8 August 2019

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

public interest
ADVOCACY CENTRE

Dear Mr Pascoe,

Submission to draft report on regulatory sandbox arrangements

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon people who are marginalised and facing disadvantage. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training. The Energy + Water Consumers' Advocacy Program represents the interests of low-income and other residential consumers, developing policy and advocating in energy and water markets.

PIAC welcomes the opportunity to respond to the AEMC's draft report on regulatory sandbox arrangements and to build on the feedback provided at the public forum in July.

Toolkit as a whole

PIAC supports the introduction of a set of regulatory sandbox tools that allow changes to the regulatory framework to be trialled in a manner that balances the potential to capture the benefits of transformation against the risks.

We see potential for prudent trials to be facilitated by the sandbox toolkit across the supply chain from behind the meter products and services, retail, networks through to wholesale. For instance, it could be used to trial wholesale demand response programs in a controlled manner and assist the development of more permanent rules and guidelines across the NEM.

However, there remain several foundational issues that must be resolved if the sandbox toolkit is to succeed. Some of these should be settled at the AEMC's policy-setting level while others are better settled later during more detailed design such as determining AER guidelines.

An essential part of the effective design and introduction of any such toolkit is the definition of success. For instance, what are the metrics that will be used to objectively define success but still maintain sufficient flexibility to apply to a wide range of new and innovative proposals? What reporting and assessment regimes will be used to help ensure transparency and information sharing across the industry and stakeholders?

These are equally relevant for both the assessment of individual trials as well as for assessing the performance of the sandbox toolkit as a whole. We recommend that the market bodies also review the performance of the sandbox toolkit through formal review and feedback to ensure the toolkit continues to address the challenges faced by innovators and stakeholders.

PIAC also notes the importance of establishing clear but flexible governance arrangements between the relevant market bodies. This must ensure that the

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process is as clear as possible for trial proponents and establish clear accountabilities between the different market bodies.

The combination of success criteria and the governance arrangements must enable comparison of applications for similar trials. For instance, if two very similar applications are received, which is progressed and which is rejected? On what grounds? How different from a previous or current trial must a new application be to constitute it being truly innovative? In order to answer this question, PIAC suggests the market bodies consider innovation not only in terms of the technology used but also in terms of the location where the trial may take place (e.g.: in a major CBD as opposed to a rural area), the types of customers being targeted, and the business model proposed to deliver the service.

Comments on each of the three aspects of the AEMC's proposed sandbox toolkit is provided in the following sections.

Regulatory guidance

PIAC supports overall the proposed approach to providing coordinated feedback and guidance on regulatory issues.

However, we recommend the regulatory guidance service be established such that the AER is a "one-stop-shop" for applicants rather than a "first-stop-shop" as the current design suggests. This is likely to provide better outcomes as it is a single point of contact for all advice for the trial applicant and provides a single, coherent piece of advice that draws on and incorporates the expertise of each of the market bodies. It avoids the risk that the applicant receives separate advice from each market body and the need for the applicant to determine how they fit together – this would fail to capture much of the value of having the guidance service in the first place.

We note there are potential legal concerns that may arise in consolidating and sending advice from other market bodies as would be required under our recommendation. However, these risks can be readily addressed by making clear the market body that provided each section or piece of advice, such as by using separate sections in a single document or email.

Regulatory waivers

PIAC supports the proposal to provide time-limited regulatory relief. The development of the AER's guideline will be critical to the success of providing regulatory waivers to encourage innovation whilst maintaining necessary consumer protections.

To this end a number of related tools and obligations would be required, including:

- an appropriate assessment prior to commencing the trial to determine:
    - a robust justification that the greater benefits from conducting the trial outweighs the cost and risk to sandbox consumers
    - which regulations need to be relaxed
    - by how much
    - how long for
    - what (additional) protections may be required for customers within the trial – for example if the technology were to develop a fault or the trial is forced to close earlier than expected
    - what are the sunset clauses on the sandbox offer(s) – for example on warranties or ongoing support services for products, or ongoing subscription fees for participating customers

- ongoing monitoring of the trial including the effectiveness of the product/service being trialled and the effectiveness of the consumer protections

- post-trial review including sharing of data/lessons learnt, and informing any other (ongoing or subsequent) sandbox trials. Ideally these reviews should specifically seek to identify any failures in the realisation of the concept, including any unintended impacts upon consumers.

By default, documentation regarding a waiver or waiver application should be made public.

This provides important transparency regarding the application of regulatory obligations and, by inference, the appropriateness of current regulations in response to developments in the market. For example, the number of waivers issued (or requested) relating to a particular regulatory obligation may suggest that the particular obligation should be reviewed.

If there are significant and legitimate concerns regarding making the waiver application public, the onus should be on the affected party to establish this. Further, we note that, if there are proven confidentiality concerns, those sections alone could be redacted rather than the entire document being kept confidential.

Trial rule changes

PIAC is generally supportive of the intent behind the trial rule change proposal. However, we expect that the majority of trials would be better suited to the regulatory waiver process rather than the trial rule change mechanism. Therefore, in order to maximise the benefits and value of the regulatory toolkit as a whole, the AEMC should prioritise implementing the regulatory advice and waiver processes ahead of the trial rule change.

Continued engagement

PIAC would welcome the opportunity to meet with the AEMC and other market bodies involved in the regulatory sandbox development as well as other stakeholders to discuss these issues in more depth.

Yours sincerely,

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