandbox arrangements to support Proof-of-concept trials, 26 September 2019, p 38 (available here: <https://www.aemc.gov.au/sites/default/files/2019-09/Regulatory%20sandbox%20toolkit%20-%20Final%20Report.pdf>)

² https://www.ofgem.gov.uk/system/files/docs/2018/09/what_is_a_regulatory_sandbox.pdf, p 2.

We also consider any definitions or guidance around the terms “genuinely innovative” and “better services and outcomes for consumers” should not be too restrictive. For example, there should not be a materiality threshold that refers to the scale or level of change in the innovation. Smaller innovations may take less time and resources to assess a Trial Rule or Waiver, and still deliver tangible benefit to customers. Often innovative energy products may involve a different product and pricing structure, but still involve the sale/supply of electricity or gas, and therefore not be considered a “step change”. These may generally be permitted under the Laws and Rules but there may be individual Rules which are a barrier or do not apply as intended.

2. Governance and process arrangements

The Draft Rules provide that the Guidelines must specify the timeline for determining Trial Waivers but there is no Guideline requirement regarding how the AER may limit or set boundaries on Trial Waiver applications or prioritise approval or feedback on applications that are received.

The final rules should explicitly require the Guidelines to cover these matters as it goes to the potential scope and operation of the regulatory sandbox arrangements. Again, explicitly requiring the Guidelines to address these matters, will ensure they are addressed and allow industry to provide their views via consultation on the Guidelines.

The AER discussed prioritisation in its submission to the Draft report.³ The AER noted that it may adopt processes that enable it to compare Trial Waiver applications, and choose the best waiver applications out of a similar set of projects, or limit waiver applications to specific types of participants.

EnergyAustralia has concerns with this approach as we consider it important to ensure that any prioritisation does not negatively impact competitive neutrality across the market. Although the AER may require that participants put forward a brief addressing all key information, the AER should not try to assess the likely chance of success of the trial (or the level of innovation or outcomes for customers as noted above). Although the AER does play this role in monopoly markets (i.e. distribution and transmission), it is not appropriate for it to do this in the retail market.

Additionally, if the AER were to choose what it considers is the best Trial Waiver application out of similar projects, this would prevent the non-successful applicant/s from being able to participate in running their own trials or taking a similar product or service to market for some time (due to non-compliance being the reason for the Trial Waiver to be sought in the first place). This would provide an unfair advantage to the successful applicant/s and thus would have detrimental impacts on competition.

The AER currently has limited experience with innovation matters in the retail energy market, and this would also pose a risk for retailers who apply for Trial Waivers if the AER were to decide the grant of them based on the factors outlined above. The AER has also recognised that the Guideline and Trial Waiver process will expand the AER’s remit to

³ AER submission available here: https://www.aemc.gov.au/sites/default/files/2019-08/Rule%20Change%20SubmissionEPR0068%20-%20AER%20-%2020190808_0.PDF

innovation which is distinct from its current focus on economic regulation and compliance and enforcement.⁴

In terms of other governance arrangements, we observe that Ofgem may be a precedent to determine what the guidelines should cover and possible approaches. For example, Ofgem receives applications in time windows, which likely provides them the ability to manage workload, awards multiple Trial Waivers, and has specified date milestones and forms to streamline their process. Possibly, there should be no more than one application for a Trial Waiver per participant per time window to further limit the impact to the AER in assessing and monitoring Trial Projects.

Coverage of Trial waiver and Trial Rules

Lastly, we note that the Trial Waivers and Trial Rules only extend to the exemptions of the Laws and Rules and making of the Rules. We ask that for completeness, the AEMC consider extending this coverage to the National Electricity Regulations, National Energy Retail Regulations and National Gas Regulations and AER guidelines that can be made under the Laws.

⁴ 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.