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Australian Energy Market Commission

## **FINAL REPORT**

# REGULATORY SANDBOX ARRANGEMENTS TO SUPPORT PROOF-OF-CONCEPT TRIALS

26 SEPTEMBER 2019

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# REVIEW

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## ABOUT THE AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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## SUMMARY

- 1 The Australian Energy Market Commission's (AEMC or Commission) final recommendation to the Council of Australian Governments (COAG) Energy Council is that current arrangements for facilitating proof-of-concept trials can be improved and that trials can be better facilitated and coordinated through the introduction of regulatory sandbox arrangements in the national energy markets.
- 2 A number of existing and new tools should be included in a regulatory sandbox toolkit to assist innovative proof-of-concept trials to be carried-out. Three new tools are proposed, which trial proponents should consider sequentially:
  - an innovation enquiry service, to provide guidance and feedback that can help facilitate trials that are feasible under current laws and regulation
  - a new Australian Energy Regulator (AER) regulatory waiver power, which can temporarily exempt trials from regulatory barriers arising out of the existing rules
  - a new AEMC trial rule change process that can temporarily change existing rules or temporarily introduce a new rule of limited application to allow a trial to go ahead.
- 3 To implement the second and third sandbox tools, the Commission recommends changes to the National Electricity Law (NEL), National Energy Retail Law (NERL) and National Gas Law (NGL) with more detailed provisions to be made under the rules and under a new trial projects guideline.  
**Request from COAG Energy Council Senior Committee of Officials (SCO)**
- 4 The Commission was requested by SCO to provide interim advice by February 2019 as part of the 2019 *Electricity network economic regulatory framework review* on how to best facilitate co-ordination of proof-of-concept trials and the need for formal regulatory sandbox arrangements to support innovative projects offering benefits to customers while managing any risks. The Commission was requested to consider issues beyond economic regulation and the need for regulatory sandbox arrangements in other parts of the regulatory framework.  
**Background**
- 5 The Commission published a consultation paper on 20 December 2018 to seek feedback from stakeholders on the need for regulatory sandbox arrangements. Feedback from stakeholders suggested there were barriers to conducting proof-of-concept trials under the current regulatory framework, with stakeholders raising concerns including a lack of flexibility in the regulatory framework, the absence of a defined and well understood regulatory process for conducting trials and the complexity of the framework. Stakeholders highlighted that regulatory sandbox arrangements which provided further regulatory flexibility, a defined regulatory process for conducting trials and further guidance on navigating the regulatory framework for innovators would serve to better facilitate proof-of-concept trials and promote innovation.
- 6 Based on initial stakeholder feedback, the Commission published its interim advice on 7 March 2019 proposing a regulatory sandbox initiative that could make use of a variety of

existing and new tools that could be applied according to their suitability to a proposed trial.

7 The Commission collaborated with the Australian Energy Regulator (AER), Australian Energy Market Operator (AEMO), Energy Consumers Australia (ECA) and Australian Renewable Energy Agency (ARENA) to develop a new process for coordinated guidance and feedback for trial proponents and in preparing the interim, draft and final advice.

8 On 11 July 2019, the Commission published a draft report recommending the introduction of the regulatory sandbox toolkit and the proposed high-level design of each element of the toolkit. The Commission sought stakeholder feedback on the proposal.

9 Stakeholders overwhelmingly supported the introduction of the regulatory sandbox toolkit. Most stakeholders also provided suggestions regarding the design of each regulatory sandbox tool and the use of the overall toolkit by trial proponents.

10 Based on stakeholder input on the draft proposal, the Commission has adjusted and further refined the design of the sandbox toolkit. In preparing the final recommendations, the Commission has taken into account stakeholder submissions through all stages of consultation.

11 The Commission's final recommendations are provided as part of the 2019 *Electricity network economic regulatory framework review*.

### **Recommended sandbox toolkit**

12 The emergence of innovative technologies and business models in the national energy markets can bring significant benefits to consumers.

13 The Commission considers that a regulatory sandbox initiative would provide for a regulatory framework that is better equipped to respond to the rapid change in the energy sector and deliver customer benefits through innovation. To access regulatory relief, proof-of-concept trials would need to be time-limited and meet appropriate eligibility criteria, and appropriate consumer safeguards must remain in place during the trial.

14 The objective of these arrangements should be to encourage innovation which has the potential to contribute to the long-term interests of consumers, rather than simply to facilitate an increased number of trials. Innovations that are in consumers' interests can be encouraged by establishing a clearer process for proponents of proof-of-concept trials to approach energy market regulatory bodies for feedback and guidance on regulatory issues and regulatory options to avoid unnecessary delays and costs for eligible trials. This approach to facilitating trials can help reduce the barriers to the introduction of more efficient approaches to the delivery of energy services.

15 The Commission proposes a regulatory sandbox initiative that makes use of a variety of existing and new tools that could be applied according to their suitability to a proposed trial. The regulatory tools in the sandbox initiative include the following:

- **Coordinated feedback and guidance on regulatory issues.** Market bodies have designed a new, coordinated approach to providing feedback and guidance to proponents of innovative trials, technologies and business models. This would be led by the AER as a

clear first point of contact for proof-of-concept trials who is able to provide "fast, frank feedback" on a range of issues, whilst referring to the other market bodies where appropriate. This would build on the market bodies established processes to answer regulatory enquiries.

- **A new AER regulatory waiver power** that can provide time-limited regulatory relief to eligible trials. This can be used if an eligible trial required an exemption from a specific rule (or rules) in the NER/NERR/NGR or from the registration requirement(s) in the NEL (s.12), NERL (s.88) or NGL (ss. 91BJ, 91BRD, 91BRR and 91LB) to proceed. As proposed by the AER, this would involve a broad power for the AER to grant specific exemptions and waivers to facilitate the conduct of proof-of-concept trials, subject to the "trial projects guidelines" the AER develops in consultation with the market bodies and relevant stakeholders. The exercise of this power by the AER would be subject to the energy objectives and the eligibility requirements being met.
- **A new AEMC rule change process for proof-of-concept trials.** This could be used if an eligible trial required new rules or the alteration of existing rules for a limited time to be conducted. The proposed trial rule change process will be conducted by the Commission in under 10 weeks and encompass the NER, NERR and NGR.
- **Existing regulatory tools** such as the AER's ring-fencing waivers and retailer exemptions. The first point of contact would refer trial proponents to these processes where appropriate.

16 The design of the sandbox toolkit seeks to balance the need for the framework to be transparent and easy to use for trial proponents while providing sufficient protection to consumers and other parties that may be impacted by trials.

17 It is possible that some proof-of-concept trials may require more than one of the regulatory sandbox tools to proceed. For other proof-of-concept trials, existing arrangements may be sufficient, and they may not need any of the sandbox tools to proceed. Trials that can be conducted under current regulatory arrangements will still be able to proceed without using the sandbox tools.

### **Implementation**

18 In light of the stakeholder support for these reforms, the Commission has developed this package of recommendations having regard to the benefits of timely implementation.

19 The Commission considers that law and rule changes will not be necessary for implementation of the innovation enquiry service. The AER will be responsible for its implementation including determining when the service will be launched and resourcing requirements. The Commission expects the service will be available before the other new sandbox tools are in place. Until the launch of the innovation enquiry service, any member of the public — including innovators — can still request guidance and advice from the AER, AEMO and AEMC through their general enquiry channels.

20 Implementation of the other two recommended sandbox tools will require a package of changes to the national energy laws and rules. To this end, the Commission has prepared recommended drafting instructions for amendments to the NEL, NERL and NGL (Appendix A).

The purpose of these drafting instructions is to explain the legislative changes the Commission considers are needed to provide for a new trial rule change process and for a new AER waiver power to take effect through the national energy rules. The AEMC recommends the COAG Energy Council proceed with these law changes.

- 21 The recommended drafting instructions propose that:
- additional functions be conferred on the AER under the NEL, NERL and NGL
  - a section be added in the NEL, NERL and the NGL to empower the AER to grant trial waivers, with more detailed provision to be made under new provisions of the NER, NERR and NGR and the proposed trial projects guideline
  - a section be added in the NEL, NERL and the NGL to empower the AEMC to make trial rules, with the information required to be included in a trial rule change request set out in the NER, NERR and NGR
  - the AER be given responsibility for monitoring trial projects under the NEL, NERL and the NGL, whether they are conducted under a trial waiver or a trial Rule.
- 22 The Commission has also proposed drafting for changes to the national energy rules setting out detailed provisions to give effect to the toolkit (see separate document published with this report). The initial drafting of proposed rules is not being made subject to stakeholder consultation at this time.
- 23 There are two alternative approaches for implementation of the complete package of reforms:
- Firstly, the amendments to the national energy laws could be made by the South Australian Parliament and a rule change request could then be submitted to the AEMC (by the COAG Energy Council or any other person) to consult on, draft and make the supporting rules.
  - Alternatively, following endorsement of the recommendations by the COAG Energy Council, the AEMC could commence work to further develop rule changes to implement the recommended framework including seeking stakeholder feedback on the proposed rule changes. The complete package of national energy law and rule changes could then be submitted to South Australian Parliament and the South Australian Minister (respectively) to be made.
- 24 Implementation of the sandbox toolkit will lead to additional responsibilities for the AER and will require adequate resourcing.
- 25 The Commission's more detailed final recommendations are set out below.

#### **BOX 1: REGULATORY SANDBOX TOOLKIT RECOMMENDATIONS**

- The Commission's final recommendation is that a regulatory sandbox toolkit should be established to assist innovative proof-of-concept trials to be carried-out. Some trials may be able to proceed without using any of the tools contained in the sandbox toolkit but the

other trials facing information or regulatory barriers could be enabled by the regulatory sandbox toolkit. The toolkit contains three distinct levels that trial proponents should consider sequentially:

- the enquiry service provides guidance and feedback, which can help facilitate trials that are feasible under current laws and regulation
- the regulatory waiver process can temporarily exempt trials from regulatory barriers arising out of existing rules and relevant sections of the laws
- the trial rule change process can temporarily change existing rules or temporarily introduce a new rule for a person to permit a trial to be conducted.

#### **BOX 2: INNOVATION ENQUIRY SERVICE RECOMMENDATIONS**

- Introduce an innovation enquiry service to provide a dedicated channel for trial proponents and innovators to access feedback and guidance on energy regulatory issues.
- The service will provide an informal steer on energy regulatory implications for trials and innovative products, services and business models being proposed by guidance seekers.
- It will be accessible to all innovators and can provide a first step towards access to the other regulatory sandbox tools.
- The service will not provide legal advice, binding rulings, regulatory decisions, endorsements, business incubator services or advice relating to non-energy regulatory matters.
- The service will be led by the AER as the first point of contact.
- Queries will be referred to AEMO, AEMC, ARENA and other institutions by the AER where appropriate.
- The AER will be responsible for establishing the coordination process with assistance from other market bodies.
- The AER and other market bodies should promote awareness of and easy access to the service.
- The service will not involve a fee to be paid by the guidance seekers to access guidance.
- The service should be provided in a frank, fast and open manner.
- The AER and the other market bodies have the discretion to determine the amount of time and effort to be dedicated to queries and the type of engagement that would be appropriate to addressing a request for guidance.
- The AER to provide an indication of the expected time needed to respond to a request for guidance.

- Implementation of the service will require adequate resourcing. The AER will determine resourcing requirements for the innovation enquiry service and seek additional resources if required.
- The AER should capture and publish high level information regarding usage of the service.
- The AER will be responsible for future modifications and enhancements to the innovation enquiry service.

### **BOX 3: TRIAL WAIVER RECOMMENDATIONS**

- Establish a broad power for the AER to grant trial waivers to trial projects, meeting the energy objectives; and information and eligibility requirements.
- The AER may only grant a trial waiver if it is satisfied that the proposed trial project is likely to contribute to the achievement of the national electricity objective (NEO), national energy retail objective (NERO) or national gas objective (NGO). The trial must also meet the eligibility criteria to be specified in the rules:
  - be genuinely innovative
  - have the potential to lead to better services and outcomes for consumers
  - be unable to be conducted without a trial waiver
  - be appropriately limited in time, scope and scale
  - maintain adequate consumer protections
  - meet any other requirements specified in the trial projects guidelines.
- All rules are within scope of the waiver power, including Chapters 6 and 6A of the NER, as are sections of the energy laws relevant to registration requirements (that is, section 12 of the NEL, section 88 of the NERL and sections 91BJ, 91BRD, 91BRR and 91LB of the NGL) but the AER's power will be limited by criteria set out in the energy laws and rules. This includes a limit on the AER not being able to exempt themselves from any of their obligations under the law and rules.
- The NER, NERR and NGR will include information and eligibility requirements; and public consultation requirements for trial waiver applications.
- The Laws will include provisions for the AER to impose conditions on trial projects as part of the trial waiver application process.
- The NER, NERR and NGR will require the AER to develop trial projects guidelines. The trial project guidelines can include additional information and eligibility criteria.
- The NER, NERR and NGR will include consumer protection provisions.
- The trial projects guideline will specify the timeline within which the AER will determine applications for trial waivers.



- Trial waivers will be available under the NGL to waive requirements of the NGR.
- The NER, NERR and NGR will include provisions for knowledge sharing and treatment of confidential information in the context of knowledge sharing.

#### **BOX 4: TRIAL RULE CHANGE RECOMMENDATIONS**

- The regulatory sandbox toolkit should include a new AEMC trial-rule-making mechanism.
- The new trial rule change process should be less than 10 weeks long and involve one round of stakeholder consultation.
- The new trial rule change process should encompass the NER, NERR and NGR.
- Before making a trial rule, the AEMC must be satisfied that:
  - the making of the trial Rule will or is likely to contribute to the achievement of the relevant energy objective(s)
  - the trial project is genuinely innovative
  - the trial project has the potential to lead to better services and outcomes for consumers.
- Anyone other than the AEMC should be able to lodge a trial rule change request.
- The national energy rules should require detailed information about the proposed trial to be submitted to the AEMC with a trial rule change request.
- The AEMC to have the ability to make trial rules that apply either to a single party or multiple parties.
- If a trial rule change request is lodged, the Commission must assess that the request:
  - contains the required information
  - is not misconceived or lacking in substance
  - is a matter on which the AEMC may make a rule under the national energy laws
  - is not subject to a current or recent rule change request.
- The AEMC should have the ability to not take any further action in relation to a trial rule change process if it considers that:
  - the requested trial Rule is unnecessary to enable the trial project to be carried out
  - the trial project offers no reasonable prospect of leading to better services and outcomes for consumers
  - the requested trial Rule is unlikely to enable the trial project to be carried out
  - the requested trial Rule should more appropriately be considered for a permanent Rule change
  - the trial project is unlikely to be carried out.

- A trial Rule must be expressed to expire on a specified date, or upon the expiry of a specified length of time after its commencement.
- The AEMC to have the ability to set conditions on trials through the trial rule.
- The AEMC to have the ability to require the trial proponent to obtain explicit informed consent of consumers and impacted parties for a trial.
- The AEMC to have the ability to extend the timeline of application of a trial rule subject to certain conditions.
- The AER to monitor and enforce compliance with a trial rule.
- The AEMC should have the ability to repeal an existing trial rule under certain circumstances.
- The Commission should not seek to recover its costs through a fee paid by the rule proponent.

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# 1 INTRODUCTION

Regulatory sandboxes provide a framework within which participants can trial initiatives under relaxed regulatory requirements on a time-limited basis and with appropriate safeguards in place.

This chapter is structured as follows:

- Section 1.1 provides the background to this review
- Section 1.2 explains the regulatory sandbox approach, including examples
- Section 1.3 sets out the current arrangements in the national energy markets
- Section 1.4 discusses recent trials
- Section 1.5 summarises stakeholder feedback received by the Commission.

## 1.1 Background

The emergence of innovative technologies and business models in the national energy markets can bring significant benefits to consumers. This was highlighted in the *Independent Review into the Future Security of the National Electricity Market (Finkel review)*, which noted that innovative technologies can help reduce the costs of providing secure and reliable electricity supply and also contribute to reducing emissions.<sup>1</sup> As such, it is important that the regulatory framework and processes support potentially beneficial emerging technologies and business models.

The Finkel review recommended updating the proof-of-concept testing framework, to facilitate innovation in the NEM. The review noted that new concepts that are inconsistent with the National Electricity Rules (NER) need to be proven to the point where a rule change can be made prior to being used in the NEM. Recommendation 2.8 was that the Commission review and update the regulatory framework to facilitate proof-of-concept testing of innovative approaches and technologies. The review also suggested investigation of mechanisms adopted by other jurisdictions, such as those adopted by the Office of Gas and Electricity Markets (OFGEM) in the United Kingdom (UK). Recommendation 2.8 was accepted by Energy Ministers.

In February 2018, the Energy Market Transformation Project Team (EMTPT)<sup>2</sup> agreed that a working group made up of officials from the Commonwealth and other interested jurisdictions would undertake further research on the case for introducing a regulatory sandbox.

In the 2018 *Electricity network economic regulatory framework review*, the Commission outlined the regulatory sandbox arrangement that has been adopted by OFGEM in the UK. The review highlighted that where innovation may benefit consumers, there may be merit in applying a regulatory sandbox arrangement so that any changes to the regulatory framework can be fast tracked. However, the Commission noted that trials and other forms of regulatory

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1 Dr Alan Finkel et al., *Independent Review into the Future Security of the National Electricity Market*, June 2017, p.66.

2 The EMTPT was established by the COAG Energy Council in December 2015 to consider issues related to the ongoing energy sector transition driven by changing technologies, increasing consumer engagement, new energy products and services. It is made of officials from each jurisdiction.

innovation can currently be facilitated under the regulatory framework through the AER exercising its enforcement discretion and the use of "no action letters". The Commission noted it was interested in stakeholder views on the need for more formal arrangements for regulatory sandboxes and would consider this further in the 2019 *Electricity network economic regulatory framework review*.

On 24 October 2018, the Commission received a request from the Senior Committee of Officials (SCO) of the COAG Energy Council to further investigate a formal approach for facilitating proof-of-concept testing in the NEM. The request was informed by research carried out by the working group of Commonwealth and state officials and reported in the EMTPT paper attached to the SCO request.

### **1.1.1 Request from the Senior Committee of Officials**

The Senior Committee of Officials (SCO) believes that there is merit in looking at a more formal and systematic approach to supporting experimentation within the regulatory framework where there are potential benefits to energy consumers. In its request to the Commission, SCO noted that it would be useful to be able to perform in-market trials of wholesale demand response to inform the current rule change process. SCO considers that a regulatory sandbox could also help to test a range of technologies and business models to inform the Distributed Energy Integration Program (DEIP). The DEIP is a collaboration of government agencies, market authorities, industry and consumers associations aimed at maximising the value of customers' distributed energy resources for all energy users.<sup>3</sup>

### **1.1.2 Energy Market Transformation Project Team paper**

A research paper from the EMTPT on regulatory sandbox arrangements was attached to the request from SCO (EMTPT paper). A working group made up of Commonwealth, Victorian, Queensland and New South Wales representatives undertook research and consultation on the case for introducing a regulatory sandbox and options for next steps to progress implementation of the Finkel review recommendation 2.8. The consultation involved a range of stakeholders including the energy market bodies, ARENA, the Australian Securities and Investment Commission (ASIC), network businesses, new entrants, and consumer representatives. Consultation with market bodies was undertaken on an unofficial basis.

The EMTPT paper provides an introduction of regulatory sandboxes, the current arrangements for proof-of-concept testing, an assessment of the need for a sandbox arrangement and a suggested approach for adoption of a regulatory sandbox arrangement. The paper notes that the Commission along with AEMO, AER and ARENA have been working together to support proof-of-concept trials within the existing regulatory framework and that the approach appears to be adequate to deal with the current demand. However, EMTPT considers that there is merit in a more structured process to facilitate experimentation within the regulatory settings as a tool that could support major future reforms. According to EMTPT, it would also enable energy market bodies to identify key priorities, and develop trials which address particular problems or help define the design of reforms. EMTPT suggests that

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<sup>3</sup> ARENA 2018, viewed 21 June 2019, <https://arena.gov.au/where-we-invest/distributed-energy-integration-program/>.

further work be undertaken on designing a regulatory sandbox initiative, coordinated across all market bodies, as a pilot to support future reforms with a specific and limited project scope.

The stakeholders responding to the EMTPT consultation took a broad view of what could be tested in a NEM sandbox to include both new technologies and business models, and also new regulatory approaches or market design. The stakeholders also saw potential application of a regulatory sandbox across a number of areas including network regulation, wholesale markets and retail. ARENA's response to EMTPT consultation considered that a range of tools could exist within the concept of a regulatory sandbox, including regulatory exemptions and/or a wide range of complementary activities such as technical advice, industry capacity building or funding.

## 1.2 The regulatory sandbox approach

### 1.2.1 What is a regulatory sandbox?

A regulatory sandbox was first adopted by the Financial Conduct Authority (FCA) in the United Kingdom in June 2016.<sup>4</sup> The approach has since been adopted by regulators across different industries and jurisdictions seeking to facilitate innovation. Broadly, a formal regulatory sandbox is a framework within which participants can trial innovative business models, products and services in the market under relaxed regulatory requirements on a time-limited basis and with appropriate safeguards in place. There are a variety of other regulatory tools that could be used to facilitate proof-of-concept trials, such as provision of information, exemptions and waivers, a number of which are already in place in the national energy markets.

### 1.2.2 Potential benefits of regulatory sandbox arrangements

Regulatory sandbox arrangements are expected to support innovative projects in several ways including through:

- improved access to finance for projects through increased regulatory certainty<sup>5</sup>
- enabling testing and fine-tuning in a controlled testing environment<sup>6</sup>
- allowing regulators to work with innovators to build appropriate consumer protection safeguards into new products and services<sup>7</sup>
- helping regulators identify the need for reform to the existing regulatory framework.<sup>8</sup>

### 1.2.3 Implementation by OFGEM

OFGEM offers a one stop shop called "innovation link" for businesses seeking to introduce innovative or significantly different propositions to the UK energy sector. Innovation link offers two main services that includes "fast, frank feedback" and a regulatory sandbox.

4 Ernst & Young, *As FinTech evolves, can financial services innovation be compliant?*, 2017, p.13.

5 Financial Control Authority, *Regulatory sandbox lessons learned report, October 2017*, pp.5-6.

6 Ibid.

7 Ibid.

8 OFGEM, *Insights from running the regulatory sandbox, October 2018*, p.1.

The fast, frank feedback service is available throughout the year to businesses meeting the eligibility criteria. Under the criteria the proposition:

- must be ground-breaking or significantly different
- must have a good prospect for consumer benefit
- must demonstrate a genuine need for support
- may be required to show they have undertaken a reasonable amount of background research and thinking.

The service can provide an "informal steer" to innovating businesses on the regulatory implications of their propositions, however it is not a binding response. The advice provided by the innovation link team does not represent an official view from OFGEM, and the feedback is subject to a legal disclaimer.<sup>9</sup> It can help innovating businesses to navigate the regulatory challenges being faced, identify the regulatory barriers affecting the proposition and provide input to long term policy development. It can be accessed by innovators through an application to OFGEM.

OFGEM grants regulatory sandboxes to eligible innovative projects under a process carried out periodically through a round for applications. OFGEM initiates the process by requesting expressions of interest from energy innovators aiming to trial a proposition that may benefit from a regulatory sandbox. OFGEM engages with all project proponents who apply to discuss their proposition in the context of the sandbox eligibility criteria as well as to understand their product, service or business model. For an innovative project to be able to receive regulatory sandbox support, the proposal needs to meet the following criteria:

- the proposal is genuinely innovative
- the innovation will deliver consumer benefits and consumers will be protected during the trial
- a regulatory barrier inhibits innovation
- the proposal can be trialled.

#### **1.2.4 Implementation by ASIC**

ASIC has launched an innovation hub to foster innovation in the finance sector. Services of the hub can be accessed by "startups and scaleups" meeting the relevant criteria.<sup>10</sup> Similar to OFGEM arrangements, the ASIC innovation hub can provide assistance to eligible innovative projects by providing them advice and regulatory sandboxes.

### **1.3 Current arrangements in the national energy markets**

This section sets out the current regulatory tools, arrangements and processes administered by different market bodies in the national energy markets that provide flexibility within the regulatory framework.

<sup>9</sup> OFGEM 2018, viewed 4 December 2018, <https://www.ofgem.gov.uk/about-us/how-we-engage/innovation-link>.

<sup>10</sup> ASIC Innovation hub website, viewed 21 June 2019, <https://asic.gov.au/for-business/innovation-hub/>.



### 1.3.1

#### Market bodies

##### AER

Under the current regulatory framework, trials and other forms of innovation can be facilitated by the AER exercising its enforcement discretion. The AER has a range of compliance tools and discretion in deciding whether to take enforcement action. It undertakes a risk assessment to target and prioritise its monitoring and enforcement activities based on several factors including the potential impacts and probability of breaches.<sup>11</sup> The AER is able to issue a no action letter in a wide range of circumstances, however they generally avoid using them except in special circumstances where they are appropriate.

The AER also has the ability to provide a range of exemptions and waivers, including under its network service provider registration exemption guideline<sup>12</sup>, retail exempt selling guideline<sup>13</sup> and ring-fencing guideline<sup>14</sup>, and is able to provide individual exemptions if existing guidelines do not cover the situation.

##### AEMO

As the independent market and system operator AEMO is involved in trials in a range of capacities. AEMO is currently involved in several trials of new energy technologies and systems.

Proof-of-concept trials can play an important role in understanding and responding to the challenges and opportunities that new technologies and solutions present. In response to these changes, AEMO seeks to run trials under conditions that are as close to the real-world, "in-market" scenario as possible.

AEMO engages with scientific and funding bodies such as the Commonwealth Scientific and Industrial Research Organisation (CSIRO), ARENA and the Bureau of Meteorology (BOM) to develop and trial new technologies. AEMO has entered into formal relationships (e.g. memoranda of understanding (MOU)) with these bodies to support collaboration, facilitate prioritisation and value maximisation of trials. In addition, AEMO has a formal advisory role with other research and development bodies.

AEMO is also regularly approached by registered or prospective market participants seeking to progress new concepts and innovations.

##### AEMC

While the AEMC does not have a formal role in facilitating trials, it can consider innovative rule changes that facilitate new business models where they are in the long term interests of consumers. For example, the AEMC completed the 5-minute settlement rule change in November 2017 which aligns financial incentives with physical operation and will more

11 AER, *Compliance and Enforcement: Statement of Approach*, April 2014.

12 AER, *Electricity network service provider registration exemption guideline*, version 6, March 2018.

13 AER, *AER (retail) exempt selling guideline*, version 5, March 2018.

14 AER, *Ring-fencing guideline - electricity distribution*, version 2, October 2017.

accurately reward those who can deliver supply or demand side responses when they are needed by the power system. The AEMC is currently considering the wholesale demand response rule change. AEMO and ARENA are assisting this rule change process through trials or studies that leverage existing ARENA projects or the knowledge of ARENA project participants.<sup>15</sup>

The AEMC also has an expedited rule change process, under which non-controversial or urgent rule changes can be made within eight weeks. It could allow for prompt changes to the rules to bring new products and services to the market under certain circumstances. The rule change process can therefore be an avenue to facilitate innovative ideas and new business models.

#### **Information for new entrants**

The market bodies publish a range of information that can help new entrants understand the energy markets and rules such as the AER's annual *State of the energy market* reports, AEMO's *Electricity statement of opportunities* and the AEMC's guides to the rule change process and applying the energy objectives, as well as information sheets and infographics that accompany reviews and rule change determinations. AER and AEMO engage directly with new retail and generation market entrants as they go through the relevant authorisation and registration processes. The market bodies each have general information lines that can be used by members of the public to ask questions about the regulatory framework.

### **1.3.2**

#### **Non-market bodies**

##### **ARENA**

ARENA was established in 2011 with the objective of improving the competitiveness of renewable energy technologies and increasing the supply of renewable energy in Australia.<sup>16</sup> ARENA provides funding to researchers, developers and businesses that have demonstrated the feasibility and potential commercialisation of their project. ARENA also builds and supports networks, and shares the knowledge, insights and data from funded projects.

ARENA has established the A-lab initiative<sup>17</sup> to create cross-sector partnerships and world-first projects to transform Australia towards a clean energy future. AEMC, AEMO, Energy Consumers Australia and AER have participated in this process to help participants develop their ideas into new projects, trials and other initiatives.

ARENA is collaborating with the market bodies, consumer representatives and industry on the Distributed Energy Integration Program (DEIP) to better coordinate DER integration activities.<sup>18</sup> DEIP's mission is to collaborate to maximise the value of customers' distributed energy resources to all energy users.

##### **Energy Consumers Australia**

<sup>15</sup> AEMC, *Wholesale demand response mechanisms*, Consultation paper, 15 November 2018.

<sup>16</sup> Australian Renewable Energy Agency Act 2011, s.3.

<sup>17</sup> ARENA 2018, viewed 10 December 2018, <https://arena.gov.au/a-lab-energy-system-innovation/>.

<sup>18</sup> ARENA 2018, viewed 6 December 2018, <https://arena.gov.au/where-we-invest/distributed-energy-integration-program/>.

Energy Consumers Australia (ECA) is an independent organisation set up by the COAG Energy Council in 2015 and seeks to promote the long term interest of consumers with respect to price, quality, safety, reliability and security of supply of energy services. ECA is a member of the DEIP steering group and has been involved in the early discussions regarding regulatory sandboxes.

## 1.4 Recent trials

A range of propositions have gone under trial across the energy sector. They vary in terms of size of the trial, the duration, proponents of trials, the matter being tested and potential impacts of the trial. Some of these trials include:

- **Hornsedale wind farm Frequency control ancillary services trial:** An in-market technical demonstration of a wind or solar farm providing frequency control ancillary services (FCAS) in the NEM.<sup>19</sup>
- **CONSORT Bruny Island Battery Trial:** An exploration of how the residential batteries can be used by households to manage their energy while simultaneously assisting network operators with ongoing network issues by providing improved network visibility, improved reliability and up-time, and managing voltage levels and load flows across the network.<sup>20</sup>
- **New Reg process trial by Ausnet:** A project to aimed at improving engagement on network revenue proposals, and to identify opportunities for regulatory innovation.<sup>21</sup>
- **AGL Virtual Power Plant (VPP):** Creating a prototype Virtual Power Plant (VPP) by installing and connecting a large number of solar battery storage systems across residential and business premises in Adelaide, South Australia.<sup>22</sup>
- **AEMO-ARENA joint Demand Response Trial:** ARENA and AEMO have partnered to trial demand response services using the Reliability and Emergency Reserve Trader (RERT) arrangements.<sup>23</sup>
- **Virtual power plant demonstrations:** The AEMC, AEMO, AER and members of the Distributed Energy Integration Program (DEIP) are collaborating to establish VPP demonstrations.<sup>24</sup>

## 1.5 Stakeholder feedback

The Commission published a consultation paper on "Regulatory arrangements to support proof of concept trials" in December 2018.<sup>25</sup> The consultation paper explored potential

19 AEMO, *Hornsedale Wind Farm 2FCAS trial: Knowledge Sharing Paper*, July 2018, pp.1-4.

20 Australian National University, *Reposit Power*, The University of Sydney, University of Tasmania and TasNetworks.

21 AER ECA ENA, *New Reg - towards consumer centric energy network regulation*, March 2018.

22 ARENA, viewed 21 June 2019, <https://arena.gov.au/projects/agl-virtual-power-plant/>.

23 ARENA/AEMO, *Joint response to AEMC Directions Paper Section 5: Wholesale Demand Response*, May 2018, p.5.

24 AEMO 2018, viewed 21 June 2019, <http://aemo.com.au/Electricity/National-Electricity-Market-NEM/DER-program/Virtual-Power-Plant-Demonstrations>.

25 AEMC, *Consultation paper, Regulatory sandbox arrangements to support proof-of-concept trials*, 20 December 2018.

regulatory barriers to proof-of-concept trials and the need for formal regulatory sandbox arrangements.

Feedback from stakeholders suggested there were barriers to conducting proof-of-concept trials under the current regulatory framework, with stakeholders raising concerns including a lack of flexibility in the regulatory framework, the absence of a defined and well understood regulatory process for conducting trials and the complexity of the framework. Stakeholders highlighted that regulatory sandbox arrangements which provided further regulatory flexibility, a defined regulatory process for conducting trials and further guidance on navigating the regulatory framework for innovators would serve to better facilitate proof-of-concept trials and promote innovation.

The Commission published an interim advice, which included a detailed analysis of responses to the consultation paper, in March 2019.<sup>26</sup>

Building on the interim advice, the Commission published a draft report on 11 July 2019 outlining its proposal for a regulatory sandbox toolkit. The Commission also proposed a high-level design for each element of the toolkit and sought stakeholder feedback on the proposal.

As part of the consultation package, the Commission held a workshop on 26 July 2019 in Sydney to enable stakeholders to provide input on the proposed regulatory sandbox toolkit. The workshop was attended by a wide range of stakeholders including energy retailers, start-ups, network businesses, regulators, consumer representatives and service providers.

Submissions on the draft report closed on 8 August 2019. The Commission received submissions from 21 stakeholders. In arriving at its final recommendations, the Commission has taken into consideration all feedback received from stakeholders through the submissions and the stakeholder workshop.

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<sup>26</sup> AEMC, *Interim Advice, Regulatory sandbox arrangements to support proof-of-concept trials*, 7 March 2019.

## 2 THE REGULATORY SANDBOX TOOLKIT

The Commission's final recommendation is that a regulatory sandbox toolkit should be established to assist innovative proof-of-concept trials to be carried-out. The toolkit contains three distinct levels that trial proponents should consider sequentially:

1. the innovation enquiry service provides guidance and feedback
2. the regulatory waiver process
3. the trial rule change process.

This chapter outlines the Commission's overall approach to the regulatory sandbox toolkit:

- Section 2.1 outlines the Commission's interim advice and draft recommendation
- Section 2.2 outlines the components of the toolkit and how they fit together
- Section 2.3 considers how the toolkit will be used by proponents
- Section 2.4 discusses how the toolkit can encourage innovation
- Section 2.5 discusses the implementation of the toolkit.

### 2.1 Background

The Commission's interim advice to SCO highlighted that proof-of-concept trials can be better facilitated and coordinated through a regulatory sandbox initiative.<sup>27</sup> It was suggested that this initiative should make use of a variety of existing and new regulatory tools that are appropriate to the proposed trial. Formal regulatory sandbox arrangements that allow for regulatory relief would be one of these tools.

In its interim advice, the Commission noted that trials have the potential to contribute to consumers' interests where they encourage innovation to meet consumers' needs whilst maintaining appropriate consumer safeguards. It was established that while some trials have been conducted under current regulatory arrangements, a regulatory sandbox initiative can better facilitate appropriate trials by creating a clearer process and avoiding unnecessary delays and costs. It can also help market bodies better coordinate prioritisation of trials, provision of input to their design and dissemination of any lessons learnt.

Building on the interim advice, the Commission's draft report proposed a regulatory sandbox toolkit comprised of:

- a new coordinated innovation enquiry service
- a new regulatory waiver power for the AER
- new AEMC rule change process for proof-of-concept trials.

In the draft report, the Commission outlined the proposed design of each element of the toolkit and sought stakeholder feedback on the overall toolkit as well as the proposed design for each individual tool.

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<sup>27</sup> AEMC, *Regulatory sandbox arrangements to support proof-of-concept trials*, interim advice, March 2019.

Out of the 21 stakeholders who provided feedback, 20 supported the introduction of the regulatory sandbox toolkit. Most of the stakeholders also provided recommendations on the design of the individual regulatory sandbox tools and made suggestions regarding how the overall toolkit should be used by trial proponents. The Commission has taken into account the stakeholder submissions it received on the consultation paper, draft report and views expressed during the stakeholder workshop in arriving at its final recommendations.

The composition of the proposed final regulatory sandbox toolkit remains the same as the draft. However, based on feedback from stakeholders the design of regulatory waiver and trial rule change process has been amended and further defined.

The following section provides an explanation of the final overall toolkit, including how the different tools are expected to be used by innovators and trial proponents.

## 2.2 What is the toolkit?

The sandbox initiative can be thought of as a toolkit of various regulatory tools that can be used according to their suitability to a trial.

There are three new proposed tools in the sandbox initiative on top of existing regulatory tools:

1. **Innovation enquiry service:** a new process for innovators to access feedback and guidance on regulatory issues to help them better understand and navigate the energy regulatory arrangements and facilitate trials under the current rules.
2. **AER trial waiver process:** a new regulatory waiver power for the AER to allow for regulatory obligations under the current rules and parts of the laws relevant to registration requirements to be waived in order to allow a trial to proceed, where it is in the long term interest of consumers.
3. **AEMC trial rule change process:** a new rule change process to provide for temporary trial rules to be made that allow a trial to proceed, where it is in the long term interest of consumers.

Existing regulatory tools such as the AER's ring-fencing waivers and retailer exemptions may also be used in some circumstances to assist trials. The first point of contact would refer trial proponents to these processes where appropriate.

The toolkit is aimed at promoting innovation and making it easier to conduct trials in the energy markets by reducing information and regulatory barriers where it is in the long term interest of consumers. The toolkit also aims to provide a clear regulatory pathway for conducting trials.

A broad range of concepts can be tested in the regulatory sandbox including innovative technologies, business models or regulatory approaches. It is expected to be used by current as well as potential future market participants.

### RECOMMENDATION 1: THE REGULATORY SANDBOX TOOLKIT

The Commission's final recommendation is that a regulatory sandbox toolkit should be established to assist innovative proof-of-concept trials to be carried-out. Some trials may be able to proceed without using any of the tools contained in the sandbox toolkit but the other trials facing information or regulatory barriers could be enabled by the regulatory sandbox toolkit. The toolkit contains three distinct levels that trial proponents should consider sequentially:

1. the enquiry service provides guidance and feedback, which can help facilitate trials that are feasible under current laws and regulation
2. the regulatory waiver process can temporarily exempt trials from regulatory barriers arising out of existing rules and relevant sections of the laws
3. the trial rule change process can temporarily change existing rules or temporarily introduce a new rule for a person to permit a trial to be conducted.

## 2.3 How will it be used?

Innovators with ideas and proposal for trials at different stages of development can make use of the innovation enquiry service. The Commission considers that this level of the sandbox toolkit will be the most utilised by trial proponents (see Chapter 3). This is partly based on OFGEM's finding that innovators commonly needed advice, not a sandbox.<sup>28</sup>

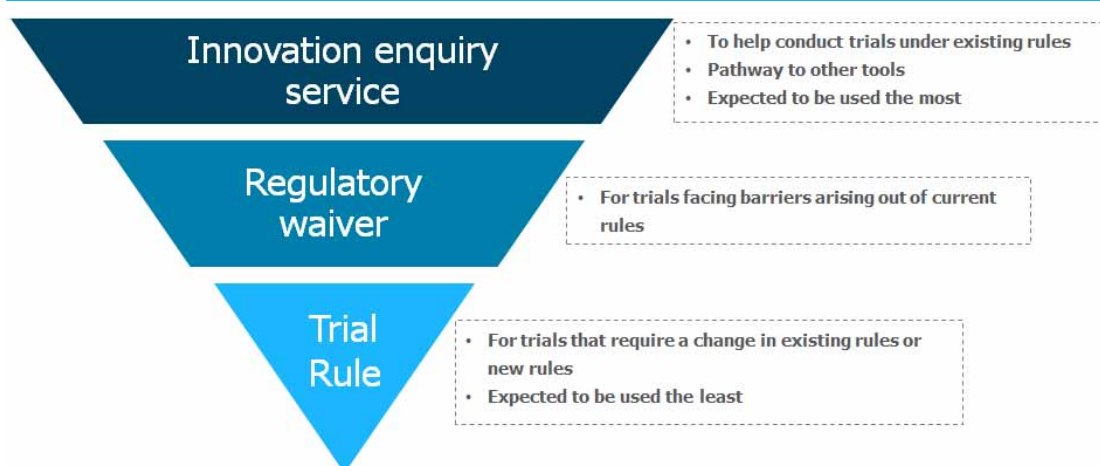
If specific regulatory barriers have been identified that arise out of the current rules, the trial proponent can apply to the AER for a regulatory waiver (Chapter 4), though we expect far fewer applications than requests for guidance and feedback. If it has been identified that rules have to be amended or new rules have to be introduced to facilitate a trial, and it would not be appropriate to seek a market wide rule change, the trial proponent has the opportunity to apply to the AEMC for a trial rule change. It is expected that only a few trials will use this tool, and proponents would need to do substantial preparations for their application, but the Commission believes it is important to provide this opportunity so that there is a process for innovative trials that can benefit consumers to be able to go ahead.

The Commission recommends that the AER should take on the role of a first point of contact for proponents of trials interested in accessing the sandbox toolkit. An explanation of the sandbox toolkit will be made available via the three market bodies' websites to guide innovators on the use of the toolkit.

Figure 2.1 shows how the sandbox tools are linked.

<sup>28</sup> OFGEM, Insights from running the regulatory sandbox, October 2018, pp. 1-4.

**Figure 2.1: Overall sandbox toolkit**



Source: AEMC

It is expected that most innovators would consider using the toolkit sequentially. Proponents would also need to demonstrate that the earlier step in the toolkit is not sufficient for conducting their trial when applying for later steps, however they would not require written approval to enter the later steps. For example, a trial rule proponent would need to demonstrate the trial cannot be conducted under the current rules or under a regulatory waiver, but they would not need to complete a full regulatory waiver application process before applying for a trial rule change. Stakeholders familiar with the sandbox toolkit may apply for a waiver or a trial rule change without applying for the earlier step.

It is possible that some proof-of-concept trials may require more than one of the regulatory sandbox tools to proceed. For other proof-of-concept trials, existing arrangements may be sufficient, and they may not need any of the sandbox tools to proceed. Trials that can be conducted under current regulatory arrangements will still be able to proceed without using the sandbox tools.

Table 2.1 and figure 2.2 below illustrates a potential trial proponent's journey through the sandbox toolkit.

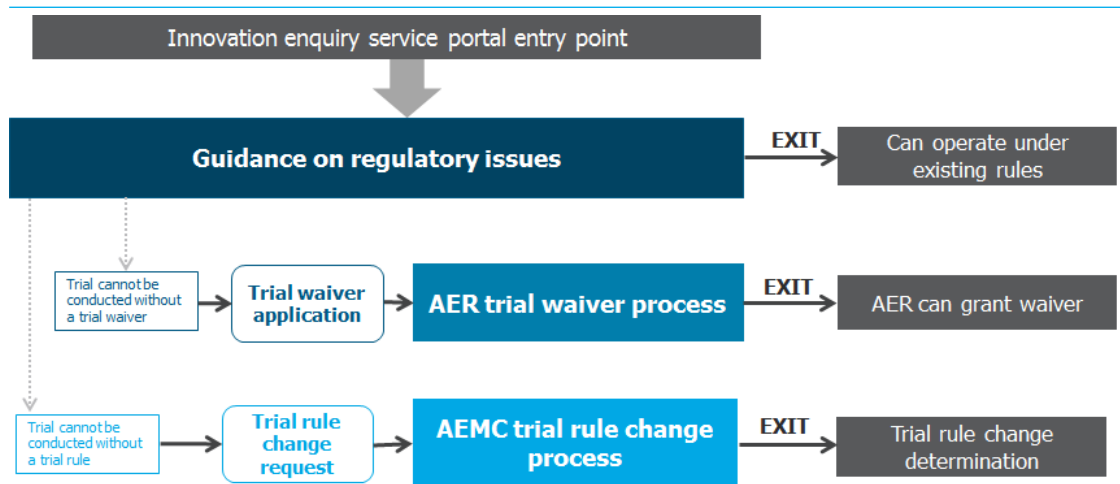
**Table 2.1: Sandbox trial proponent's journey**

<b>APPLICANT</b>	<b>MARKET BODIES</b>
1. Contacts the innovation enquiry line and provides some details of their proposal and issues.	The AER provides guidance and feedback in coordination with AEMO and AEMC where needed. The process can also help identify whether a trial waiver or trial rule change process may be appropriate for the proposal.
2. If the proponent has identified a specific	The AER assess the application, consults with



APPLICANT	MARKET BODIES
regulatory barrier they can apply for a regulatory waiver. They should contact the AER to discuss this process before applying, but are not required to. They will need to provide the information required in the AER's trial projects guideline, including demonstrating that they cannot proceed under the existing rules.	stakeholders if needed and decides to grant or refuse a waiver.
3. If the proponent has determined their trial can't proceed under the existing rules, nor under a waiver, they can request a trial rule change. They should contact the AEMC to discuss this process before applying. They will need to provide a detailed written application, including demonstrating that the trial cannot be conducted under the current rules or under a trial waiver.	The AEMC assesses the application, consults with the AER, AEMO and other stakeholders and decides to grant or refuse a trial rule.

**Figure 2.2:** Trial proponent's journey



Source: AEMC

The waivers and trial rules granted under the sandbox will be time limited. Trial proponents can rely on the waiver or the trial rule to conduct their trial project under relaxed or adjusted regulatory arrangements. Under certain conditions a waiver or trial rule could be extended, terminated or repealed. Once a waiver or a trial rule has been granted, the AER will enforce the conditions on which the waiver was granted and the trial rule. The AER will also enforce the knowledge sharing arrangements that were agreed to under the waiver or the trial rule.

## 2.4 How will the toolkit encourage innovation?

Innovation in the energy markets, has the potential to advance the national energy objectives (NEO, NERO and NGO) and lead to better services and prices for consumers. Feedback from stakeholders indicated that the testing of innovative concepts under proof-of-concept trials is being limited and prevented due to:

- regulatory barriers
- the absence of a well-defined and understood regulatory process.

For example, ARENA highlighted that it had worked with trials that have not proceeded due to regulatory barriers and where no-action letters were deemed insufficient to address legal risks such as third party litigation.<sup>29</sup>

On a similar note LO3 Energy considered that its Local Energy Market (LEM) platform that involves peer-to-peer trading and aggregation of sources to provide demand response, energy and ancillary services could not be fully tested under the current rules. It considered that limitations were imposed by restrictions on multiples trading relationships (MTR) at a connection point and the wholesale market settlement processes.<sup>30</sup> Drawing on its experience, TasNetworks highlighted that its proposed embedded network and microgrid project at Nubeena has not proceeded due to regulatory barriers.<sup>31</sup>

Stakeholders also indicated that sandbox arrangements would make conducting trials in some areas easier. The Australian National University (ANU) considered that sandbox arrangements could provide benefits to several possible areas of innovation such as new customer representation models, novel tariffs and tiered regulations. According to the ANU, the sandbox arrangements could also provide for investigating tiered approaches to regulations such as those involving different regulatory environments for electricity retailers of different sizes.<sup>32</sup>

The Commission considers that the proposed sandbox toolkit will encourage innovation that has the potential to contribute to the long term interest of energy consumer by providing a clear and transparent process for:

- innovators to obtain guidance on navigating the energy regulatory arrangements
- reducing regulatory barriers for the testing of new concepts where it is in the long term interest of consumers.

The Commission considers the provisions for the regulatory waiver and trial rules will reduce regulatory barriers for conducting trials where the barriers exist and reducing these barriers is in the long term interest of consumers. Meanwhile, enquiry service will help clarify the current arrangements to allow for trials to be conducted under the current regulatory arrangements and also promote a greater understanding of the regulatory arrangements amongst innovators.

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29 ARENA submission to the consultation paper, p.4.

30 LO3 Energy submission to the consultation paper, p.2.

31 TasNetworks submission to the consultation paper, p.3.

32 ANU submission to the consultation paper, p.3.

Furthermore, consistent with overseas experience, the Commission's sandbox toolkit aims to support innovation in markets in several ways including through:

- enabling testing and fine-tuning of new concepts in a controlled testing environment<sup>33</sup>
- allowing regulators to work with innovators to build appropriate consumer protection safeguards into new products and services leading to better compliance<sup>34</sup>
- helping regulators identify the need for reform to the existing regulatory framework<sup>35</sup>
- enabling knowledge acquired through trials to be shared with the wider industry
- improved access to finance for projects through increased regulatory certainty<sup>36</sup>

Although the sandbox toolkit is expected to further support innovation, the Commission notes that the existing arrangements including the rule change processes provide an appropriate avenue for regulatory reform to respond to the ongoing innovation and support potential future innovation in the energy markets. Proof-of-concept trials, facilitated by the regulatory sandbox toolkit, could inform consideration of regulatory changes before adoption of reforms across the market.

## 2.5 Implementation of the toolkit

The Commission considers that law and rule changes will not be necessary for implementation of the innovation enquiry service. The AER will be responsible for its implementation including determining when the service will be launched and resourcing requirements. The Commission expects the service will be available before the other new sandbox tools are in place. Until the launch of the innovation enquiry service, any member of the public including innovators can still request guidance and advice from the AER, AEMO and AEMC through their general enquiry channels.

Implementation of the other two above-mentioned sandbox tools will require a package of changes to the national energy law and rules. To this end, the Commission has prepared recommended drafting instructions for amendments to the NEL, NERL and NGL. The purpose of these drafting instructions is to explain the legislative changes the Commission considers are needed to provide for a new trial rule change process and for a new AER waiver power to take effect through the national energy rules. The AEMC recommends the COAG Energy Council proceed with these law changes.

The Commission's drafting instructions propose that:

- additional functions be conferred on the AER under the NEL, NERL and NGL
- sections be added in the NEL, NERL and the NGL to empower the AER to grant trial waivers, with more detailed provision to be made under new provisions of the NER, NERR and NGR and the proposed trial project guidelines

33 Financial Control Authority, *Regulatory sandbox lessons learned report*, October 2017, pp. 5-6.

34 Financial Control Authority, *Regulatory sandbox lessons learned report*, October 2017, pp. 5-6.

35 OFGEM, *Insights from running the regulatory sandbox*, October 2018, p. 1.

36 Financial Control Authority, *Regulatory sandbox lessons learned report*, October 2017, pp. 5-6.

- sections be added in the NEL, NERL and the NGL to empower the AEMC to make trial rules, with information required to be included in a trial rule change request set out in the NER, NERR and NGR
- the AER be given responsibility for monitoring trial projects, whether they are conducted under a trial waiver or a trial Rule under the NEL, NERL and the NGL.

The full drafting instructions can be found in Appendix A.

The Commission has also prepared initial drafting for proposed changes to national energy rules setting out detailed provisions to give effect to the toolkit. The initial drafting of the proposed rule changes set out detailed provisions for the toolkit including:

- the content of the trial projects guidelines
- application process for trial waiver
- initial consideration of a proposed trial waiver by the AER
- consultation on a proposed trial waiver
- eligibility requirements to be met for the granting of a waiver
- extension of a trial waiver
- information requirements for lodging a trial rule change request
- monitoring of trial projects by the AER.

The initial drafting of proposed rules is not being made subject to stakeholder consultation at this time. As the toolkit encompasses all national energy rules, similar provisions will need to be adopted in the NER, NERR and NGR. The initial drafting of the proposed rule changes can be found in a separate document published alongside this report.

There are two alternative approaches to implementation of the complete package of reforms:

- Firstly, the amendments to the national energy laws could be made by the South Australian Parliament and a rule change request could then be submitted to the AEMC (by the COAG Energy Council or any other person) to consult on, draft and make the supporting rules.
- Alternatively, following endorsement of the recommendations by the COAG Energy Council, the AEMC could commence work to further develop rule changes to implement the recommended framework including seeking stakeholder feedback on the proposed rule changes. The complete package of national energy law and rule changes could then be submitted to South Australian Parliament and the South Australian Minister (respectively) to be made.

After the law and rule changes, the AER will need to develop the trial projects guidelines in consultation with stakeholders. The whole sandbox toolkit will not be in effect until the law changes, rule changes and the sandbox guideline are in place.

### **2.5.1 Implementation across jurisdictions**

The law changes for the sandbox toolkit will be effective in jurisdictions that have enacted an application Act to adopt the national energy laws. This means the toolkit will provide regulatory relief from the NER, NERR and NGR and relevant provisions of the NEL, NERL and

NGL in all NEM jurisdictions and the Northern Territory in accordance with their respective application acts. As the National Energy Customer Framework has not been adopted in all jurisdictions, regulatory relief from the NERR will only apply in the Australian Capital Territory, Tasmania, South Australia, New South Wales and Queensland.

The NEL and NERL are not adopted in Western Australia. Western Australia has adopted a modified version of the NGL and the Western Australia Energy Minister can choose to adopt any changes to the NGL. Limited provisions in the NGR mainly relating to gas pipeline regulation have been adopted in Western Australia. This means adoption of the NGL changes to give effect to the sandbox toolkit is likely to be of limited benefit in Western Australia.

States and territories may wish to further consider the need for sandbox arrangements in relation to jurisdictional regulation.

## 3 REGULATORY GUIDANCE

The feedback received from stakeholders indicated there was need for a service providing fast, frank feedback to innovators on regulatory issues to help them navigate the energy regulatory arrangements. The Commission's final recommendation is that a new **innovation enquiry service** that provides a dedicated channel for innovators and trial proponents to access guidance on regulatory issues should be implemented. The service should be provided in a coordinated manner with the AER to be first point of contact.

This chapter sets out the Commission's preferred approach to an enquiry service that can provide regulatory guidance and feedback for proponents of innovative trials in the national energy markets. This design of the service has been developed in collaboration with the AEMO, AER, ARENA and ECA.

Section 3.1 provides background and summarises our draft recommendations

The following sections outline stakeholder feedback and the Commission's final recommendations covering the following topics:

- section 3.2 discusses the need for a guidance service
- section 3.3 covers the scope of the advice provided by the service
- section 3.4 discusses the approach to delivery of the service
- section 3.5 covers resourcing of the service
- section 3.6 discusses knowledge sharing arrangements
- section 3.7 outlines the approach to continued development of the service
- section 3.8 covers implementation of the service.

### 3.1 Background and draft recommendations

The Commission's draft report recommended the introduction of a new innovation enquiry service that would provide coordinated guidance and feedback to innovators.

The draft report followed stakeholder feedback that navigating the regulatory arrangements and the complexity of the regulatory framework can be challenging for newer and smaller participants, and that providing further guidance and advice on regulations would help address these challenges. The majority of the stakeholders agreed that the provision of advice was an important element of facilitating innovation and proof-of-concept trials. According to stakeholders, it was important that parties trying to introduce innovative technologies were supported in understanding the relevant regulatory requirements. It was suggested that the service would build on the guidance already provided by the AER through its general inquiries line.

#### **Scope**

The Commission's draft recommendation was that the service would provide an informal steer on regulatory implications for proof-of-concept trials and innovative products, services and business models being proposed by guidance seekers in order to help them successfully

navigate the energy regulatory arrangements and any specific regulatory challenges they may face. The Commission considered that the guidance and feedback service should not provide legal advice, binding rulings, regulatory decisions, endorsements or business incubator services. It was recommended that the service would be targeted at proponents of trials but would be open to all innovators.

### **Implementation**

The draft recommendation was that the service would be provided under a coordinated approach with the AER being the first point of contact for guidance seekers and queries could be referred to other market bodies where appropriate. A "first-stop-shop" as opposed to a "one-stop-shop" approach was considered appropriate to avoid the need for one market body to provide advice on behalf of other market bodies. The AER was suggested to be the appropriate body to be the first point of contact given its previous experience in providing guidance and its key role in enforcement and compliance. It was suggested that charging a fee for the enquiry service would not be appropriate.

The draft report also recommended knowledge sharing arrangements for the service which would involve the AER capturing and publishing high level information regarding usage of the guidance service.

### **Delivery of guidance**

The draft report outlined the manner in which the service will be delivered to guidance seekers, including principles that would be relevant to determine the level of guidance provided to a guidance seeker.

The following sections outline the feedback received from stakeholders regarding the draft proposal and the Commission's final recommendations concerning the establishment of the innovation enquiry service.

## **3.2 Establishment of the innovation enquiry service**

### **Stakeholder feedback on draft report**

The submissions received from stakeholders overwhelmingly supported the creation of the innovation enquiry service as part of the regulatory sandbox toolkit.<sup>37</sup> Stakeholders generally considered that the enquiry service would support innovation by helping innovators navigate the energy regulatory framework and conduct trials.<sup>38</sup>

Jemena considered that the service will assist proponents of innovations particularly for new entrants and smaller operators.<sup>39</sup> TransGrid noted that the service would play an important role in facilitating innovation within the existing arrangements and identifying genuine

37 Submissions to the draft report: Essential Energy, p.2, PIAC, p.2, AGL, p.1, ENA, p.2, EQ, p.3, EUAA, p.1, Simply Energy, p.1 Mondo, p.1, Endeavour Energy, p.1, BoomPower, p.2.

38 Submissions to the draft report: Essential Energy, p.2, ENA, p.2, EUAA, p.1, Simply Energy, p.1, Mondo, p.1

39 Jemena submission to the draft report, p.2.

regulatory barriers.<sup>40</sup> Endeavour Energy highlighted that they expect the enquiry service to be the most frequently used sandbox tool.<sup>41</sup>

Red Energy and Lumo Energy did not support the creation of the enquiry service due to concerns regarding the incumbents never having had the benefits of such a service, the service not providing binding advice and potential for service to be used to "get free advice in relation to the national electricity market".<sup>42</sup>

Some stakeholders also expressed views suggesting possible changes to the design of the service. These are discussed in the following sections.

### **Final advice**

The Commission's final recommendation is that a coordinated regulatory guidance and feedback service, the innovation enquiry service, is established to provide guidance and feedback to trial proponents and innovators on navigating the energy regulatory arrangements. This will build on the established processes the AER and AEMO use to provide guidance. Submissions received from stakeholders overwhelmingly supported the creation of the enquiry service as part of the toolkit.

The aim of establishing the new service is to create a clear process for guidance and feedback for innovative projects and to help communicate clearly that guidance and feedback is available to innovators. The new arrangements will provide guidance and feedback through a dedicated channel for proponents of trials and innovators. A formal avenue is expected to increase the accessibility of guidance and feedback for trial proponents and innovators, and promote within the market bodies a greater understanding of the innovation happening in the industry, which can inform regulatory reform.

The AER will be the first point of contact for trial proponents and innovators to seek guidance on matters related to regulation. The AER will support guidance seekers in their understanding of the relevant regulatory arrangements and where appropriate refer guidance seekers to other institutions. Once a guidance seeker is referred to them, the other institutions will support guidance seekers in their understanding of the matters administered by them.

#### **RECOMMENDATION 2: ESTABLISHMENT OF AN INNOVATION ENQUIRY SERVICE**

Introduce a new innovation enquiry service to provide a dedicated channel for trial proponents and innovators to access feedback and guidance on energy regulatory issues.

<sup>40</sup> TransGrid submission to the draft report, p.1.

<sup>41</sup> Endeavour Energy submission to the draft report p.1.

<sup>42</sup> Red Energy and Lumo Energy submission to the draft report, p.2.



## 3.3 Scope of the innovation enquiry service

The following section outlines the Commission's final recommendation on the scope of the innovation enquiry service.

### 3.3.1 What can innovators expect

#### **Final recommendation**

Innovators can expect the service to provide an informal steer on energy regulatory implications for proof-of-concept trials and innovative products, services and business models being proposed by guidance seekers in order to help them successfully navigate the energy regulatory arrangements and any specific regulatory challenges they may face. Guidance seekers can expect the service to help them explore and understand:

- what energy regulations and rules may apply to their specific project or business model
- options available to progress a project or business model with respect to the regulations
- how to undertake any formal regulatory processes or applications and who they can contact to progress the process.

The new service channel will be aimed at proponents of innovative trials as well as proponents of innovative products, services or business models. The service will be open to access for all innovating businesses in the energy industry regardless of their size and the development stage of the innovative proposition. However, smaller and newer industry players are expected to benefit more from this service.

The objective of the new service channel will be to encourage innovation which has the potential to contribute to the long term interest of consumers through promoting a greater understanding of the energy regulatory arrangements.

When the recommended regulatory sandbox tools, including the waiver and trial rule change process become available to trial proponents, the guidance service will also provide advice in relation to these tools and act as a first point of call for trial proponents considering access to the other tools.

Although the innovation enquiry service is aimed at innovators and proponents of innovative trials, it is important to note that the public and proponents of other projects can continue to access similar levels of guidance and feedback through market bodies' general enquiry lines.

The AER may put in place eligibility criteria for accessing the new service channel and require some information to be provided by guidance seekers. The service provided will be an informal steer that represents staff views rather than a regulatory decision or an organisational view.

Depending on the request, guidance may be delivered in the form of response deemed appropriate by the AER. Responses could be provided via email, over the phone or face-to-face and may involve multiple iterations.

### RECOMMENDATION 3: WHAT IS IN SCOPE

- The innovation enquiry service will provide an informal steer on energy regulatory implications for trials and innovative products, services and business models being proposed by guidance seekers.
- It will be accessible to all innovators and can provide a first step towards access to the other regulatory sandbox tools.

### 3.3.2

#### Services out of scope

##### Stakeholder feedback on draft report

Stakeholder submissions generally supported the scope of the enquiry service outlined in the draft report.<sup>43</sup> The Energy Users Association of Australia (EUAA) considered that the ability to "get an opinion on whether a trial is possible within the existing rules should help innovators considerably".<sup>44</sup> AGL noted that the service could provide a "beneficial touchpoint for market participants to test their understanding of the regulatory regime and any possible barriers".<sup>45</sup> EvoEnergy noted that the advisory service is particularly appropriate at the early stage of a trial concept and "for advice on exemptions or waiver processes".<sup>46</sup>

Some stakeholders raised concerns regarding the scope of the advice not covering legal or binding advice. Essential Energy considered the fact that advice provided under the service represented a staff view could be problematic. As an example of when issues could arise, Essential Energy noted "if a trial proceeds on the basis of advice received and is subsequently found to be in breach of the rules". Furthermore, Essential Energy considered that such risks could be higher for advice provided by other agencies without consultation with the AER.<sup>47</sup> Red Energy and Lumo Energy considered that new entrants required reliable legal and regulatory advice before they invest in the market and it was not clear if the service would provide any real benefit.<sup>48</sup>

Energy Queensland (EQ) noted that given the guidance provided by the AER was not binding it shouldn't be used to force other parties to comply. EQ provided an example that if guidance was provided under the service that a peer-to-peer trial could be progressed under the current arrangements, it should not compel DNSPs or other market participants to participate without their prior approval.<sup>49</sup>

##### Final recommendation

43 Submission to draft report: AER, p. 3, ENA, p.2, EUAA, p.1, AGL, p.3, EvoEnergy, p.1, AGL, p. 3, EvoEnergy, p.1, AEMO, p.2.

44 EUAA submission to the draft report, p. 1.

45 AGL submission to the draft report, p.3.

46 EvoEnergy submission to the draft report, p.1

47 Essential Energy submission to the draft report, p.1.

48 Red Energy and Lumo Energy submission to the draft report, p.2.

49 Energy Queensland submission to the draft report, p.3.

The Commission notes the stakeholder concerns regarding the service not providing legal or binding advice and the risk highlighted by Essential Energy that an innovator may progress a trial on the basis of the advice received through the service and can subsequently be found to be in breach of the rules. The Commission considers that the advice provided by knowledgeable staff from the market bodies will be of use, especially during early stages of development of a concept. The aim of the service is not to eliminate all regulatory risk associated with conducting trials or to supplant existing providers of legal advice. It is appropriate that trial proponents seek their own legal advice.

The Commission's final recommendation is that the coordinated guidance and feedback service will not provide legal advice, binding rulings, regulatory decisions, endorsements or business incubator services. The feedback and guidance provided by the service will be views of the staff rather than an official organisational view or a regulatory decision.

The Commission considers that the guidance service would not be the appropriate avenue to seek and provide regulatory decisions which are made by the AER board and require thorough deliberation. It would not be appropriate for market bodies that are responsible for developing and applying the rules to provide binding legal advice on their interpretation of the legislation. The Commission agrees with the AER submission that binding rulings would involve extra risk for regulators and are not likely to be appropriate. If the market bodies were required to provide regulatory decisions, legal and binding advice, it may limit their ability to provide advice promptly and frankly. The main utility of this service is prompt and free guidance for innovators, that is likely to be beneficial during early stages of development of concepts rather than eliminating regulatory risks. Submissions from stakeholders also suggested that innovators needed prompt and frank advice rather than binding rulings.

The guidance and feedback service is not intended to provide an endorsement or certification that a product, service or business model is compliant with the rules.

The scope of the guidance and feedback service does not extend to helping stakeholders with non-regulatory issues in order to help them launch successful businesses. Such services would be better provided by business incubators or other organisations with relevant expertise.

#### **RECOMMENDATION 4: WHAT IS OUT OF SCOPE**

The innovation enquiry service will not provide legal advice, binding rulings, regulatory decisions, endorsements, business incubator services or advice relating to non-energy regulatory matters.

### **3.4 How will the service be provided?**

The following section outlines the Commission's final recommendations on manner in which coordinated guidance and feedback service will be provided to innovators.

### 3.4.1

#### The first stop for seeking guidance

##### Stakeholder feedback on draft report

Most stakeholders including AusGrid, Energy Queensland, AGL, Jemena and Transgrid agreed that the AER is the appropriate body to deliver and lead the innovation enquiry service.<sup>50</sup>

##### Final recommendation

The AER will be the first point of contact for guidance seekers under the coordinated guidance and feedback service. The AER is the appropriate body to take on this role because it is responsible for administering many of the energy regulations and has significant experience in providing guidance and feedback.

The AER currently provides a significant amount of informal guidance and feedback to participants interacting with the regulatory framework through its general enquiries channels, email services for specific areas of regulation and through stakeholders directly contacting AER staff. As such there is potential for the coordinated guidance and feedback service to leverage the existing enquiries process managed by the AER.

#### RECOMMENDATION 5: THE FIRST STOP

The innovation enquiry service will be led by the AER as the first point of contact.

### 3.4.2

#### Coordination between the market bodies

##### Stakeholder feedback on draft report

Several stakeholder submissions commented on the proposal that the innovation enquiry service adopt a first-stop-shop approach instead of the "one-stop-shop" approach.

Some stakeholders considered that the enquiry service should adopt a one-stop-shop approach managed by the AER instead of involving referrals to other bodies due to concerns regarding innovators receiving fragmented, inconsistent or contradictory advice.<sup>51</sup> Essential Energy considered that a guidance process involving referrals could be lengthy and involve risk that the advice provided to guidance seeker by different bodies is inconsistent or contradictory.<sup>52</sup> PIAC suggested that a one-stop-shop approach would avoid the risk of guidance seekers receiving separate advice from each market body and having to determine how the advice fits together. PIAC further suggested that the legal concerns regarding consolidating and sending advice from other market bodies could be addressed by making clear the market body that provided each sections or piece of advice.<sup>53</sup> Similarly, the EUAA sought clarification regarding whether the AER would seek to resolve any inconsistencies in the advice that a guidance seeker receives from different market bodies.<sup>54</sup>

50 Submission the draft report: AusGrid, p.1, EQ, p.2, AGL, p.3, Jemena, p.2, TransGrid, p.1.

51 Submissions to the draft report: Jemena, p. 2, Essential Energy, p. 2, PAIC, p.2.

52 Essential Energy submission to the consultation paper, p.2.

53 PIAC submission the draft report, p.2.

54 EUAA submission to the draft report, p.2.

Meanwhile, several stakeholders considered that a first-stop-shop approach involving referrals to other market bodies to be appropriate.<sup>55</sup> BoomPower noted that although it was tempting to seek to create a one-stop-shop, the first-stop-shop approach was more appropriate.<sup>56</sup>

The AER raised concerns that stakeholders expectations of the innovation enquiry service may exceed the AER's roles and capabilities. As an example, the AER noted that under the enquiry service it could assist innovators to contact the most appropriate staff in the other market bodies or agencies and arrange meetings with the relevant staff in AEMO and AER, but it "cannot provide advice on behalf of AEMO or ARENA".<sup>57</sup>

### **Final recommendation**

The Commission considers that the likelihood of guidance seekers receiving contradictory and inconsistent advice will be low. This is because many of the enquiries will be best addressed by the AER. Where referrals are made to another market body, it will typically mean that the other market body has ownership of the relevant area in relation to which advice is sought. As the market bodies have distinct responsibilities, each market body providing advice in relation to its functions should not lead to contradictory advice.

The Commission's final recommendation is that if a request for guidance would be better addressed by a different market body, or query would benefit from the input of another market body, the AER will refer the query to the relevant points of contact within the other market institutions or establish a cross organisational team to address the query. The AER may also refer the request for guidance to ARENA or jurisdictional regulators if deemed appropriate. It is expected, for example, that queries related to market participant registrations would be referred to the registrations team within AEMO, queries related to the rule change process and ongoing rule changes would be referred to the AEMC and funding related queries may be referred to ARENA in some instances.

The market bodies and ARENA will coordinate further to develop procedures for coordinating referrals between the institutions and establish the points of contacts for certain types of inquiries within each of the relevant bodies. This will involve developing a list of contacts across different areas of AEMO, AEMC and ARENA to allow the AER to direct queries to the correct contacts quickly and effectively. Once a guidance seeker is referred to them, the other institutions will support guidance seekers in their understanding of the matters administered by them.

Appropriate referrals of request for guidance within market bodies and ARENA is required to avoid the need for one market body to provide advice on behalf of another organisation. Referrals could also limit the need for a market body to share a guidance seeker's potentially confidential project information with another market body as this information could be provided by the guidance seeker itself after the referral. A guidance seeker could also provide consent for a market body to share their project information with other market bodies.

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55 Submissions to the draft report: EvoEnergy, p.1, BoomPower, p.1, AER, p.3, AusGrid, p.1, EQ, p.2

56 BoomPower submission the draft report, p.3.

57 AER submission to the draft report, p.3.

#### RECOMMENDATION 6: COORDINATION

- Queries will be referred to AEMO, AEMC, ARENA and other institutions by the AER where appropriate.
- The AER will be responsible for establishing the coordination process with assistance from other market bodies.

### 3.4.3

#### The innovation enquiry service's shop front

##### Final recommendation

The Commission considers that the success of the service in promoting a greater understanding of the regulatory arrangements in order to promote innovation is likely to depend on its accessibility and recognition by guidance seekers. As such, the service needs to be widely perceived as an avenue for regulatory assistance aimed at promoting innovation which is accessible to trial proponents and innovators. To achieve this, the new guidance and feedback service needs to be easily accessible for potential users and publicly available through the websites of institutions, and be promoted to potential users of the service.

##### Potential perception challenges faced by the current arrangements

Submissions to the consultation paper highlighted that although guidance was currently provided by the AER through their general enquiries line, including to innovators and those seeking to launch trials, and previously by AEMO through the innovation centre, it may not be readily accessible for those less experienced with the regulatory and institutional arrangements. Some stakeholders highlighted that it was difficult for them to find the right starting point for guidance as they might not know what to ask and which organisations to approach. This suggests that there is likely to be a perception and recognition barrier associated with the current arrangements which may limit trial proponents and innovators from accessing the required regulatory guidance and advice.

##### Accessibility

Making the guidance service easily accessible through market bodies' websites and promoting the service among potential users is expected to address the perception challenges.

The Commission's final recommendation is that the AER and other market bodies establish the innovation enquiry service with the following features:

- An external innovation portal will be set up by the AER providing contact details through which the guidance service can be accessed by innovators.
- The market bodies will each publish information on their respective websites explaining what the service can offer to innovators and trial proponents, and how guidance can be accessed by interested parties.
- The guidance service may be promoted by the market bodies to encourage its use.

#### RECOMMENDATION 7: ACCESSIBILITY

The AER and other market bodies should promote awareness of and easy access to the innovation enquiry service.

### 3.4.4

#### Fee associated with the service

##### Final recommendation

The Commission's final advice is that the provision of the service will not involve a fee to be paid by guidance seekers. If the service was provided for a fee, it may discourage some innovators and trial proponents from seeking advice and the service may be seen to compete with commercial law firms and consultants providing regulatory advice. If proponents pay for guidance and feedback from the market bodies, they may expect a level of service commensurate with what they can obtain from the market. This would ultimately lead to poorer outcomes for consumers if the AER and other market bodies provided a service that would be better provided on a competitive basis.

#### RECOMMENDATION 8: FEE FOR THE SERVICE

The innovation enquiry service will not involve a fee to be paid by the guidance seekers to access guidance.

### 3.4.5

#### General principles for delivery of guidance

##### Final recommendation

The service will provide frast-frank-feedback to guidance seekers and will endeavour to:

- be generally welcoming to inquiries, not have unnecessary barriers for stakeholders to access guidance and adopt a “no wrong doors” approach whereby a stakeholder can access the service even if they didn’t use the correct method initially to contact the guidance and feedback service
- be as helpful as possible, by providing the guidance seekers with the right amount and right kind of information to help them understand their regulatory obligations and ways of addressing regulatory issues, subject to prioritising resources in line with the interests of consumers
- provide feedback to innovators as fast as practicable subject to other demands on resources.

#### RECOMMENDATION 9: PRINCIPLES FOR DELIVERY

The innovation enquiry service should be provided in a frank, fast and open manner.

### 3.4.6 Mode of delivery and level of engagement

#### Stakeholder feedback on draft report

The AER's submission noted that the Commission's draft report set out the operational and mechanical detail of the proposed service which could lead to the risk of raising unrealistic stakeholder expectations of the service. According to the AER, details such as how the innovators can expect to contact the AER and how the AER staff should prioritise individual enquiries is best left to the AER to determine.<sup>58</sup>

#### Final recommendation

For the guidance service to be effective in promoting innovation, the level of service and the type of engagement provided to a guidance seeker will need to reflect the needs of the guidance seeker and the potential benefits of the proposition to the consumers. Some stakeholders seeking guidance through the service may only need guidance on a minor matter than can be clarified relatively quickly and without significant ongoing engagement. Such inquiries could be suitably answered via email communication between the guidance seeker and the AER or another market body. Other queries may be more complex and providing guidance may require face-to-face advice or multiple exchanges over several months. The AER and the other market bodies have the discretion to determine the amount of time and effort to be dedicated to queries, and the type of engagement that would be appropriate to addressing a request for guidance. The market body delivering advice may ask guidance seekers to provide further information regarding their circumstances in order to be able to provide guidance.

#### RECOMMENDATION 10: HOW SERVICE WILL BE PROVIDED

The AER and the other market bodies have the discretion to determine the amount of time and effort to be dedicated to queries and the type of engagement that would be appropriate to addressing a request for guidance.

### 3.4.7 Timing of response

#### Stakeholder feedback on draft report

A few stakeholders suggested that there should be greater certainty surrounding the timing of a response from the AER. TransGrid noted that the proposed approach provided "would give too high a level of discretion to the AER to determine the timing of when feedback is provided to proponents".<sup>59</sup> TransGrid further noted that innovators would require some certainty regarding the timing of a response to the enquiry and suggested the AER commit to providing advice within a specified time-frame, while allowing discretion to extend the time-frame under certain circumstances. Similarly, Energy Networks Australia (ENA) suggested specifying the time period for the AER to respond to trial proponents request for guidance.

<sup>58</sup> AER submission to the consultation paper, p.3.

<sup>59</sup> TransGrid submission to the draft report, p.1



ENA considered that in the absence of set time-frames, the timeline of when a guidance seeker can expect to receive advice may be unknown and could vary depending on the AER's workload.<sup>60</sup>

### **Final recommendation**

The Commission notes that guidance seekers are likely to benefit from knowing the time it would take to receive a response from the enquiry service. However, the timeline within which the AER responds to enquiries lodged through the service may vary in terms of complexity and priority, and due to resourcing concerns raised by the AER. A fixed timeline could lead to quality of service being affected and limit the AER's flexibility in addressing queries.

As the concerns from stakeholders relate to stakeholders being unaware of when they can expect a response, the Commission considers that they can be better addressed by the AER providing an indication of the time-frame within which a guidance seeker can expect to receive a response on its website.

#### **RECOMMENDATION 11: TIME FOR RESPONSE**

The AER to provide an indication of the expected time needed to respond to a request for guidance.

## **3.5**

### **Resourcing**

#### **Stakeholder feedback on draft report**

Some stakeholder submissions noted the importance of the enquiry service being adequately resourced.<sup>61</sup> Essential Energy noted that the success of the service would depend on the resources devoted to it and the workload of all market bodies is already quite large. Essential Energy further noted that if the service is an add-on to the market bodies' business as usual functions and is not provided with dedicated resources it could lead to the queries not being processed in timely manner.<sup>62</sup> The AER noted that the stakeholder submissions received in response to the consultation indicate that there is likely to be pent-up demand for the enquiry service and the AER will likely receive a material increase in enquiries once the enquiry service is established and promoted.<sup>63</sup> According to the AER, the proposed enquiry service as well as the waiver process will require additional resourcing for the AER as it is not sufficiently resourced to service the expected increase in enquiries and hence will likely need to seek additional resources to address this.<sup>64</sup>

#### **Final recommendation**

<sup>60</sup> ENA submission to the draft report, p.2

<sup>61</sup> Submissions to the draft report, Essential Energy, p.2, AER, p.7.

<sup>62</sup> Essential Energy submission to the draft report, p.2.

<sup>63</sup> AER submission to the draft report, p.7.

<sup>64</sup> AER submission to the draft report, p.2.

The Commission notes stakeholders comments regarding the need for the service to be appropriately resourced and the risks highlighted by Essential Energy that if the service is not provided with dedicated resources it could impact the effectiveness of the service. The Commission also notes that the establishment of the innovation enquiry service may lead to a material increase in guidance requests to be handled by the AER and the AER may need to acquire further resources to be able to provide the innovation enquiry service, and to implement and administer the other regulatory sandbox tools.

The Commission considers that the innovation enquiry service will need to be appropriately resourced to be effective in helping innovators navigate the regulatory framework. The AER will need to determine resource requirements for efficient and effective delivery of this service, in the context of the AER's other functions, and seek additional resources if required.

#### **RECOMMENDATION 12: RESOURCING**

Implementation of the service will require adequate resourcing. The AER will determine resourcing requirements for the innovation enquiry service and seek additional resources if required.

## **3.6 Knowledge sharing**

### **Stakeholder feedback on draft report**

Stakeholders considered the knowledge sharing proposal for the AER to capture and publish high level information regarding usage of the guidance service to be valuable.<sup>65</sup> BoomPower suggested that an annual publication could "even be used to distil frequently asked questions and standardised advice on regularly asked questions".<sup>66</sup> Similarly AusGrid suggested that the knowledge sharing arrangements include a summary of advice given to the proponents to help increase transparency about actual advice provided and avoid multiple parties seeking advice about the same issue.<sup>67</sup>

Essential Energy suggested the knowledge sharing information should also include outcomes of guidance including how many trials went ahead under current rules, how many waiver applications were made as a result of guidance and number of trials that didn't proceed.<sup>68</sup>

It was suggested by several stakeholders that the enquiry service could be enhanced through the development and publication of written guidance by the AER addressing areas regarding which advice is commonly sought.<sup>69</sup> Essential Energy noted that if many queries relate to the same topic and the AER regularly provides similar responses, commonly provided advice could be drafted in fact-sheets or frequently asked questions (FAQ) documents and published

65 Submissions to the draft report: TransGrid, p.2, BoomPower, p.3, AusGrid, pp. 1-2, Essential Energy, p.2.

66 BoomPower submission the draft report, p.3

67 AusGrid submission to the draft report, pp.2-3.

68 Essential Energy submission to the draft report, pp.2-3.

69 Submissions to the draft report: Essential Energy, p. 3, Mondo, p.1

on the AER website. Mondo suggested the development of high quality education material. As an example, Mondo noted that an educational pack may focus on identifying broad regulatory issues relevant to Stand Alone Power Systems (SAPS) or peer-to-peer energy platforms.<sup>70</sup>

### **Final recommendation**

The Commission notes that stakeholders generally considered the proposed knowledge sharing arrangements to be valuable. The Commission considers that there is potential for the coordinated guidance and feedback service to capture and share information relevant for regulators and innovators, as well as process improvement. The Commission considers that through the guidance service, areas of regulation that are unnecessarily complex may be identified, and these could inform regulatory reform to simplify arrangements. The Commission notes the AER may use the knowledge sharing exercise to distil frequently asked questions and standard advice, and publish on its website as suggested by some stakeholders. Though this would be at the AER's discretion considering confidentiality and the usefulness to other parties .

The Commission's final advice is that the AER should capture and publish high level information regarding usage of the guidance service, for example, including a breakdown of:

- the types and areas of innovation seeking guidance e.g. stand-alone power systems, peer to peer trading etc.
- areas of regulation regarding which guidance is sought
- utilisation of the service
- how many trials went ahead under the rules, sought waivers as a result of guidance or didn't proceed.

#### **RECOMMENDATION 13: KNOWLEDGE SHARING**

The AER should capture and publish high level information regarding usage of the innovation enquiry service.

## **3.7**

### **Continued development**

#### **Final recommendation**

If, as recommended, the other regulatory tools including the regulatory waiver and trial rule change process are established, the market bodies will also provide guidance and feedback in relation to these tools.

After the availability of the other tools, there will be scope to leverage the guidance service. The AER would provide early guidance for regulatory relief applicants and provide feedback

<sup>70</sup> Mondo submission to the draft report, p. 1.

to proponents on their applications. OFGEM found that applicants for their regulatory sandbox initiative often needed advice rather than regulatory relief.

After the trial rule change process becoming available to trial proponents and innovators, the AER would refer proponents to the AEMC to provide guidance in relation to this.

As the lead organisation in the guidance and feedback service, the AER will be responsible for future modifications and enhancements to the service. There may be future opportunities to improve the service after it begins operating.

Modification or improvements of the service will be done in collaboration with the other market institutions. The AER may also consider the need for further formalisation to improve the service and modify the service accordingly. Examples of further formalisation may include:

- requiring guidance seekers to meet eligibility criteria in order to be able to access the service; this could for example assist the AER to dedicate resources towards more pressing issues
- requiring guidance seekers to complete a form describing their proposition and regulatory challenges being faced.

#### **RECOMMENDATION 14: CONTINUED DEVELOPMENT**

The AER will be responsible for future modifications and enhancements to the innovation enquiry service.

## 3.8 Implementation

### **Final recommendation**

The Commission considers that law and rule changes will not be necessary for implementation of the service. It can be provided by the market bodies as part of their general functions.

The AER will be responsible for implementation of the innovation enquiry service including determining when the service will be launched. Prior to launching the service, the AER may need to acquire additional resources, in the context of delivering against all its functions efficiently. The Commission expects the service to be available to innovators before the other new sandbox tools are in place.

Until the launch of the innovation enquiry service, any member of the public — including innovators — can still request guidance from the AER, AEMO and AEMC through their general enquiry channels.<sup>71</sup>

<sup>71</sup> For the AER see: <https://www.aer.gov.au/about-us/contact-us> for AEMO see: <https://aemo.com.au/Contact-us> and for the AEMC see: <https://www.aemc.gov.au/contact-us>

## 4 TRIAL WAIVERS

As outlined in chapter 2, if a trial project cannot be undertaken under the existing rules, a proponent should have the opportunity to apply to the AER for a trial waiver (referred to as sandbox waiver in the draft report). Trial waivers provide exemptions to specific regulatory requirements of the rules for a time and size limited trial.

The AER currently has powers to grant waivers or exemptions under the NEL, NERL and the NGL (energy laws) such as the existing framework for ring-fencing waivers. The Commission's final recommendation is that these powers be expanded to apply to waivers of specific regulations for the purpose of conducting trials. This will involve changes to the energy laws and expansion of the AER's existing functions and powers including publication of a trial projects guidelines the AER would develop in consultation with stakeholders.

The objectives of trial waivers are:

- on a broader level, encourage innovation which has the potential to contribute to the long-term interests of consumers and thereby advance the NEO, NERO and the NGO (energy objectives)
- more specifically, to enable innovative trial projects that have the potential to benefit consumers to proceed where regulatory barriers in the existing rules are identified.

This chapter summarises the submissions we received from stakeholders and provides the Commission's response and final recommendations:

- Section 4.1 provides background information and a summary of the Commission's draft recommendation
- Section 4.2 discusses the scope of the AER's waiver power
- Section 4.3 looks at the trial waiver approval process, including information and eligibility requirements
- Section 4.4 considers waivers under the NGL
- Section 4.5 discuss knowledge sharing requirements.

### 4.1 Draft recommendations

The Commission's draft recommendation proposed trial waivers as one of the options available under the Commission's proposed regulatory sandbox toolkit. In the draft report, the Commission noted that it is expected that trial project proponents would have gone through the regulatory guidance step of the regulatory sandbox toolkit and that a regulatory barrier arising from existing rules has been identified.

In the draft report, we proposed to extend the AER's existing powers and functions to grant temporary regulatory relief for trial projects. This means that the AER would be granted a broad power of regulatory waiver in the energy laws, subject to a trial projects guidelines (referred to as a sandbox guideline in the draft report) required by the NER, NERR and NGR (energy rules).

In particular, the Commission made the following draft recommendations:

- Establish a broad power for the AER to grant trial waivers to trial projects. In order to grant a trial waiver, the AER must be satisfied that the trial project is likely to contribute to the NEO and meets the information and eligibility requirements in the rules and trial project guidelines, (referred to as entry and eligibility requirements in the draft report).
- The AER will develop trial projects guidelines in consultation with stakeholders.
- The requirement for the AER to develop trial projects guidelines will be set out in the National Electricity Rules (NER), National Energy Retail Rules (NERR) and National Gas Rules (NGR) with the AER retaining discretion to include entry (information) and eligibility criteria (in addition to those included in the rules) in consultation with stakeholders.
- Trial projects will have to meet the entry criteria in the trial projects guideline required by the NER, NERR and NGR.
- Trial projects will be limited in time and scope
- Trial waivers can only be granted for regulatory barriers arising out of existing rules.
- The AER will have a time limit to issue a decision on trial waiver applications specified in the trial projects guideline.
- The AER can impose conditions on a trial waiver and revoke the trial waiver if conditions are not met.
- Trial proponents can be required under the trial projects guidelines to report to the AER on their performance against the conditions of their trial waiver.
- The AER will have the ability to extend trial waivers to allow proponents of successful trials to become fully compliant with the rules.

## 4.2 Scope of power

In our draft report we set-out how the AER's existing powers and functions could be expanded to allow them to grant regulatory relief for sandbox trials. Stakeholders generally supported our proposed approach and provided input, in particular, on cost recovery and ease of use for applicants. Only Red Energy and Lumo Energy submitted that they don't see a need for trial waivers.

### **Stakeholder response to draft report**

The main issues raised in submissions relating to the scope of power are summarised below.

The AER submitted that it supported the trial waiver power including Chapter 6 and 6A of the Rules (economic regulation). The AER believes that it will be an important precondition for network service providers' participation in trial projects in some cases and agreed with the Commission's draft position that the AER should not be able to exempt themselves from provisions in the rules.<sup>72</sup>

Australian Gas Infrastructure Group (AGIG) submitted that it agrees that the trial waiver power should be broad and apply to all rules. It noted that the nature and structure of innovative technologies, business models and markets remains uncertain; and the

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<sup>72</sup> AER submission to the draft report, p.4.

relationship between any proof-of-concept trial and the existing law and rules is not clear. It therefore considers it important to give the AER sufficient flexibility to waive rules as required in the specific project context.<sup>73</sup>

In its submission, TransGrid specifically supported the proposal that Chapters 6 and 6A are within the scope of trial waivers, as well as the recommendation that network businesses be allowed to recover trial expenditure as regulated revenue that would otherwise not be recoverable in this way.<sup>74</sup>

In its submission, ATCO seeks additional clarity in the final report on how the regulatory sandbox framework will improve regulatory certainty of cost recovery for regulated network businesses, which will improve access to finance for projects. It noted that innovation, by its very nature, requires a network business to incur up-front costs in the short to medium-term on initiatives with uncertain long-term pay-offs. In its view, network businesses could be deterred from innovations that have potential (but uncertain) long-term benefits in the form of lower costs, or new and improved services required by consumers if the regulatory sandbox framework is unclear on how these costs will be recovered.<sup>75</sup>

Red Energy and Lumo Energy submitted that they do not support the establishment of a broad power for the AER to grant trial waivers to proof-of-concept trials.<sup>76</sup>

### **Final recommendation**

The Commission does not intend the regulatory sandbox toolkit to be a mechanism to provide additional funding for trials and it is not expected to have a direct impact on revenue determinations of regulated businesses.

Parts of the Rules related to economic regulation of distribution and transmission services are within scope in order to avoid restricting trial waivers that may be in the long term interests of consumers. However, as previously noted the AER would not be able to exempt itself from any of their obligations under the rules, including in Chapters 6 and 6A of the NER. This includes requirements for the AER to be satisfied that expenditure by network businesses is prudent and efficient.

If a trial proponent considers that waiving an obligation on the AER is required in order for their trial project to proceed they could consider making a trial rule change request (see Chapter 5).

The Commission notes that no submissions argued against the draft recommendation to include Chapters 6 and 6A of the NER (and related chapters of the NGR) in the regulatory waiver framework. On balance the Commission considers that no change from the draft recommendation is required.

The Commission also considered whether to recommend allowing the AER to waive registration requirements in the energy laws. For example, s.12 of NEL overlaps with AEMO's

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73 AGIG submission to draft report, p. 2.

74 TransGrid submission to the draft report, p. 2.

75 ATCO, submission to the draft report, August 2019, p. 2-3.

76 Red Energy and Lumo Energy submission to the draft report, p. 2.

registration/exemption powers under Chapter 2 of the NEL. Without s.12 being in scope, there would be a risk that the AER could grant an exemption from obligations to register as a generator, NSP or market customer under Chapter 2 of the NEL, but that exemption would be ineffective if the AER is not able to exempt the trial proponent from the overlapping registration requirements under s.12 of the NEL. As such the Commission recommends that the scope of AER waiver power should provide AER the ability to waive all national energy rules and the specific sections of the NEL, NERL and NGL (other than provisions that apply to the AER itself) relevant to registration.

#### RECOMMENDATION 15: SCOPE OF POWER

- Establish a broad power for the AER to grant trial waivers to trial projects, meeting the energy objectives; and information and eligibility requirements.
- The AER may only grant a trial waiver if it is satisfied that the proposed trial project is likely to contribute to the achievement of the national electricity objective (NEO), national energy retail objective (NERO) or national gas objective (NGO). The trial must also meet the eligibility criteria to be specified in the rules:
  - be genuinely innovative
  - have the potential to lead to better services and outcomes for consumers
  - be unable to be conducted without a trial waiver
  - be appropriately limited in time, scope and scale
  - maintain adequate consumer protections
  - meet any other requirements specified in the trial projects guidelines.
- All rules are within scope of the waiver power, including Chapters 6 and 6A of the NEL, as are sections of the energy laws relevant to registration requirements (that is, section 12 of the NEL, section 88 of the NERL and sections 91BJ, 91BRD, 91BRR and 91LB of the NGL) but the AER's power will be limited by criteria set out in the energy laws and rules. This includes a limit on the AER not being able to exempt themselves from any of their obligations under the law and rules.

### 4.3 Trial waiver approval process

Stakeholders have provided comments on several aspects of the trial waiver application process. This section summarises submissions and the Commission's analysis on:

- trial waiver information requirements
- consultation processes
- trial project guidelines
- consumer protections
- time-limit on application processing
- prioritising trial waiver applications.



### 4.3.1 Trial waiver requirements

In the draft report, the Commission recommended:

- a trial waiver test (referred to as regulatory waiver test in the draft report) set out in the laws (that is, the trial must meet the NEO/NERO/NGO)
- information requirements (set out in rules and trial projects guidelines)
- eligibility requirements (set out in the rules and trial projects guidelines).

This section summarises submissions on the trial waiver requirements and the Commission's analysis. Stakeholders generally supported the Commission's draft decision, but noted that more guidance should be provided on how 'genuinely innovative' will be defined.

#### Stakeholder response to draft report

The AER considered that the minimum requirements outlined in the AEMC's draft report are broadly appropriate. The AER recommended that:

- the requirements included in the rules (draft information and eligibility requirements) should be optional on the AER, rather than mandatory
- the energy rules specifically require an applicant to comply with the information and eligibility requirements set out in the trial projects guideline to give the trial projects guidelines' information and eligibility requirements sufficient enforcement power.

The AER considers that a number of elements of the trial waiver power should be established in the energy rules. These include the ability to:

- impose time limits on trial waivers
- extend trial waivers
- impose conditions on trial waivers
- revoke trial waivers
- require recipients of trial waivers to comply with any condition set out by the AER.<sup>77</sup>

TransGrid submitted that it supports the proposal that the AER be able to grant extensions to trial waivers to allow the proponent to become fully compliant with the rules once the trial project is over. It submitted that it thinks this power is important to allow time for the rules to evolve to support the product or business model that was trialled, if a permanent rule change is required for ongoing compliance.<sup>78</sup>

Endeavour Energy also submitted that the AER should be able to extend trial projects to become fully compliant with the rules.<sup>79</sup>

Mondo submitted that many innovators may intend to use a trial waiver as a way to build a business and establish a first mover advantage. At the end of a trial waiver, the waiver pathway could include extending the trial waiver, applying for a new trial waiver scope (with different scope and perhaps wider application), proposing a rule change or terminating the

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<sup>77</sup> AER submission to the draft report, p.5.

<sup>78</sup> TransGrid submission to the draft report, p.2.

<sup>79</sup> Endeavour Energy submission to the draft report, p.2.

trial waiver or trial rule change. Mondo considers that whatever the next steps are at the end of a trial waiver or trial rule change, it is important that applicants are advised early and credible arrangements are in place for consumers should the trial waiver terminate.<sup>80</sup>

AGL submitted that where a trial has been successful in terms of delivering customer benefits, a formal AER process should be established to assess whether the trial waiver should be transitioned towards a permanent waiver. As well as allowing a trial project to become fully compliant with the rules, this process should enable other market participants to apply for the trial waiver. The process should entail formal market notification, stakeholder consultations and an AER determination to ensure that all market participants are afforded equal access and an opportunity to respond should the trial waiver present any material impacts to third parties.<sup>81</sup>

Endeavour Energy submitted that there should be a four to six week time-limit on the trial waiver process subject to information requirements.<sup>82</sup>

Energy Networks Australia saw merit in a mechanism to allow a trial project to be extended in circumstances where the results of the trial technology have yet to be determined. They submitted that to this end, the AER should be granted the ability to extend trial projects in situations where, for example, technologies require a rare weather or market event to occur before their functionality is tested and proven to be successful or not.<sup>83</sup>

Jemena submitted that it supports that trial waivers can be extended. However, it submitted that extension should be conditional on, (i) a commitment within a short time period to lodge a submission to the AEMC for a permanent rule change, and (ii) that the length of the extension is the latter of the time the AEMC makes a decision or the time the rule change comes into effect.<sup>84</sup>

EvoEnergy submitted that there should be an opportunity for trial waivers from the rules to be readily extended should the trials advance from small to larger scale trials.<sup>85</sup>

The AER submitted that it supports the trial waiver requirements (trial must meet the NEO and be genuinely innovative) that will be in the NEL and other energy laws and proposed a more refined definition for a project to be "genuinely innovative" which in their opinion is quite broad in scope. The AER considers that 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".<sup>86</sup>

AGIG submitted that it believes the definition of "genuinely innovative" may be unduly limiting.<sup>87</sup>

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80 Mondo submission to the draft report, p.3.

81 AGL submission to the draft report, p.5.

82 Endeavour Energy, submission to the draft report, August 2019, P.2

83 Energy Networks Australia submission to the draft report, p.2.

84 Jemena submission to the draft report, p.3.

85 EvoEnergy submission to the draft report, p.1.

86 AER submission to the draft report, pp. 4-5.

87 AGIG submission to the draft report, p.3.

Essential Energy submitted that more guidance should be provided on the criteria that a trial project must be “genuinely innovative” in order to qualify for a trial waiver. For example, a trial of stand-alone power systems may not wish to trial the technology (as this has already been proven) but rather ways to provide this service to customers in the most cost-effective way. There is a lack of clarity in terms of whether this type of trial would meet the innovative criteria as currently described.<sup>88</sup>

In its submission, Energy Queensland seeks clarity regarding the proposed trial waiver requirement of the trial project being truly innovative, and how the AER will assess this requirement.<sup>89</sup>

### Final recommendation

The Commission has considered submissions on the trial waiver requirements and found that some changes compared to the draft recommendation are required.

The Commission believes that some information and eligibility requirements are significant enough to be included in the rules, though most are better placed in the trial projects guideline. The eligibility requirements will include the requirement that a trial must be genuinely innovative and this will not be a requirement under the laws as recommended in the draft report. The energy laws will require the AER to be satisfied that a trial project is likely to contribute to the achievement of the energy objective(s).

The Commission's final recommended information and eligibility requirements are set out below:

1. The NEL, NERL and NGL will require the AER to be satisfied that a trial project is likely to contribute to the achievement of the NEO/NERO/NGO.
2. Inclusion of the following information requirements in the NER, NERR and NGR:
  - details of the particular sections of the Law and/or provisions of the Rules in respect of which the person seeks a trial waiver
  - identification of the trial project confidential information
  - any other information specified in the trial projects guidelines.
3. Inclusion of the following eligibility requirements in the NER, NERR and NGR:
  - the trial project is genuinely innovative
  - the trial project has the potential to lead to better services and outcomes for consumers
  - the trial project is unable to be conducted without a trial waiver
  - the trial waiver will be appropriately limited in time, scope and scale
  - adequate consumer protections will be maintained in connection with the trial project
  - that any other eligibility requirement specified in the trial projects guidelines has been satisfied.

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<sup>88</sup> Essential Energy submission to the draft report, p.2.

<sup>89</sup> Energy Queensland submission to the draft report, p.6.

The AER will require sufficient information regarding the proposed trials in order to assess waiver applications. In addition to the high level information requirements set in the rules, detailed information requirements for trial waiver applications are likely to be appropriately included in the trial projects guidelines. As the waiver applications will be assessed by the AER, this will provide flexibility for the AER to determine the relevant information requirements for waiver applications in consultation with stakeholders.

After considering stakeholder submissions, the Commission also found additional provisions should be included in the energy laws. These include the ability of the AER: to impose time limits on waivers, to extend waivers, to revoke waivers, to impose conditions on trial waivers and to require recipients of waivers to comply with any waiver conditions set out by the AER. The Commission considers that this will facilitate a more efficient and transparent trial waiver process, allow for successful trials to become fully compliant with the rules and provide the AER with sufficient flexibility to impose conditions on trials, and monitor and enforce compliance.

A number of submissions sought a stronger definition of the meaning of the term "genuinely innovative". The Commission considers that it is preferable to retain the general meaning of genuinely innovative in the rules and leave it to the AER's discretion to determine if it is satisfied that the trial project meets this criterion. The AER may choose to provide further guidance in the trial projects guideline.

#### **4.3.2 Consultation on waiver applications**

Stakeholders supported the AER allowing for public consultation for trial waiver applications, but commented that a firmer and more transparent framework should be set out in the guidelines.

##### **Stakeholder response to draft report**

The AER supported the AEMC's draft recommendation that the AER should retain discretion to consult with other parties on trial waiver applications. It anticipated that any projects significant enough to require a trial waiver will, in almost all cases, be put to public consultation.<sup>90</sup>

AGL submitted that further consideration should be given to the stakeholder consultation process for trial waiver applications. AGL considered that this process will need to carefully balance the need for public consultation where a trial waiver may have an impact on third-parties with the protection of commercial information and intellectual property in the context of a proposed trial project. It recommends that the stakeholder engagement process be governed by the AER's trial projects guideline with greater prescription on the circumstances in which stakeholder engagement would be undertaken.<sup>91</sup>

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<sup>90</sup> AER submission to the draft report, p.6.

<sup>91</sup> AGL submission to the draft report, p.4.

EvoEnergy submitted that it agrees that the AER should allow for public consultation for trial waiver applications, but noted that the AER should have some discretion in deciding whether to conduct public consultation or not.<sup>92</sup>

AEMO submitted that there should be provisions in the guideline to ensure that AEMO is consulted for trial waiver applications which could impact AEMO's operation of the power system or an energy market.<sup>93</sup>

#### **Final recommendation**

The Commission considers that public consultation requirements are best addressed in the rules. Trial projects are likely to impact on customers and other market participants and there should be certainty that any party potentially impacted by a trial project will be able to engage with the AER before it makes a decision to grant a trial waiver.

The Commission's final recommendation is to include the following public consultation requirements in the NER, NERR and NGR:

- The AER must carry out public consultation in relation to a proposed trial waiver, unless it is satisfied that the proposed trial waiver
  - is unlikely to have an impact on other registered participants
  - is unlikely to have a direct impact on retail customers other than those who provide explicit informed consent to participate in the trial project.
- The AER must consult AEMO in relation to a proposed trial waiver unless the AER is satisfied that the proposed trial waiver and trial project will not affect AEMO's operation of the power system and the market.
- The AER must carry out public consultation in relation to a proposed trial waiver for which AEMO is the applicant, and may consult further with AEMO about the proposed trial waiver.
- The trial projects guideline must specify the procedures by which the AER will carry out public consultation in relation to a proposed trial waiver.

The AER may also consult with the AEMC, AEMO or any jurisdictional regulator in relation to any proposed trial waiver, regardless of whether it carries out public consultation. This does not need to be prescribed in the energy rules.

#### **4.3.3**

#### **Trial projects guidelines**

Stakeholders generally supported the Commission's draft recommendation on the trial projects guidelines, but noted that to support innovation, the process to obtaining a trial waiver should be kept as simple and transparent as possible.

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<sup>92</sup> EvoEnergy submission to draft report, p.2.

<sup>93</sup> AEMO submission to the draft report, p.2.

### Stakeholder response to draft report

TransGrid submitted that the trial projects guideline should not impose limits on the scope, scale or duration of innovative ideas, products or business models that can be proposed, however each trial waiver should set appropriate limits on a case by case basis. TransGrid considers that the process and timing for proposing, reviewing and granting trial waivers, set out in the trial projects guideline, should be mindful that innovative trials require relatively short time frames for assessing and granting trial waivers.<sup>94</sup>

AEMO submitted that the trial projects guidelines should address any perceived conflict for AEMO in situations where AEMO would be reviewing trial waiver applications and be the trial proponent at the same time.<sup>95</sup>

Energy Networks Australia submitted that it believes that it is vital that the good intent of this reform should not be lost to an overly cumbersome and restrictive approach to the test that the AER may decide to run in order to grant trial waivers and complex accompanying trial projects guidelines. According to Energy Networks Australia, tests should be simple in nature, for instance the test could be broadly based on the National Energy Objective.<sup>96</sup>

PIAC submitted that the AER needs to monitor trial projects on an ongoing basis, including the effectiveness of the product/service being trialed and the effectiveness of the consumer protections.<sup>97</sup>

### Final recommendation

The Commission notes the submissions it received on the trial projects guidelines and recommends that the trial projects guidelines be developed by the AER in consultation with stakeholders.

The Commission's final recommendation is that the following requirement for a trial projects guidelines be included in the NER, NERR and NGR:

- The AER:
  - must develop and make the trial projects guidelines
  - may amend the trial projects guidelines from time to time, in accordance with the rules consultation procedures.

## 4.3.4

### Consumer protections

Stakeholders mostly agreed with our proposed approach to ensure that appropriate customer protections are maintained for trial projects operating under a trial waiver.

### Stakeholder response to draft report

Jemena considered that given the tensions between customer protection and restricting opportunity, this is best addressed on a case by case basis. Jemena believes that the AER—as

<sup>94</sup> TransGrid submission to the draft report, p.2.

<sup>95</sup> AEMO submission to the draft report, p.3.

<sup>96</sup> Energy Networks Australia submission to the draft report, p.1.

<sup>97</sup> PIAC submission to the draft report, p.3.

manager of the trial waiver process—should consider the need for customer consent in its consultation process when considering each trial waiver application.<sup>98</sup>

Energy Queensland submitted that it believes that there must be the opportunity for emergency intervention or provision to halt a trial project by impacted stakeholders if it is resulting in poor outcomes for customers including those participating in the trial project and those that are not. For example, if a peer-to-peer trading trial results in excessive energy flows resulting in an outage, there must be provision to halt the trial project.<sup>99</sup>

Endeavour Energy submitted that it believes the proposed customer protections are appropriate. Endeavour Energy notes that it would suggest that these conditions are expanded to address a scenario where the trial proponent has not yet engaged with impacted customers. Under such a scenario a process for obtaining consent could be agreed to instead.<sup>100</sup>

#### **Final recommendation**

The Commission has considered submissions on consumer protections and found that the submissions can be addressed by requirements included in the trial projects guidelines, consultation requirements, eligibility requirements for granting of waivers and the compliance functions recommended being included in the rules.

Under the detailed information requirements to be set by the trial projects guideline, the Commission expects that the trial proponents will report on their approach to maintaining consumers protections through the trial.

Unless the AER is satisfied that a trial project is unlikely to have an impact on customers and other participants, the AER will carry out public consultation on the applications. This will provide an opportunity for potentially impacted parties to raise any concerns with a trial proposal. In granting a trial waiver, the AER will need to be satisfied that adequate consumer protections will be in place during the trial.

Furthermore, the proposed rules will include a provision for the AER to monitor compliance with conditions on which a trial waiver is granted and to be able to terminate a trial waiver on grounds outlined in the trial projects guidelines.

#### **4.3.5**

##### **Time limit on application process**

Stakeholders noted in their submissions that there should be a limit on how long the AER can take to process trial waiver applications.

##### **Stakeholder response to draft report**

AGL submitted that there should be a two months' time limit on the application process, potentially with an option to pause or rewind the process if more information is required.<sup>101</sup>

<sup>98</sup> Jemena submission to the draft report, p.6.

<sup>99</sup> Energy Queensland submission to the draft report, p.7.

<sup>100</sup> Endeavour Energy submission to the draft report, p.3.

<sup>101</sup> AGL submission to the draft report, p.4.

Energy Queensland suggests that the trial waiver application process should be time-limited and commensurate to an expedited rule change process at a maximum.<sup>102</sup>

#### **Final recommendation**

The Commission considers that there is a trade-off between meeting time critical milestones of innovators and ensuring that sufficient time is available for the AER to consider the trial information provided as part of an application, including sufficient time for public consultation where necessary.

The Commission understands that processing waiver applications in a prompt manner is likely to be of high importance for trial proponents. The Commission's view is that the AER's assessment should be less than the ten-week time-frame for the AEMC to consider trial rules applications, though there should be options to extend the process in limited circumstances. There may be circumstances where the complexity of a trial project could require a longer application processing time-frame.

On balance the Commission considers that the trial projects guidelines should further consider and specify the timeline within which the AER will determine applications for trial waivers. This will provide the AER and stakeholders with sufficient flexibility to allow for appropriate time-frames to be determined as the AER is required to consult with stakeholders in developing this guideline under the rules consultation procedures.

#### **4.3.6**

#### **Prioritising trial waiver applications**

Stakeholders also provided comments on how trial waiver applications could be prioritised by the AER.

#### **Stakeholder response to draft report**

In its submission, the AER recommends that it should be able to decide not to grant a trial waiver applications if the application does not fit with an established set of priorities for sandbox experiments and trial projects. It recommended that the rules should enable the AER to prioritise trial projects based on future areas of reform. It also considers that subject to consultation with stakeholders, the AER may explore options to target trial waiver applications. For example, the AER may call for trial waiver applications that address particular innovation challenges identified collaboratively by stakeholders.

The AER submitted that they could prioritise, for example, by considering if a trial project would :

- improve the ability to discover trial projects that are most likely to contribute to the long-term interests of customers
- target trial projects that are likely to provide evidence and experience that can be used to support rule changes

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<sup>102</sup> Energy Queensland submission to the draft report, p.6.



- mitigate various kinds of project risks (e.g. risks to customers, other market participants, or project failure risk).<sup>103</sup>

ARENA submitted that sometimes there are no commercial incentives to proceed with a trial project. This suggests that useful trial projects may also be identified via more proactive approaches, which respond to strategic needs in the sector rather than relying on prospective commercial proponents to self identify. A strategic consultation and coordination network, like DEIP, could provide an important vehicle for identifying and prioritising trial projects of strategic importance for the sector.<sup>104</sup> ARENA also noted that further consideration should be given to whole of sector consultation and coordination to ensure trial projects are identified and prioritised in relation to the needs of the sector and ultimately the broader benefit to the Australian economy.<sup>105</sup> ARENA further submits that whole of sector coordination and governance will be critical in this process and should work to apply a whole of industry development perspective to the process for filtering or escalating new challenges and opportunities. This is not something that any one party (including the market bodies) is well-placed to do in isolation from broader sector interests and insights including consumer and industry representative organisations.<sup>106</sup>

Mondo considers that there could be value in combining a number of applicants into a single trial waiver application.<sup>107</sup>

Simply Energy submitted that it is of the view that businesses should not be required to seek a trial waiver for each and every new product or service they wish to trial. It considers that the AER should provide broad trial waivers that allow proponents to trial certain classes of technologies without the need for ongoing consent on a time-limited basis. It also submitted that trial waivers should be granted to up to five years at the discretion of the AER and that there should be an option for the AER to extend trial waivers where a proponent is awaiting formal regulatory changes or requires more time to fully test a concept.<sup>108</sup>

### Final recommendation

The Commission has considered submissions and found that on balance the ability of the AER to prioritise innovation trials by reform areas defined by the AER should not be included in the rules. The Commission considers that innovation is best left to the market, including what particular areas of the energy industry should harbour innovation. If trial proponents risk delay if they are not in priority areas, this may discourage trial waiver applications being submitted to the AER.

The Commission notes the comments from ARENA on the need for coordination across the sector, however is of the view that existing formal and informal processes, such as DEIP, are appropriate avenues for coordination in relation to trials.

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103 AER submission to the draft report, pp.5-6.

104 ARENA submission to the consultation paper, p.2.

105 ARENA submission to the consultation paper, p.3.

106 ARENA submission to the draft report, p.2.

107 Mondo submission to the consultation paper, p.2.

108 Simply Energy submission to the draft report, p.2.

#### RECOMMENDATION 16: WAIVER APPROVAL PROCESS

- The NER, NERR and NGR will include information and eligibility requirements; and public consultation requirements for trial waiver applications.
- The Laws will include provisions for the AER to impose conditions on trial projects as part of the trial waiver application process.
- The NER, NERR and NGR will require the AER to develop trial projects guidelines. The trial project guidelines can include additional information and eligibility criteria.
- The NER, NERR and NGR will include consumer protection provisions.
- The trial projects guideline will specify the timeline within which the AER will determine applications for trial waivers.

## 4.4

### Waivers under the national gas laws

In our draft report, we asked stakeholders if the regulatory sandbox toolkit including trial waivers should also apply to the NGL/NGR. Stakeholders submitted that the NGL/NGR should be included in the AER's new trial waiver power.

#### Stakeholder response to draft report

In their submission, AGIG submitted that in the future "natural gas" as defined in the NGL and referenced in the National Gas Objective, may not be the basis of innovations in gas markets and networks. They consider that the trial waiver needs flexibility to allow for innovation and proof-of-concept trials involving natural gas networks and services that are not limited to methane.<sup>109</sup>

Evo Energy submitted that the toolkit should apply equally to the NGR as to the NER and NERR. They consider that innovation is needed across the energy industry and omitting gas businesses would potentially deny a significant sector of the energy industry from benefiting from more trial projects, which would not be in the long term interests of customers. They noted that currently the rules may place constraints on new developments in the areas of renewable gas such as hydrogen generation, hydrogen distribution and interconnection of biogas fuel projects.<sup>110</sup>

ATCO submitted that the gas regulatory framework does not currently include any specific mechanisms to support innovation, unlike the electricity regulatory framework that incorporates mechanisms such as the Demand Management Innovation Allowance mechanism to encourage innovation. ATCO considers that adopting the regulatory sandbox framework across both electricity and gas provides for a level playing field, avoiding biases towards any particular technology, and will remove barriers for innovation and proof-of-concept trials across the energy sector.<sup>111</sup>

<sup>109</sup> AGIG submission to the draft report, p.2.

<sup>110</sup> EvoEnergy submission to the draft report, p.2.

<sup>111</sup> ATCO submission to the draft report, p.2.

Energy Networks Australia submitted that they see it as vital that the AER's power to grant trial waivers should encompass the National Gas Rules. They consider that decarbonising gas networks is a high priority for gas distribution businesses and governments. In particular, they noted that in their opinion, technology trials under a regulatory sandbox framework for hydrogen and renewable gas will be highly beneficial for Australia's renewable gas industry development.<sup>112</sup>

Jemena submitted that it supports the trial waiver process applying to the gas rules.<sup>113</sup>

### **Final recommendation**

The Commission notes that it has not received any submissions opposing including the NGL/NGR in the trial waiver framework. The Commission will therefore maintain its draft recommendation to include provision for trial waivers in the NGL/NGR. Application of these recommendations in Western Australia is discussed in section 2.5.1.

#### **RECOMMENDATION 17: NATIONAL GAS LAW AND RULES**

Trial waivers will be available under the NGL to waive requirements of the NGR.

## **4.5**

### **Knowledge sharing**

Stakeholders generally commented that knowledge was one of the main benefits of undertaking trial projects and proposed provisions through which knowledge gained from trial projects can be disseminated to the wider market.

#### **Stakeholder response to draft report**

AGL submitted that all trial waiver applications should be subject to certain knowledge-sharing obligations. It considers that given the regulatory sandbox arrangements are intended to benefit the development of innovation across the national energy markets, there is substantial benefit in the broader market having some degree of visibility of the outcomes of trial projects conducted with trial waivers in place. In AGL's experience, knowledge sharing in the context of innovation trials needs to carefully balance the need for knowledge sharing to support the development of the market, with commercial imperatives to encourage further market innovation and participation. According to AGL, their knowledge sharing arrangements with ARENA strike this balance through clearly described agreements that consider the project outcomes and allow the program partners to develop the most appropriate mechanism for gathering and sharing information.<sup>114</sup>

Energy Queensland submitted that jurisdictional regulators, DNSPs and retailers should be explicitly informed of trial waiver requests that are expected to impact on their operating

112 Energy Networks Australia submission to the draft report, p.3.

113 Jemena submission to the draft report, p.3.

114 AGL submission to the draft report, p. 5.

environment. It noted that potential issues with intellectual property rights will need to be addressed as part of this process.<sup>115</sup>

The AER submitted that it recognises that some trial waiver applications may involve confidential or proprietary information. It considers that in principle, applicants should be prepared to make their entire trial waiver application public, unless there are specific elements of the trial waiver application that are clearly confidential.<sup>116</sup>

PIAC submitted that documentation regarding a trial waiver or trial waiver application should be made public. It considers that 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. PIAC also consider that post-trial review including sharing of data/lessons learnt are important as this would inform 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.<sup>117</sup>

In their submission, ARENA commented that knowledge is the principal value generated from any trial project and demonstration and knowledge sharing is enshrined in ARENA's legislation. ARENA recommends that knowledge sharing should be framed as an integral feature of the sandbox toolkit, supported by appropriate skills and resources.<sup>118</sup>

Red Energy and Lumo Energy submitted that they prefer that any trial project is made public with the relevant analysis to justify the trial waiver made available to all market participants. This approach would be beneficial to all market participants.<sup>119</sup>

### **Final recommendation**

The Commission has considered stakeholder submission and agrees that gaining knowledge is an important benefit of innovative trials. The Commission believes knowledge gained from innovation trials should be disseminated to the wider market given the proponent has obtained the benefit of a waiver, however some confidential information should be protected. The process of competition also has an important role to play in disseminating knowledge gained from trials.

The proposed amendments to the energy rules require the application for a trial waiver or trial Rule to identify any "trial project confidential information". This is defined as information that is identified by the applicant as being confidential. The amendments also make it clear that information not identified as trial project confidential information is not to be treated as information given to the AER in confidence. Accordingly, the AER will be bound by the confidentiality obligations under the energy laws with respect to trial project confidential information only.

The Commission's final recommendation is to include relevant provisions in the rules:

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<sup>115</sup> Energy Queensland submission to the draft report, p. 7.

<sup>116</sup> AER submission to the draft report, p. 6.

<sup>117</sup> PIAC submission to the draft report, p. 3

<sup>118</sup> ARENA submission to the draft report, p. 3.

<sup>119</sup> Red Energy and Lumo Energy submission to the draft report, p. 2.

- In considering whether to grant a trial waiver, the AER must have regard whether the carrying out and monitoring of the trial project is likely to contribute to the development of regulatory and industry experience.
- As part of the information requirements an applicant must identify trial project confidential information.

More detailed knowledge sharing arrangements can be provided in the trial projects guideline.

#### **RECOMMENDATION 18: KNOWLEDGE SHARING**

- The NER, NERR and NGR will include provisions for knowledge sharing and treatment of confidential information in the context of knowledge sharing.

## 5 TRIAL RULE CHANGES

As outlined in chapter 2, if a trial cannot be facilitated under the existing rules or a trial waiver, and needs temporary rules to be set-up in order to proceed, then proponents should have the opportunity to seek rules to be made through a trial rule making process. The energy laws currently provide for standard, fast-track and expedited rule change processes. The Commission's final recommendation is that a new trial rule making process, of less than ten weeks duration be introduced that can provide for time and scope limited rules under the NER, NERR and NGR where conducting a trial is likely to be in the long term interest of consumers.

This chapter sets out the Commission's recommended approach to trial rule changes. The Commission's draft report recommended the introduction of a trial rule change mechanism and outlined a proposed approach for a trial rule change process. Feedback from stakeholders indicated that they were broadly supportive of the proposed approach. The Commission has taken into consideration the feedback from stakeholders in arriving at its final recommendations on trial rule changes. This chapter covers a summary Commission draft recommendations, a summary of stakeholder submissions and final recommendations outlined by issue:

- Section 5.1 discusses the need for a trial rule change mechanism
- Section 5.2 explores the timeline and features of the trial rule change process
- Section 5.3 discusses whether the process would cover gas rules
- Section 5.4 outlines the trial rule making tests
- Section 5.5 explores who can lodge a trial rule change request
- Section 5.6 covers the information requirements for lodging a trial rule change request
- Section 5.7 discusses preconditions for a trial rule change request and conditions for termination of a trial rule making process
- Section 5.8 discusses setting of conditions on trial proponents
- Section 5.9 explores consumer consent requirements
- Section 5.10 looks into pathway to regulatory reform
- Section 5.11 discusses enforcement of trial rules and a process for repealing of trial rules
- Section 5.12 explores whether a fee to submit a trial rule will be necessary.

### 5.1 A new trial rule change mechanism

#### 5.1.1 Summary of draft report

The Commission's draft report recommended the introduction of a new trial rule change mechanism as part of the regulatory sandbox toolkit. The Commission noted that where a worthwhile innovation trial cannot be implemented under existing rules or through a waiver or procedures, then in some cases a temporary rule change may be able to facilitate the trial. It was noted that if the proposal for broad discretion on waivers for the AER is maintained then the trial rule change process may seldom be used, as the vast majority of rule based

trial impediments may be able to be dealt with using waivers. The Commission considered the rule change processes to be useful as a waiver can only exempt a party from an obligation to comply with a rule and it cannot introduce a new rule in its place. In the Commission's opinion trial rule changes would only be required where a new or alternate rule is needed in order to facilitate a trial.

### 5.1.2 Stakeholder response to draft report

Feedback from stakeholders was generally supportive of the introduction of the new trial rule making process as part of the regulatory sandbox toolkit and noted that the process should be used rarely and as an option of last resort.<sup>120</sup> AGL supported the Commission's draft recommendation to introduce a new trial rule making process with its proposed features.<sup>121</sup> AEMO noted that where "no other route is able to facilitate proof-of-concept work, the trial rule change process will deliver value to consumers and the industry".<sup>122</sup> Similarly, the Energy Users Association of Australia (EUAA) noted that the trial rule change process might be used infrequently, but they supported its availability.<sup>123</sup> PIAC expected the majority of trials to be better suited to the regulatory waiver process rather than the trial rule change process.<sup>124</sup>

Essential Energy sought clarification of the need for a trial rule change process given the example of regulatory sandbox arrangements in other jurisdictions did not include a trial rule change process.<sup>125</sup>

Some stakeholders did not consider the trial rule change process to be necessary and raised concerns regarding its ability to promote innovation. Jemena suggested that the trial rule process would seek to place new constraints or obligations on proponents which will "only serve to reduce rather than enhance innovations".<sup>126</sup> Red Energy and Lumo Energy raised concerns that the introduction of a new trial rule making process adds additional administrative complexity and undermines the rule change process.<sup>127</sup>

TransGrid highlighted that the implementation of the trial rule change process should not affect the standard, expedited or fast track rule change processes conducted by the Commission. TransGrid suggested that it would not be appropriate for "the standard of proof" for making rules under the standard, fast-track and expedited processes to change due to the existence of a trial rule change process that could be used to provide more evidence to support a rule change.<sup>128</sup>

<sup>120</sup> Submissions to the draft report: TransGrid, p.2, PIAC, p.3, ATCO, p.3, Simply Energy, p.2, AEMO, p.3, EUAA, p.3, Endeavour Energy, p.3, AGL, p.6.

<sup>121</sup> AGL submission to the draft report, p.6.

<sup>122</sup> AEMO submission to the draft report, p.2.

<sup>123</sup> EUAA submission to the draft report, p.3.

<sup>124</sup> PIAC submission to the draft report, p.3.

<sup>125</sup> Essential Energy submission to the draft report, p.3.

<sup>126</sup> Jemena submission to the draft report, p.1

<sup>127</sup> Red Energy and Lumo Energy submission to the draft report, p.3.

<sup>128</sup> TransGrid submission to the draft report, p.2.

### 5.1.3

#### Final recommendation

The Commission considers that some trials would not be able to go ahead relying solely on regulatory relief and would require temporary alternate regulatory arrangements. The feedback received by the Commission in response to the consultation paper highlighted that for some trials to proceed, amendments needed to be made to the rules authorising the necessary arrangements for trial. As an example, AEMO highlighted that for its aggregated demand response trial to proceed, new concepts such as “the calculation of the baseline energy” and a “demand response interval” needed to be incorporated in the rules.<sup>129</sup> While each proposed trial needs to be assessed on its merits, without a rule process for trials, a subset of trials likely to contribute to the interests of consumers may not be able to go ahead.

A trial rule could lead to obligations and constraints on trial proponents and other parties as suggested by Jemena. However, the Commission considers that trials that can be facilitated by a regulatory waiver, will go ahead under the waiver process. As the trial rule change process will be utilised in instances where regulatory relief provided through a waiver is insufficient, the Commission considers that the trial rule change process is likely to facilitate additional trials and promote innovation. The Commission does not consider that the trial rule change process undermines the rule change process as trial rules will be limited in scope and time and the process will be used under limited circumstances. Further, the trial rule making test encompassing the long-term interest of consumers will apply. In some instances the ability of a trial rules to place obligation on other parties may be beneficial for allowing trials to proceed.

The Commission's final recommendation, in line with the draft, is to introduce a new trial rule change process. The Commission notes that if the proposal for broad discretion on waivers for the AER is maintained then the rule change process may seldom be used, as the vast majority of rule based trial impediments may be able to be dealt with using waivers. The Commission notes that the existence of the trial rule change process will not impact the “standard of proof” as noted by TransGrid that is required by the Commission for making rules under the standard, fast-track and expedited processes.

#### **RECOMMENDATION 19: A NEW TRIAL RULE MAKING PROCESS**

The regulatory sandbox toolkit should include a new AEMC trial-rule-making mechanism.

## 5.2

### The trial rule change process

#### 5.2.1

##### Summary of draft report

The Commission's draft report noted that although it would be possible to deal with a time limited rule change proposal for the purpose of trialling an innovation under the existing standard, fast-track and expedited processes, the existing processes may not be optimal for a

<sup>129</sup> AEMO submission to the consultation paper, pp.7-8



trial rule. The standard process was considered to be disproportionately long and resource intensive for a trial and the definition of a non-controversial rule was expected to impact the applicability of the expedited process.

The Commission considered that a new rule change process may be appropriate for trial rules in order to provide a proportionate and timely outcome. The Commission also recognised that impacted parties, including impacted consumers and competitors, should have an opportunity to comment on the proposal, either through a submission or objection. Other parties could also wish to join the trial. The Commission therefore considered that a process, similar to but in general shorter than, the expedited rule change process of less than eight weeks duration could apply. The Commission recommended that a trial rule change process could be shorter than the expedited process by including a consultation period that can be less than four weeks long.

The Commission also considered that some trial rule changes may be complex and require more time than provided in the proposed process. In such cases, time extensions may be needed to conduct a trial rule change.

## 5.2.2 Stakeholder feedback on draft report

### Consultation requirements

Stakeholders generally agreed with the draft proposal to include a single round of stakeholder consultation in the trial rule change process.<sup>130</sup> EvoEnergy commented that it was appropriate for a consultation paper to be published for public comment prior to a final decision but more frequent public consultation was not required as the impact of trials would be limited.<sup>131</sup> Similarly, the EUAA considered that there should be an opportunity to make submissions.<sup>132</sup> Energy Queensland considered the proposed process to be sufficient provided appropriate protections were in place.

Endeavour Energy considered that while there should be an opportunity for impacted parties to make suggestions or raise concerns with a proposal, there should 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. Endeavour Energy also expected trial rule change proponents to have engaged with impacted parties prior to lodging the trial rule change request.<sup>133</sup>

Energy Queensland suggested that the trial rule making process should include a feedback mechanism that can allow for a trial to be suspended or terminated in an expedited manner if the operation of the trial results in poor customer outcomes, or impacts safety or reliability or security of supply.<sup>134</sup>

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130 Submission to the draft report: EvoEnergy, p.2 EQ, p.7, EUAA, p.3.

131 EvoEnergy submission to the draft report, p.2.

132 EUAA submission to the draft report, p.3.

133 Endeavour Energy submission to the draft report, p.3.

134 EQ submission to the draft report, p.7.

### Opportunity for other parties to join

Some stakeholders considered that through the consultation process, there should be an opportunity for interested parties to join a trial rule making process.<sup>135</sup> Endeavour Energy highlighted that it supported there being an opportunity for interested parties to join a trial provided it does not delay the trial rule making process.<sup>136</sup> Energy Queensland suggested that there should be an opportunity for other participants to seek to join the trial but the trial rule change proponent should have discretion over the decision of whether the other party is able to join.<sup>137</sup>

### Timeline

Some stakeholders noted their support for the timeline of the proposed trial rule making process.<sup>138</sup> However, Essential Energy considered the draft recommendation of the trial rule change process timeline spanning eight weeks to be ambitious.<sup>139</sup> According to Essential Energy, trials take a number of months to plan and to understand its impacts on the network and other parties. It considered that a considerable amount of work would be involved in conducting a trial rule change process and conducting the process in eight weeks would have significant resource implications for the Commission.<sup>140</sup>

## 5.2.3

### Final recommendations

The Commission's view remains that a new rule change process to facilitate trials is likely to be appropriate to provide a proportionate and timely outcome.

### Consultation requirements

The Commission considers that a single round of consultation is likely to balance the need for providing protections for potentially impacted parties and reducing barriers to conducting trials. Through the consultation process, stakeholders including potentially impacted parties will have an opportunity to comment on the proposal and raise any objections that they may have with the proposal. Additional rounds of consultation are likely to lead to a process that is more onerous for trial proponents which may discourage the conduct of some trials.

In relation to the burden of evidence on respondents seeking to materially modify (or reject) a proposal, the Commission considers that the consultation process is likely to be more effective if the stakeholders express their views freely and the Commission exercises its discretion on whether a trial rule change should be amended to address the concerns raised by a stakeholder. Setting expectations on the burden of proof required by stakeholders to raise concerns regarding a trial may discourage my stakeholders from expressing their views.

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135 Submissions to the draft report: Energy Queensland, p.7, EUAA, p.3

136 Endeavour Energy submission to the draft report, p.3.

137 Energy Queensland submission to the draft report, p.7

138 Submissions to the draft report: AGL, p.6, EUAA, p.3.

139 Essential Energy submissions to the draft report, p.3.

140 Essential Energy submission to the draft report, p.4.

### **Opportunity for other parties to join**

Although some stakeholders supported the opportunity for other parties to be able to be able to join a trial through the consultation process, the Commission considers that this provision is unlikely to be appropriate. If a third party requests to join a trial during the stakeholder consultation phase, then stakeholders will not be able to comment on details of the trial proposed by the third party without an additional round of consultation. An additional round of consultation will delay the trial rule change processes initiated by the original trial rule proponent.

However, through the consultation process, the stakeholder would be able to suggest that the trial rule being considered, be applicable to multiple parties or be available to the broader market participants. The stakeholders can also suggest how a trial rule could be drafted to apply to them or the broader market whilst supporting the original proposed trial. The Commission will be able to consider benefits of application of the proposed trial rule to a wider set of participants. A trial rule could also be drafted to be applicable to multiple parties as explained in section 5.6.3.

The Commission also considers that it should have the discretion to combine similar requests for trial rule changes, as can be done for normal rule change requests, and conduct the trial rule change process under a single AEMC process in order to complete the process in a timely and efficient manner.

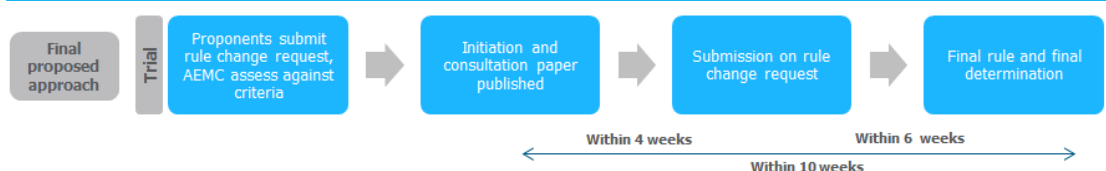
### **Timeline**

The Commission notes the concerns raised by Essential Energy that it can take a number of months to plan trials and understand their impacts on the network and other parties. The Commission considers that although trial proponents seek a timely process for making trial rules, trials needing rules to be able to go ahead could be complex. In conducting the trial rule change process, the Commission will need to:

- understand the proposal including what the trial will test and how the trial will be conducted, these would involve understanding new technical, business model or regulatory concepts
- understand and investigate the impact of the proposal on other parties
- seek and assess stakeholder feedback on the proposal
- design trial rules that establish new concepts in the rules whilst minimising impact on other parties
- carry out an assessment of trial rule against the trial rule making test.

For potential trials such as the "aggregated demand response trial" as explained by AEMO, carrying out a trial rule process could be complex and involved. In the draft proposal, the Commission highlighted that extensions could be sought for complex trial rule changes, however this approach could lead to a decreased certainty of process for trial rule proponents. The Commission considers that a trial rule change process spanning up to 10 weeks is more appropriate.

**Figure 5.1: Trial rule change process overview**



Source: AEMC

### RECOMMENDATION 20: PROCESS AND TIMELINE

The new trial rule change process should be less than 10 weeks long and involve one round of stakeholder consultation.

## 5.3 Inclusion of gas rules

### 5.3.1 Summary of draft report

The draft report envisaged the trial rule making process to encompass the NER, NERR and the NGR as innovative proof-of-concept trials may be impacted by the three set of rules.

### 5.3.2 Stakeholder feedback on draft report

Stakeholders generally considered that the trial rule making process should encompass the National Gas Rules.<sup>141</sup> Energy Queensland considered that "any opportunity that enables the development of better regulation should be adopted across the industry".<sup>142</sup> ENA shared that it was important the trial rule change process encompasses the NGR as "gas distribution businesses are investing in innovative technologies and processes such as electrolysers and hydrogen blending."<sup>143</sup>

### 5.3.3 Final recommendation

The Commission's final recommendation is the same as the draft, that is the trial rule making process should encompass the NER, NERR and the NGR as innovative proof-of-concept may be impacted by the three set of rules. The inclusion of the NGR in the trial rule making process is in line with the scope of the trial waiver process and innovation enquiry service encompassing the gas rules.

141 Submissions to the draft report: EQ, p.7, EUAA, p.3. ENA p.3, EVoEnergy, p.3, Simply Energy, p.2.

142 EQ submission to the draft report, p.7.

143 ENA submission to the draft report, p.3.

## RECOMMENDATION 21: INCLUSION OF GAS

The new trial rule change process should encompass the NER, NER and NGR.

## 5.4 Rule making test

### 5.4.1 Summary of draft report

The Commission considered that the rule-making tests as they stand could be fit for purpose when considering a trial rule change. It was noted that the rule-making test would need to be applied to the trial itself, rather than the potential outcome of the trial, as the test will then be that undertaking the trial was in the long term interests of consumers because of potential benefits, even if the outcome of the trial is uncertain and the trial has potentially deleterious impacts.

### 5.4.2 Stakeholder feedback on draft report

Stakeholders generally supported the proposed test for trial rule changes being the relevant energy objective(s) applied to the trial itself.<sup>144</sup> Energy Queensland supported the existing rule making tests, with the ultimate test being that the trial should be in the long-term interests of consumers.<sup>145</sup> Endeavour Energy supported the Commission's proposed trial rule making test and noted that because innovation was necessary for promoting economic efficiency over the long term, trials were likely to satisfy the rule-making test. Endeavour Energy suggested that it was important that a lower threshold applies to assessing trials given the uncertainty associated with them.<sup>146</sup>

### 5.4.3 Final recommendations

In the Commission's view, the appropriate rule-making tests for trial rules would include:

- the existing rules making tests involving the application of the energy objectives
- requirement that the trial proposed is genuinely innovative
- requirement that the proposed trial has the potential to lead to better services and outcomes for consumers.

The energy objectives would need to be applied to conduct of the trial itself, rather than the potential outcome of the trial. The test will be whether undertaking the trial is in the long term interests of consumers because of the potential benefits, considering the outcome of the trial may be uncertain and the trial may potentially have deleterious impacts.

In the draft report, the Commission considered that the requirement for the trial to be genuinely innovative and have the potential to lead to better outcomes for consumers could be captured under the application of the energy objectives. However, the Commission

<sup>144</sup> Submissions to the draft report: EUAA, p.3, EvoEnergy, p.2, EQ, p.7, Endeavour Energy, p.4.

<sup>145</sup> EQ submission to the draft report, p.7.

<sup>146</sup> Endeavour energy submission to the draft report, p.4.

considers that making these requirements explicit will make the process clearer for trial proponents. The Commission considers that the requirement for the trial to be genuinely innovative is relevant as the objective of the toolkit is to promote innovation. The requirement for the trial to have potential to lead to better outcomes for consumers is expected to make it clear to trial proponents that trials with no potential benefit for consumers will not be accepted.

#### **RECOMMENDATION 22: RULE MAKING TEST**

Before making a trial rule, the AEMC must be satisfied that:

- the making of the trial Rule will or is likely to contribute to the achievement of the relevant energy objective(s)
- the trial project is genuinely innovative
- the trial project has the potential to lead to better services and outcomes for consumers.

## **5.5**

### **The procedure for lodging a trial rule change**

#### **5.5.1**

#### **Summary of draft report**

The Commission noted that under the current arrangements for rule changes, a rule change request can be from any person and that the AEMC can generally make a rule change if and only if it receives a rule change request.<sup>147</sup> The Commission also noted that there could be some advantages in restricting trial rule change proponents to the AER and AEMO such as assisting forum shopping between regulators and trial rule change requests being carefully considered before lodgement. However, this approach could lead to barriers for trial proponents who need a rule change in order to conduct a trial and require the AER and AEMO as rule change proponents to commit resources and develop rule change proposals. The Commission recommended that the existing arrangement, where any person can submit a rule change proposal, was fit for purpose for a trial rule change.

#### **5.5.2**

#### **Stakeholder feedback on draft report**

Stakeholders generally agreed that it was not necessary to limit the ability to lodge trial rule change requests to the AER and AEMO.<sup>148</sup> Energy Queensland agreed that any person should be able to submit a trial rule change proposal as this maintained flexibility and timeliness. Some stakeholders also suggested it was important that frivolous requests and forum shopping were prevented, while keeping the process open to all parties.<sup>149</sup>

Essential Energy raised concerns regarding the trial rule change process being accessible to parties lacking resources and experience with the regulatory framework.<sup>150</sup>

<sup>147</sup> There are minor exceptions - see NEL rule 91(2), NGL rule 295(2), NERL rule 243(2).

<sup>148</sup> Submission to the draft report: AER, p. 6, EQ, p.8, Endeavour Energy, p.4, EUAA, p.3.

<sup>149</sup> Submissions on draft report: EQ, p.8, EUAA, p.3.

<sup>150</sup> Essential Energy submission to the draft report, p.3.

### 5.5.3

#### Final recommendation

The Commission considers that the trial rule change process being accessible to all parties is likely to be appropriate and limiting access to the process to AER and AEMO will likely inhibit the use of the mechanism by trial proponents and thereby potentially inhibit some trials from proceeding.

For parties lacking resources and experience with the regulatory framework, the innovation enquiry service would be able to provide guidance on engagement with the trial rule change process. The risk of forum shopping can be addressed through the information requirements for the lodgement of a trial rule change request as discussed in section 5.7.3.

The Commission's final recommendation is that the existing arrangements used for the normal rule change process, where any person (other than the AEMC) can submit a rule change proposal, are fit for purpose for a trial rule change process.

#### **RECOMMENDATION 23: ACCESS TO TRIAL RULE PROCESS**

Anyone other than the AEMC should be able to lodge a trial rule change request.

## 5.6

### Proposal content and scope of application of trial rule

#### 5.6.1

##### Summary of draft report

The Commission noted that it would require relevant information about the trial to be able to determine whether the trial rule change is in the long term interests of consumers. The Commission noted that it may be interested in the following information:

- the benefits of the trial and the innovation that it may lead to
- the reasons a trial rule change is needed in order to conduct the trial
- the impact of the trial on consumers and other market participants
- risks to consumers and other market participants
- evidence of the proponent's ability to conduct the trial in a professional and competent manner
- plans the proponent has to address impacts and risk
- proposed participant consent requirements
- proposed information sharing arrangements, including timing of information disclosure
- the trial closure process.

Further, the draft report noted the possibility that a trial rule change could apply to only one party, in a manner analogous to a participant derogation, or it could be applicable to a particular type of trial (e.g. stand-alone power systems type trials) and accessible to parties seeking to conduct relevant trials.<sup>151</sup>

<sup>151</sup> For example, NEL sections 2, 91(5), 92(2), 103(4), NER chapter 8A.

### 5.6.2 Stakeholder feedback on draft report

Some stakeholders expressed their general support for the proposed information requirements for trial a rule request.<sup>152</sup> Endeavour Energy highlighted that the information listed in the draft proposal was appropriate and suggested that a flexible approach should be adopted acknowledging there may be instances where additional or less information is required.<sup>153</sup> Similarly, the EUAA suggested that the Commission should have the discretion to require different standards of information from different proponents of similar trials.<sup>154</sup> Energy Queensland suggested that trial proponents should also be required to include a process for trial termination in the event of unforeseen circumstances as well as customer dispute resolution and engagement plan.<sup>155</sup>

Stakeholders expressed different views regarding whether a trial rule should be restricted to a participant in a manner similar to a participant derogation or it should be accessible to other parties. Endeavour Energy considered that a trial rule should be available to multiple parties where similar trial requiring similar additions to the rules are being conducted. According to Endeavour Energy, conditions, information reporting requirements and consumer protections applying to each participant may need to be bespoke and separate. Meanwhile, Energy Queensland considered that trial rules should be limited to the trial rule change proponent to protect intellectual property right and limit the risk exposure to consumers of unintended consequences. Energy Queensland further argued that "a determination could be made as to the additional long-term value of any other participant using the rule change for a trial as opposed to leveraging the knowledge gained".<sup>156</sup> The EUAA saw merit in the Commission having the flexibility to make a trial rule change that is applicable to "a particular kind of trial and accessible to all parties seeking to conduct relevant trials".<sup>157</sup>

VRT systems noted that the initial trial proponent is likely to have invested significant resourcing in planning and conducting the trial and should receive some benefit. It was suggested that if a normal rule change is being sought after the successful conduct of the trial, the trial proponent should have exclusive use of the trial rule whilst a normal rule change is being considered by the Commission.<sup>158</sup> On the contrary, Red Energy and Lumo Energy considered that special care should be taken in permitting new entrants to operate under favourable conditions as it could provide them with a competitive advantage.<sup>159</sup>

### 5.6.3 Final recommendation

The Commission is likely to require adequate information regarding the proposed trial in order to understand the impacts of a trial rule proposal on consumers and to be able to

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152 Submissions to the draft report: EUAA, p. 4, EQ, p.5, Endeavour Energy, p.4.

153 Endeavour Energy submission to the draft report, p.4.

154 EUAA submission to the draft report, p.4.

155 EQ submission to the draft report, p.5.

156 Energy Queensland submission to the draft report, p.8.

157 EUAA submission to the draft report, p.4.

158 VRT Systems submission to the draft report, p.1.

159 Red Energy and Lumo energy submission to the draft report, p.3.



assess the trial rule against the long term interest of consumers. Some additional information to the requirements outlined in the draft report is likely to be required by the Commission. The Commission considers that trial proponents should also submit information regarding the trial's approach to managing customer disputes and a customer engagement plan. Although, the overall information requirement for trial rule change requests are higher than the normal rule change requests, the Commission considers that the type of information being sought under these requirements are likely to be readily available for well planned trials.<sup>160</sup> The Commission considers that these requirements will also serve to provide better consumer outcomes by prompting trial proponents to carry out sufficient planning before commencing a trial.

The Commission's final recommendation is that it will require detailed information to successfully conduct a trial rule change process. The information requirements for trial rule changes recommended to be set-out in the national energy rules are:

- the name and address of the person making the request
- detailed outline of the proposed trial
- the expected benefits and costs of the trial for consumers and other market participants and the innovation that it may lead to
- the reasons a trial rule change is needed in order to conduct the trial
- a description of the proposed trial rule
- a summary of the person's previous engagement with the AER, AEMO or any jurisdictional regulator in relation to the trial
- 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
- approach to engaging with consumers, managing disputes with consumers and other parties involved
- an explanation of how risks to the safety, reliability and security of supply will be avoided or mitigated
- evidence that the person has the operational and financial ability to carry out the trial
- identification of any confidential information
- 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
- any other information specified in the trial projects guidelines.

In relation to application of a trial rule to multiple parties, the Commission considers that it should retain flexibility to define the applicability of a trial rule on a case by case basis. The Commission expects that most trial rules will be drafted for use by the trial rule proponent to conduct the specific trial. However, it may be possible to develop trial rules that can apply across a broader range of market participants to allow for trials in a similar category to

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<sup>160</sup> A normal change means a rule change conducted under the standard, fast-track or expedited rule change process.

proceed. In some instances trial rules will likely need to be applicable to multiple parties to allow the trial to be conducted successfully.

**RECOMMENDATION 24: PROPOSAL CONTENT AND SCOPE OF APPLICATION OF A TRIAL RULE**

- The national energy rules should require detailed information about the proposed trial to be submitted to the AEMC with a trial rule change request.
- The AEMC to have the ability to make trial rules that apply either to a single party or multiple parties.

**5.7**  
**5.7.1**

**Preconditions for a trial change request and termination of process**  
**Summary of draft report**

**Preconditions**

In the draft report, the Commission noted the preconditions for lodging a normal rule change under the energy laws. These required the rule change request to contain certain information and required the AEMC to determine whether the rule change request:<sup>161</sup>

- contains the information required above
- is not misconceived or lacking in substance
- is a matter on which the AEMC may make a rule under the national energy laws
- is not subject to a current or recent rule change request.

The Commission considered that the above criteria along with further criteria were required for trial change requests. The Commission considered that a trial rule change could be rejected if a trial rule proponents cannot demonstrate that 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.

Furthermore, the Commission considered that the trial rule change process should 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.

In relation to the requirement of a trial be genuinely innovative, it was noted that this requirement would be tested under the trial rule making test. A trial rule change proposal that does not demonstrate genuine innovation could be considered to be misconceived or lacking in substance.

<sup>161</sup> NEL section 94, NGL section 301, NERL section 249.

### Termination of a trial rule making process

It was considered that situations may arise where it may be appropriate for the Commission to terminate a trial change process. An example of such a situation included where the Commission may seek to make alterations or make a more preferable trial rule where the final form of the rule is unlikely to provide a sufficient benefit to the proponent such that the trial will proceed.

## 5.7.2 Stakeholder feedback on draft report

### Sequential use of toolkit and forum shopping

Some stakeholders commented on the sequential use of regulatory sandbox tools and recommended measures to prevent potential forum shopping by trial proponents.<sup>162</sup> The AER considered that the regulatory sandbox toolkit components should be used sequentially, that is innovators first seek guidance through the enquiry service before applying for a regulatory waiver. The AER supported the proposal that only once it has been determined that a regulatory waiver would not be appropriate should a trial rule change request be submitted by trial proponents. Furthermore, the AER recommended that the trial rule change proponents should also be required to describe any previous engagements with the AER and AEMO and the outcomes of this engagement to avoid the risk of forum shopping.<sup>163</sup>

AusGrid sought clarification regarding the interaction between the waiver and trial rule change process in the toolkit and highlighted the risk of forums shopping by trial proponents. According to AusGrid if a proponent does not seek a waiver prior to applying for a trial rule change a trial proponent could approach the AER and AEMC simultaneously to try and get a new trial approved. AusGrid recommended that prior to lodging a trial rule change request, trial proponents must approach the AER and the AER must provide them written advice about whether it can or cannot provide a waiver or that a trial rule change is a better option.<sup>164</sup>

EvoEnergy disagreed with requirements that the sandbox toolkit be used sequentially and considered that once participants are familiar with the toolkit then applications can be made based on previous experience with the toolkit. EvoEnergy added that the three tools may not all be needed and after regulatory guidance the next step may be a trial rule change application.<sup>165</sup> Furthermore, EvoEnergy disagreed with restrictions on trial rules that applied across all trial rule changes such as trial rule lodgement preconditions, time limits, information requirements, costumer consent as well as other requirements.<sup>166</sup> Meanwhile, Simply Energy submitted that it will be imperative for the AEMC to establish a framework and clear conditions that proponents must satisfy before their rule change proposal is considered and progressed.<sup>167</sup>

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162 Submissions to the draft report: ENA, p.1, AER, p.6, AusGrid, p.2.

163 AER submission to the draft report, p.6.

164 AusGrid submission to the draft report, p.2.

165 EvoEnergy submission to the draft report, p.1.

166 EvoEnergy submission to the draft report, p.1.

167 Simply energy submission to the draft report, p.2.

The EUAA and Energy Queensland agreed with the proposal that the trial rule change request should demonstrate why the trial cannot proceed without the rule to limit the rule change requests and to ensure that all avenues have been explored prior to this stage.<sup>168</sup>

#### **Trials to be time-limited**

Stakeholders generally agreed that the trial rule change process should be restricted to time-limited trials.<sup>169</sup> Energy Queensland considered that if a trial is not time-limited, it would not be a true trial, and would be seeking a permanent change to the rules and should therefore proceed with a traditional rule change request. Endeavour Energy considered that the requirement for the trial to have a reasonable prospect of delivering material benefit sets a higher requirement than the rule making test proposed in the draft report.

#### **Consideration of a normal rule change**

TransGrid agreed with the Commission's draft proposal that the criteria includes the requirement that the rule changes be restricted to trials where a permanent rule change would otherwise be hampered by inadequate information or experience.<sup>170</sup>

#### **Termination of a trial rule making process**

The stakeholders generally considered that the Commission should be able to terminate a trial rule change process and a trial rule under certain conditions. Endeavour Energy agreed that the Commission should be able to terminate a process if the proponent was not going to utilise it.<sup>171</sup> Energy Queensland considered that the AEMC should have the ability to terminate a trial rule change process if "there is mutual agreement, knowledge from the trial or other sources resulting in the value of the trial becoming limited, or funding issues".<sup>172</sup>

### **5.7.3**

#### **Final recommendation**

##### **Preconditions**

The Commission considers that requirements such as the preconditions, information requirements for trial rule change requests and consent requirements are appropriate to define a clear process for granting trial rules that can be used by trial proponents and providing necessary protections to consumers.

The current preconditions for normal rule changes are also likely to be relevant for the trial rule changes to provide a coherent and consistent approach to lodgement of trial rule change request.

A trial rule change request not meeting the trial rule change preconditions criteria may be rejected by the Commission. If the criteria is met the Commission must determine if further information is required, and if so request that information.

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168 Submissions to the draft report: Energy Queensland, p.4, EUAA, p.4.

169 Submissions to the draft report: Endeavour Energy, p.4, Energy Queensland, p.5.

170 TransGrid submission to the draft report, p. 2,

171 Endeavour Energy submission to the draft report, p.5.

172 Energy Queensland submission to the draft report, p.9.

### Termination of a trial rule making process

The Commission notes the risk of forum shopping by trial proponents as raised by some stakeholders and concerns raised by EvoEnergy that requiring a trial proponent to seek a waiver prior to submitting a trial rule change application may pose a barrier for some trial proponents. The Commission considers that the risk of forum shopping is likely to be adequately addressed through the combination of:

- provisions for the Commission to not take any further action in relation to a trial rule change process if it is found that a trial rule is not necessary to enable the trial
- information requirements for the trial rule change requests to include a summary of the proponent's previous engagement with the AER, AEMO and an explanation of why a trial rule change is needed in order to conduct the trial as part of the information requirements for trial rule change request.

The ability for the Commission to not take further action will allow the Commission to terminate a trial rule change request if a trial rule change request cannot demonstrate that a trial rule is necessary to conduct the trial. This could occur prior to or after the initiation of a trial rule change process. The Commission considers requiring the trial proponent to seek a waiver before lodging a trial rule change request is unlikely to be necessary and will lead to barriers in conducting trials.

In relation to proposed trial rules, the Commission considers that if there is adequate information and experience to consider potential changes to the rules that are likely to benefit the broader market, then a normal rule change process should be considered first. The Commission considers that it should be able to not progress a trial rule change request if it considers that the trial rule change request will be more appropriately considered under the normal rule making process. Prior to lodging a trial rule change request, trial proponents could seek feedback regarding whether a trial rule change would be appropriate through the innovation enquiry service.

Similarly, the Commission considers that it should have the flexibility to not progress a trial rule making process if it considers that a trial project is unlikely to be carried out or if the trial rule requested is unlikely to enable the proposed trial project. This flexibility is likely to be needed under some scenarios. As an example, if the Commission considers that a more preferable trial rule is necessary but the trial proponent may not be willing to conduct a trial under the preferable trial rule. Then there would be little point in continuing with a trial rule making process for a particular proponent if the trial rule would not be used.

Proposed precondition requirements that a trial have a reasonable prospect to deliver material benefit to consumers may be too stringent as highlighted by some stakeholder and potentially exceed the trial rule making test. The Commission considers that a more appropriate requirement would be for the trial to have a reasonable prospect to deliver benefit to consumers. This requirement is expected to prevent proposals that are obviously not in the interest of consumers from being considered further. Instead of being a precondition to lodging a trial rule change request, the Commission considers that, if during the trial rule making process it becomes clear that the trial doesn't offer reasonable prospect

of leading to better services, it should have the discretion to discontinue a trial rule making process.

#### **Time limited trial rules**

The Commission considers it is appropriate for the trial rule change process to be restricted to time limited trials. Trial rules made under this process will be in force for a limited amount of time and will include an expiry date. The Commission will retain flexibility over the way time limits may be imposed on a trial.

#### **RECOMMENDATION 25: TRIAL RULE CHANGE PRECONDITIONS CRITERIA**

If a trial rule change request is lodged, the Commission must assess that the request:

- contains the required information
- is not misconceived or lacking in substance
- is a matter on which the AEMC may make a rule under the national energy laws
- is not subject to a current or recent rule change request.

#### **RECOMMENDATION 26: TERMINATION OF TRIAL RULE CHANGE PROCESS**

The AEMC should have the ability to not take any further action in relation to a trial rule change process if it considers that:

- the requested trial Rule is unnecessary to enable the trial project to be carried out
- the trial project offers no reasonable prospect of leading to better services and outcomes for consumers
- the requested trial Rule is unlikely to enable the trial project to be carried out
- the requested trial Rule should more appropriately be considered for a permanent Rule change
- the trial project is unlikely to be carried out.

#### **RECOMMENDATION 27: TIME LIMIT OF TRIAL RULE**

A trial Rule must be expressed to expire on a specified date, or upon the expiry of a specified length of time after its commencement.

## 5.8 Conditions on proponents

### 5.8.1 Summary of draft report

It was noted that the Commission may wish to impose conditions on the use of the trial rule change or the trial proponent. For example, the trial rule may be restricted to being used by certain market participants in certain geographies, or the proponent may have to submit interim reports that provide confidence that the trial will proceed in the planned manner.

### 5.8.2 Stakeholder feedback on draft report

Some stakeholder expressed concerns regarding conditions imposed through the trial rule. Essential Energy highlighted that often trials are adjusted after they become operational based on lessons learnt through a trial and error approach. Essential Energy raised concerns that trial rules drafted in advance of a trial being conducted may not allow for the trial to adjust, as trial rules cannot be easily changed and thereby risk inhibiting innovation.<sup>173</sup> EvoEnergy suggested that few if any restrictions should be placed on trial rule changes as the objectives of the toolkit is to encourage innovation by relaxing rules.<sup>174</sup>

Other stakeholders considered it was important for the Commission to be able to impose conditions and constraints on the trial through the trial rule.<sup>175</sup> Energy Queensland considered that the ability for the Commission to impose conditions would ensure the rule is not utilised for any unintended consequences.<sup>176</sup> AEMO noted that it was important to have appropriate scope and time constraints, including sunset clauses that minimise the risk posed by possible unforeseen disruption to markets or system operations.<sup>177</sup>

Some stakeholders highlighted the need for trials to be conducted under a trial rule to have knowledge sharing requirements. AGL suggested that in line with the regulatory waiver process, trials conducted under a trial rule should be subject to certain knowledge sharing obligations for the benefit of the broader market.<sup>178</sup> Simply Energy suggested that information disclosure and registration requirements should be imposed on any party seeking to operate a trial pursuant to a time-limited rule change.<sup>179</sup>

### 5.8.3 Final recommendation

The Commission notes the concerns raised by some stakeholders that trials will need to operate within the bounds of a trial rule and this may limit potential future changes to the way a trial is conducted. The Commission considers that it will need to be cognisant of potential future changes that could be made to the trial so that the trial rule provides some flexibility in the way a trial can be conducted whilst maintaining appropriate protections.

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173 Essential Energy submission to the draft report, p.4.

174 EvoEnergy submission to draft report, p.2.

175 Submission to the draft report: Endeavour Energy, p.5, EQ, p.5, AEMO, p.3, EUAA, p.4.

176 EQ submission to the draft report, p.5.

177 AEMO submission to the draft report, p.3.

178 AGL submission to the draft report, p.6.

179 Simply Energy submission to the draft report, p.2.

Adequate planning and engagement with the Commission by the trial proponent may help provide for flexibility in a trial rule.

The Commission considers that the ability to set conditions on a trial through a trial rule is likely to be important to address potential adverse outcomes for consumers and operation of the market. The Commission considers that requirements to share knowledge obtained through a trial is likely to be a condition applicable to all trials. The Commission may seek to rely on the approach taken in the trial projects guidelines to set more detailed knowledge sharing requirements for a trial. Consent requirements are also likely to be a condition set by the Commission for most trials conducted through a trial rule.

#### RECOMMENDATION 28: CONDITIONS

The AEMC to have the ability to set conditions on trials through the trial rule.

## 5.9 Consumer consent

### 5.9.1 Summary of draft report

The Commission noted that in its view the risk of even minor generally adverse consumer outcomes should be very low before a trial can proceed. It was recommended that where consumers are part of a directly affected trial group that could potentially experience materially negative outcomes, then their explicit and informed consent should be obtained.

### 5.9.2 Stakeholder feedback on draft report

Stakeholders generally agreed that trial rules should require consumer consent to proceed under a trial rule.<sup>180</sup> The EUAA agreed that where consumers have even a small chance of suffering a loss, then their explicit informed consent should be obtained.<sup>181</sup> The EUAA suggested that consent should be obtained prior to the application for a trial rule change. Endeavour Energy said that consumer consent should be a critical consideration and it is unlikely that it will present a material barrier to trials.<sup>182</sup>

### 5.9.3 Final recommendation

The Commission considers the risk of even minor generally adverse consumer outcomes should be very low before a trial can proceed under a trial rule. The trial proponents will be required to report on their approach to gathering consent of impacted customers. In the Commission's view, the requirement to obtain explicit informed consent from consumers who may be impacted by a trial is likely to be needed for most trials to safeguard consumers. As highlighted in section 5.8, the Commission will impose consent requirements through conditions in the trial rule. This may mean that the trial proponent must acquire consent from impacted parties before the trial can commence operation. Through the trial rule, the

<sup>180</sup> Submissions to the draft report: EQ, p.9, EUAA, p.5, Endeavour Energy, p.5.

<sup>181</sup> EUAA submission to the draft report, p.5.

<sup>182</sup> Endeavour Energy submission to the draft report, p.5.



Commission may also set in place requirements to demonstrate consumer protections throughout the trial.

The Commission does not consider that consumer consent will need to be obtained prior to application for a trial rule change, as it may pose a barrier for some trials to obtain regulatory approval before commencing any work. The Commission may seek to rely on the approach taken in the trial projects guidelines to set detailed consent requirements for a trial. The Commission also notes that in some instances, agreement from parties that are not consumers but are impacted by the trial may also be required.

#### **RECOMMENDATION 29: CONSENT REQUIREMENTS**

The AEMC to have the ability to require the trial proponent to obtain explicit informed consent of consumers and impacted parties for a trial.

## **5.10 Pathway to regulatory reform and extension**

### **5.10.1 Summary of draft report**

The Commission noted that proponents are likely to be interested in the pathway to a full rule change should a trial be successful. The existing standard, fast-track and expedited processes were considered to generally provide the appropriate pathway for regulatory change. It was suggested that the Commission should also have the option to extend the trial rule when a full rule change request is being considered.

### **5.10.2 Stakeholder feedback on draft report**

Stakeholders generally considered that the current standard, fast-track and expedited rule change process provided an appropriate avenue for a trial to lead to regulatory reform.<sup>183</sup>

Energy Queensland considered that extensions on trial rule could be beneficial. It suggested that where the trial rule change provides benefits to consumers, extensions could be sought such that a permanent rule change request process can be followed. This would enable the trial to continue in parallel with the development of a permanent rule with the benefit of established knowledge.<sup>184</sup>

VRT Systems suggested that a trial proponent should be able to expand the scope of the trial when a normal rule change is being sought after the successful conduct of the trial.

### **5.10.3 Final recommendation**

Trial proponents are likely to be interested in the pathway to a full rule change should a trial be successful. The Commission considers that the existing rule change processes provide an appropriate path for trials to lead to regulatory change. The Commission considers that after a trial has been conducted, generally, a specific rule change request would need to be

<sup>183</sup> Submissions to the draft report: EUAA, p.4, Endeavour Energy, p.5.

<sup>184</sup> Energy Queensland submission to the draft report, p.8.

submitted. Depending on the conditions set out in the law (e.g. NEL) the rule change could be conducted under the fast-track or expedited processes.

The Commission also considers that it is likely to be appropriate for the Commission to be able to extend an existing trial rule under certain circumstances. Situations may arise where extending a trial rule may be appropriate, for example a trial may need to be conducted for a longer period to provide useful information to the market and the trial proponent. Trials by their nature can also face unexpected issues which can delay their execution. Extensions may also be appropriate for trials when a normal rule change is being sought after the successful conduct of the trial. To be able to grant an extension, the Commission considers that it would need to:

- receive a timely request to extend a trial rule
- consult with the AER
- publish a notice of extension of the trial rule.

The Commission does not consider that it would be appropriate to extend the scope of the trial rule while a normal rule change process, initiated on the basis of experience gained under the trial, is being conducted. The application of the trial rule would have already resulted in sufficient information to seek a rule change. The normal rule change process will determine whether the rule being applicable to the wider market is likely to be in the long term interest of consumers.

#### **RECOMMENDATION 30: PATHWAY TO REGULATORY REFORM AND EXTENSION**

The AEMC to have the ability to extend the timeline of application of a trial rule subject to certain conditions.

## **5.11 Compliance with a trial rule**

### **5.11.1 Summary of draft report**

The Commission's draft report noted that compliance with the trial rule will be the responsibility of the AER.

### **5.11.2 Stakeholder feedback on draft report**

The AER noted that it will be required to monitor and enforce compliance with any conditions associated with a trial rule change.

In relation to terminating an ongoing trial, The EUAA considered the criteria for termination during the execution of a trial could be established by the Commission in consultation with the trial proponent. As example, the EUAA suggested that a trial could be terminated if the level of detriment is greater than what the participants agreed to.<sup>185</sup>

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<sup>185</sup> EUAA submission to the draft report, p.4.

### 5.11.3 Final recommendation

The Commission notes that the AER will be responsible for monitoring compliance with and enforcement of the trial rules including any conditions set out in the trial rule and knowledge sharing arrangements. To promote compliance, the AER is able to use a range of enforcement tools such as administrative resolutions, infringement notices and civil proceedings.<sup>186</sup>

In line with the approach set in the trial projects guidelines, if the AER detects issues with the conduct of a trial such as non-compliance or material unforeseen detriment to participants, it can recommend the Commission to repeal the trial rule. The Commission considers that if the AEMC receives such a recommendation, it should be able to repeal a trial rule. The Commission notes that it may seek to outline conditions in the trial rule under which a trial project must cease to operate.

#### **RECOMMENDATION 31: COMPLIANCE WITH A TRIAL RULE**

- The AER to monitor and enforce compliance with a trial rule.
- The AEMC should have the ability to repeal an existing trial rule under certain circumstances.

## 5.12 Trial rule change fee

### 5.12.1 Summary of draft report

The Commission noted that to ameliorate the impact of speculative trial rule change proposals the COAG Energy Council may wish to require payment of a fee to recover part or all of the cost of the rule change, particularly if a trial rule is made but the trial does not proceed, or does not proceed in accordance with the submission put to the Commission.

### 5.12.2 Stakeholder feedback on draft report

Stakeholders expressed mixed views regarding whether a payment for a fee should be required for a trial rule change process. Essential Energy and Simply Energy did not consider that the trial rule proponent should pay a fee for a trial rule change process to be conducted.<sup>187</sup> Energy Queensland supported a fee to ensure that frivolous rule changes are not requested.<sup>188</sup> Similarly, Endeavour Energy submitted that the AEMC should be able to recover its costs through a fee. The AER suggested that the risk of speculative trial rule change requests could be mitigated through information requirement for trial rule changes, which will require the applicant to demonstrate their engagement with other market bodies and providing description of outcomes of engagement.<sup>189</sup>

<sup>186</sup> AER, AER compliance and enforcement policy, July 2019, pp.9-10.

<sup>187</sup> Essential Energy submission to the draft report, p.4.

<sup>188</sup> Energy Queensland submission to the draft report, p.9.

<sup>189</sup> AER submission to the draft report, p.7.

### 5.12.3

#### Final recommendation

The Commission notes that normal rule change requests can currently be subject to payment of a fee prescribed by the Regulations, although no fee is currently payable.<sup>190</sup> COAG Energy Council may wish to require payment of a fee to recover part or all of the cost of the rule change. However, the Commission considers that the risk of speculative trial rule change proposals is likely to be low and a fee is unlikely to be required to ameliorate the impacts of such proposals. Furthermore, a fee may also discourage innovators that are not well resourced from seeking trial rule changes.

#### **RECOMMENDATION 32: TRIAL RULE CHANGE FEE**

The Commission should not seek to recover its costs through a fee paid by the rule proponent.

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<sup>190</sup> NEL section 92-92A, NGL section 298-299, NERL section 246-247.

## ABBREVIATIONS

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ARENA	Australian Renewable Energy Agency
ASIC Commission	Australian Securities and Investment Commission See AEMC
COAG	Council of Australian Governments
DEIP	Distributed energy integration program
ECA	Energy Consumers Australia
EMTPT	Energy Market Transformation Project Team
EQ	Energy Queensland
MCE	Ministerial Council on Energy
MTR	Multiple trading relationships
NEL	National Electricity Law
NEM	National electricity market
NEO	National electricity objective
NERL	National Energy Retail Law
NERO	National energy retail objective
NGL	National Gas Law
NGO	National gas objective
OFGEM	Office of Gas and Electricity Markets
SCO	Senior Committee of Officials

# A DRAFTING INSTRUCTIONS FOR REGULATORY SANDBOX ARRANGEMENTS - LAW CHANGES

## A.1 Proposed NEL amendments

### A.1.1 Overview of proposed amendments

The AEMC proposes that:

- additional functions be conferred on the AER under section 15 of the NEL;
- a section be added in Part 3 of the NEL to empower the AER to grant trial waivers, with more detailed provision to be made under new provisions of the NER and the proposed Trial Projects Guidelines;
- a section be added in Part 7, Division 3 of the NEL to empower the AEMC to make trial Rules, with information required to be included in a trial Rule change request set out in the NER; and
- the AER be given responsibility for monitoring trial projects, whether they are conducted under a trial waiver or a trial Rule.

### A.1.2 Proposed changes to the National Electricity Law

The following proposed amendments are suggested, based on the NEL as it appears in the 1 July 2019 consolidation of the *National Electricity (South Australia) Act 1996*.

#### Section 2 – new definitions

**Table A.1: Section 2 - new definitions - NEL**

<b><i>trial project</i></b>	The AEMC suggests that “trial project” be defined as meaning a project to test an innovative approach in relation to the supply of or demand for electricity
<b><i>trial Rule</i></b>	can be defined as meaning a Rule made under the proposed new section (provisionally s. 96B(1)) for the purpose of enabling a trial project to be carried out
<b><i>trial waiver</i></b>	can be defined by cross-reference to the section empowering the AER to grant trial waivers (provisionally s. 16A(1) of the NEL).

#### Section 15 – additional AER functions

The AER has an existing function (s. 15(e)) to exempt persons from being registered as Registered participants. This function supports the AER’s existing s. 13 power to exempt persons from having to register as TNSPs or DNSPs. (Otherwise, AEMO has powers to register persons as generators, NSPs or as market customers (s. 12(1)), and to exempt persons from having to register as generators or as market customers under s. 12(2). Those registration and exemption powers are addressed further by, and overlap with, rules in Chapter 2 of the NER.)

The AEMC proposes that, to enable trial waivers, the AER should be conferred with a broader exemption function than its existing s. 15(e) function – for instance, “to exempt persons from specified provisions of this Law and the Rules on a temporary basis for the purpose of carrying out trial projects” (potentially as a new s. 15(e)(ii)). As is made clear by the proposed s. 16A(1) below, it is proposed that the AER’s ability to exempt from provisions of the NEL will be confined to s. 12 of the NEL.

The AER should also be conferred with a new function (potentially as a new s. 15(eaa)) of monitoring trial projects carried out under a trial waiver or a trial Rule: this is appropriate to make clear that the AER has that responsibility both following the grant of a trial waiver (by the AER) and following the making of a trial Rule (by the AEMC).

#### Proposed new section 16A – trial waivers

As noted above, it is intended that this section confer power on the AER to grant a trial waiver, while leaving matters of detail to be provided for in the NEL or the proposed Trial Projects Guidelines.

The AEMC envisages that this new section would need to address the following matters:

1. Empowering the AER to exempt a person or persons from complying with s. 12 of the NEL and one or more provisions of the Rules for a specified period for the purpose of enabling a trial project to be carried out (to be defined in this provision as a **trial waiver**).
2. Requiring that the AER may only grant a trial waiver if it is satisfied that the proposed trial project is likely to contribute to the achievement of the national electricity objective.
3. Empowering the AER to extend or terminate a trial waiver, in accordance with the Rules.
4. Prohibiting the AER from exempting itself from compliance with any provision of the Law or the Rules under subsection (1).
5. Requiring that an application for a trial waiver must be made to the AER in accordance with the Rules.
6. Providing that the AER may grant a trial waiver on such conditions as it considers appropriate, in addition to any conditions required by or under the Rules.
7. Expressly requiring that a trial waiver must not be made or extended for an indefinite duration.
8. Making clear that the AER’s power to grant a trial waiver is in addition to, and without prejudice to, its powers to grant a waiver or exemption under any other provision of the Law or the Rules.

#### Section 87 – amended definition

The definition of **market initiated proposed Rule** should be expanded to include a request for a trial Rule. This amendment has the effect that a request for a trial Rule will in turn be included within the definition of **proposed Rule**.

#### Amendment to section 94A(1)(a)

Section 94A(1)(a) should apply to requests for the making of a trial Rule under s.96B(2), in addition to requests for the making of a Rule under s. 91(1).

#### Proposed new section 96B – trial Rules

This new section will be more prescriptive than the empowering provision for trial waivers, because (with the exception of the information required to be included in a trial Rule change request) the provisions regulating the AEMC's power to make a trial Rule will be set out exhaustively in the NEL.

It is proposed that the new section 96B will operate by modifying the provisions of Part 7, Division 3 (as they apply to a standard Rule change request), and otherwise by relying on the provisions of Part 4 (including Schedule 1) and Part 7, Divisions 1 and 4, as they apply to the AEMC's Rule-making powers generally.

The AEMC envisages that the new section would need to address the following matters:

1. Empowering the AEMC to make a trial Rule in accordance with this section for the purpose of enabling a trial project to be carried out.
2. Providing (in modification of s. 91(1)) that the AEMC may only make a trial Rule at the request of any other person or the Ministerial Council of Energy. (Any other person would include any other market body which is a body corporate, such as AEMO.)
3. A provision (similar to s. 92(1)) as to how a trial Rule change request may be made, but providing for the prescribed information to be set out in the Rules, rather than in the National Electricity Regulations.
4. A provision that Part 7, Division 3 applies to the making and consideration of a request for a trial Rule and to the making of a trial Rule, except for:
  - a. subsections 91(1) to (6);
  - b. subsection 92;
  - c. sections 96 and 96A (which relate to the making of non-controversial, urgent or fast track Rules);
  - d. sections 98 to 101 (which relate to the making of draft Rule determinations in the standard Rule-making process: it is intended that the AEMC will not be required to make a draft determination in respect of a trial Rule request),  
and as if:
    - e. in section 94(1)(a)(i), the word "Regulations" were omitted and substituted with "Rules"; and
    - f. the period of time within which the final Rule determination in respect of the trial Rule must be published were 10 weeks (rather than 8 weeks, in s. 96(1)) from the date of publication of the notice under section 95.
5. A provision empowering the AEMC not to progress a trial Rule change request if it considers that
  - a. the trial project is unlikely to be carried out;



- b. the trial project offers no reasonable prospect of leading to better services and outcomes for consumers;
  - c. the requested trial Rule is unnecessary to enable the trial project to be carried out, including because the trial project could be carried out under a trial waiver. (This is intended to require applicants to apply for a trial waiver unless the trial project can only be carried out with the benefit of a trial Rule change);
  - d. the requested trial Rule is unlikely to enable the trial project to be carried out; or
  - e. the requested trial Rule should more appropriately be considered for a Rule change other than a trial Rule change.
6. A provision adding two further matters that the AEMC must be satisfied of before making a trial Rule (in addition to being satisfied that the making of the trial Rule will or is likely to contribute to the achievement of the NEO: s. 88(1)), namely that the trial project:
    - a. is genuinely innovative; and
    - b. has the potential to lead to better services and outcomes for consumers. (These requirements mirror eligibility requirements that are also proposed to apply to the AER's granting of trial waivers, under proposed NER clause 8.15.4(1) & (2).)
  7. A provision empowering the AEMC to impose additional obligations on the person applying for a trial Rule as it considers appropriate (in the nature of the AER's power to grant a trial waiver subject to specified conditions). This provision might be expressed to include (without limitation) an obligation to submit one or more reports in relation to the trial project to the AER.
  8. A provision requiring that a trial Rule must be expressed to expire on a specified date, or upon the expiry of a specified length of time after its commencement.
  9. A provision empowering the AEMC to extend the operation of a trial Rule for a further specified length of time if:
    - a. a request to extend the operation of the trial Rule is made to the AEMC at least 60 days before the scheduled expiry of the trial Rule; and
    - b. the request specifies the length of the extension required.
  10. A provision that, upon receiving a request to extend the operation of a trial Rule, the AEMC must consult with the AER and may consult with AEMO, if the AEMC considers it appropriate to do so.
  11. A provision requiring that, if the AEMC determines to extend the operation of a trial Rule, it must publish notice of the extension (specifying the revised expiry date of the trial Rule), in the South Australian Government Gazette and on the AEMC's website. (These obligations replicate the publication requirements following the making of a Rule, including a trial Rule, under ss. 103(2) and 105(a)).
  12. A provision empowering the AEMC to repeal a trial Rule prior to its expiry, if the AEMC receives a recommendation from the AER to do so. (This is intended to mirror proposed NER clause 8.17.3(2)(ii), which would enable the AER to recommend that the AEMC repeal a trial Rule before its scheduled expiry.)

13. A provision confirming that (subject to item (6) above), nothing in this section modifies or limits the application of Part 4 and Part 7, Divisions 1 and 4 to the making of a trial Rule.
14. A provision requiring that, while any trial Rule is in force, the AER must:
  - a. monitor the trial project in accordance with the Rules and in accordance with any applicable guideline made under the Rules; and
  - b. otherwise administer and enforce the trial Rule in the performance of its statutory functions under section 15.

## A.2 Proposed NERL amendments

### A.2.1 Overview of proposed amendments

The AEMC proposes that:

- an “AER regulatory function or power” be conferred on the AER under the definition in section 2(1) of the NERL;
- a section be added in Part 8, Division 1 of the NERL to empower the AER to grant trial waivers, with more detailed provision to be made under new provisions of the NERR and the proposed Trial Projects Guidelines;
- a section be added in Part 10, Division 4 of the NERL to empower the AEMC to make trial Rules, with information required to be included in a trial Rule change request set out in the NER; and
- the AER be given responsibility for monitoring trial projects, whether they are conducted under a trial waiver or a trial Rule.

### A.2.2 Proposed changes to the National Energy Retail Law

The following proposed amendments are suggested, based on the NERL as it appears in the 21 September 2018 consolidation of the *National Energy Retail Law (South Australia) Act 2011*.

#### Section 2 – amend and new definitions

##### **AER regulatory function or power**

The AEMC suggests that an additional head of function or power be added, being a function or power of granting trial waivers under (provisionally) section 205A and monitoring trial projects carried out under trial waivers or trial Rules.

**Table A.2: Section 2 - new definitions - NERL**

<b><i>trial project</i></b>	The AEMC suggests that “trial project” be defined as meaning a project to test an innovative approach in relation to the supply of or demand for energy
<b><i>trial Rule</i></b>	can be defined as meaning a Rule made under the proposed new section (provisionally s. 253A(1)) for the purpose of

	enabling a trial project to be carried out
<b><i>trial waiver</i></b>	can be defined by cross-reference to the section empowering the AER to grant trial waivers (provisionally s. 205A(1)).

#### Proposed new section 205A – trial waivers

As noted above, it is intended that this section confer power on the AER to grant a trial waiver, while leaving matters of detail to be provided for in the NERR or the proposed Trial Projects Guidelines.

The AEMC envisages that this new section would need to address the following matters:

1. Empowering the AER to exempt a person or persons from complying with section 88 of the NERL and one or more provisions of the Rules for a specified period for the purpose of enabling a trial project to be carried out (to be defined in this provision as a ***trial waiver***).
2. Requiring that the AER may only grant a trial waiver if it is satisfied that the proposed trial project is likely to contribute to the achievement of the national energy retail objective.
3. Empowering the AER to extend or terminate a trial waiver, in accordance with the Rules.
4. Prohibiting the AER from exempting itself from compliance with any provision of the Law or the Rules under subsection (1).
5. Requiring that an application for a trial waiver must be made to the AER in accordance with the Rules.
6. Providing that the AER may grant a trial waiver on such conditions as it considers appropriate, in addition to any conditions required by or under the Rules.
7. Expressly requiring that a trial waiver must not be made or extended for an indefinite duration.
8. Making clear that the AER’s power to grant a trial waiver is in addition to, and without prejudice to, its powers to grant a waiver or exemption under any other provision of the Law or the Rules.

#### Section 235 – amended definition

The definition of ***market initiated proposed Rule*** should be expanded to include a request for a trial Rule. This amendment has the effect that a request for a trial Rule will in turn be included within the definition of ***proposed Rule***.

#### Amendment to section 250A(1)(a)

Section 250A(1)(a) should apply to requests for the making of a trial Rule under section 253A(2), in addition to requests for the making of a Rule under section 243(1).

#### Proposed new section 253A – trial Rules

This new section will be more prescriptive than the empowering provision for trial waivers, because (with the exception of the information required to be included in a trial Rule change

request) the provisions regulating the AEMC's power to make a trial Rule will be set out exhaustively in the NERL.

It is proposed that the new section 253A will operate by modifying the provisions of Part 10, Division 4 (as they apply to a standard Rule change request), and otherwise by relying on the provisions of Part 10, Divisions 1, 2 and 5, as they apply to the AEMC's Rule-making powers generally.

The AEMC envisages that the new section would need to address the following matters:

1. Empowering the AEMC to make a trial Rule in accordance with this section for the purpose of enabling a trial project to be carried out.
2. Providing (in modification of s. 243(1)) that the AEMC may only make a trial Rule at the request of any other person or the Ministerial Council of Energy. (Any other person would include any other market body which is a body corporate, such as AEMO.)
3. A provision (similar to s. 246) as to how a trial Rule change request may be made, but providing for the prescribed information to be set out in the Rules, rather than in the National Electricity Regulations.
4. A provision that Part 10, Division 4 applies to the making and consideration of a request for a trial Rule and to the making of a trial Rule, except for:
  - a. section 243;
  - b. section 246;
  - c. sections 252 and 253 (which relate to the making of non-controversial, urgent or fast track Rules);
  - d. sections 255 to 258 (which relate to the making of draft Rule determinations in the standard Rule-making process: it is intended that the AEMC will not be required to make a draft determination in respect of a trial Rule request),  
and as if:
    - e. in section 249(1)(a)(i), the words "National Regulations" were omitted and substituted with "Rules"; and
    - f. the period of time within which the final Rule determination in respect of the trial Rule must be published were 10 weeks (rather than 8 weeks, in s. 252(1)) from the date of publication of the notice under section 251.
5. A provision empowering the AEMC not to progress a trial Rule change request if it considers that:
  - a. the trial project is unlikely to be carried out;
  - b. the trial project offers no reasonable prospect of leading to better services and outcomes for consumers;
  - c. the requested trial Rule is unnecessary to enable the trial project to be carried out, including because the trial project could be carried out under a trial waiver. (This is intended to require applicants to apply for a trial waiver unless the trial project can only be carried out with the benefit of a trial Rule change);

- d. the requested trial Rule is unlikely to enable the trial project to be carried out; or
  - e. the requested trial Rule should more appropriately be considered for a Rule change other than a trial Rule change.
6. A provision adding two further matters that the AEMC must be satisfied of before making a trial Rule (in addition to being satisfied that the making of the trial Rule will or is likely to contribute to the achievement of the NERO: s. 236(1)), namely that the trial project:
    - a. is genuinely innovative; and
    - b. has the potential to lead to better services and outcomes for consumers. (These requirements mirror eligibility requirements that are also proposed to apply to the AER's granting of trial waivers, under proposed NERR rule 179(1)(a) & (b).)
  7. A provision empowering the AEMC to impose additional obligations on the person applying for a trial Rule as it considers appropriate (in the nature of the AER's power to grant a trial waiver subject to specified conditions). This provision might be expressed to include (without limitation) an obligation to submit one or more reports in relation to the trial project to the AER.
  8. A provision requiring that a trial Rule must be expressed to expire on a specified date, or upon the expiry of a specified length of time after its commencement.
  9. A provision empowering the AEMC to extend the operation of a trial Rule for a further specified length of time if:
    - a. a request to extend the operation of the trial Rule is made to the AEMC at least 60 days before the scheduled expiry of the trial Rule; and
    - b. the request specifies the length of the extension required.
  10. A provision that, upon receiving a request to extend the operation of a trial Rule, the AEMC must consult with the AER and may consult with AEMO, if the AEMC considers it appropriate to do so.
  11. A provision requiring that, if the AEMC determines to extend the operation of a trial Rule, it must publish notice of the extension (specifying the revised expiry date of the trial Rule), in the South Australian Government Gazette and on the AEMC's website. (These obligations replicate the publication requirements following the making of a Rule, including a trial Rule, under ss. 261(2) and 263(a)).
  12. A provision empowering the AEMC to repeal a trial Rule prior to its expiry, if the AEMC receives a recommendation from the AER to do so. (This is intended to mirror proposed NERR rule 185(b)(ii), which would enable the AER to recommend that the AEMC repeal a trial Rule before its scheduled expiry.)
  13. A provision confirming that (subject to item (6) above), nothing in this section modifies or limits the application of Part 7, Divisions 1, 2 and 5 to the making of a trial Rule.
  14. A provision requiring that, while any trial Rule is in force, the AER must:
    - a. monitor the trial project in accordance with the Rules and in accordance with any applicable guideline made under the NER (that is, the Trial Projects Guidelines are proposed to be developed under the NER); and

- b. otherwise administer and enforce the trial Rule in the performance of its statutory functions under section 204.

## A.3 Proposed NGL amendments

### A.3.1 Overview of proposed amendments

The AEMC proposes that:

- additional functions be conferred on the AER under section 27 of the NGL;
- a section be added in Chapter 2, Part 1, Division 1 of the NGL to empower the AER to grant trial waivers, with more detailed provision to be made under new provisions of the NGR and the proposed Trial Projects Guidelines;
- a section be added in Chapter 9, Part 3 of the NGL to empower the AEMC to make trial Rules, with information required to be included in a trial Rule change request set out in the NGR; and
- the AER be given responsibility for monitoring trial projects, whether they are conducted under a trial waiver or a trial Rule.

### A.3.2 Proposed changes to the National Gas Law

The following proposed amendments are suggested, based on the NGL as it appears in the 13 December 2018 consolidation of the *National Gas (South Australia) Act 2008*.

#### Section 2 – new definitions

**Table A.3: new definitions - NGL**

<b><i>trial project</i></b>	The AEMC suggests that “trial project” be defined as meaning a project to test an innovative approach in relation to the supply of or demand for natural gas
<b><i>trial Rule</i></b>	can be defined as meaning a Rule made under the proposed new section (provisionally s. 305A(1)) for the purpose of enabling a trial project to be carried out
<b><i>trial waiver</i></b>	can be defined by cross-reference to the section empowering the AER to grant trial waivers (provisionally s. 28A(1) of the NGL).

#### Section 27 – additional AER functions

The AEMC proposes that the AER should also be conferred with two new functions (potentially as new ss. 27(ga) and (gb)) of:

- (a) exempting persons from specified provisions of this Law and the Rules on a temporary basis for the purpose of carrying out trial projects. (As is made clear by the proposed s. 28A(1) below, it is proposed that the AER’s ability to exempt from provisions of the NGL will be confined to sections relating to registration of participants.); and
- (b) monitoring trial projects carried out under a trial waiver or a trial Rule.

### Proposed new section 28A – trial waivers

As noted above, it is intended that this section confer power on the AER to grant a trial waiver, while leaving matters of detail to be provided for in the NGR or the proposed Trial Projects Guidelines.

The AEMC envisages that this new section would need to address the following matters:

1. Empowering the AER to exempt a person or persons from complying with
  - (a) one or more of sections 91BJ, 91BRD, 91BRR and 91LB of the NGL – being provisions requiring registration as a participant; and
  - (b) one or more provisions of the Rules,for a specified period for the purpose of enabling a trial project to be carried out (to be defined in this provision as a **trial waiver**).
2. Requiring that the AER may only grant a trial waiver if it is satisfied that the proposed trial project is likely to contribute to the achievement of the national gas objective.
3. Empowering the AER to extend or terminate a trial waiver, in accordance with the Rules.
4. Prohibiting the AER from exempting itself from compliance with any provision of the Law or the Rules under subsection (1).
5. Requiring that an application for a trial waiver must be made to the AER in accordance with the Rules.
6. Providing that the AER may grant a trial waiver on such conditions as it considers appropriate, in addition to any conditions required by or under the Rules.
7. Expressly requiring that a trial waiver must not be made or extended for an indefinite duration.
8. Making clear that the AER's power to grant a trial waiver is in addition to, and without prejudice to, its powers to grant a waiver or exemption under any other provision of the Law or the Rules.

### Section 290 – amended definition

The definition of **market initiated proposed Rule** should be expanded to include a request for a trial Rule. This amendment has the effect that a request for a trial Rule will in turn be included within the definition of **proposed Rule**.

### Amendment to section 302(1)(a)

Section 302(1)(a) should apply to requests for the making of a trial Rule under section 305A(2), in addition to requests for the making of a Rule under section 295(1).

### Proposed new section 305A – trial Rules

This new section will be more prescriptive than the empowering provision for trial waivers, because (with the exception of the information required to be included in a trial Rule change

request) the provisions regulating the AEMC's power to make a trial Rule will be set out exhaustively in the NGL.

It is proposed that the new section 305A will operate by modifying the provisions of Chapter 9, Part 3 (as they apply to a standard Rule change request), and otherwise by relying on the provisions of Chapter 2, Part 2 (including Schedule 1) and Chapter 9, Parts 1 and 4, as they apply to the AEMC's Rule-making powers generally.

The AEMC envisages that the new section would need to address the following matters:

1. Empowering the AEMC to make a trial Rule in accordance with this section for the purpose of enabling a trial project to be carried out.
2. Providing (in modification of s. 295(1)) that the AEMC may only make a trial Rule at the request of any other person or the Ministerial Council of Energy. (Any other person would include any other market body which is a body corporate, such as AEMO.)
3. A provision (similar to s. 298(1)) as to how a trial Rule change request may be made, but providing for the prescribed information to be set out in the Rules, rather than in the National Electricity Regulations.
4. A provision that Chapter 9, Part 3 applies to the making and consideration of a request for a trial Rule and to the making of a trial Rule, except for:
  - a. subsections 295(1) and (2);
  - b. section 298;
  - c. sections 304 and 305 (which relate to the making of non-controversial, urgent or fast track Rules);
  - d. sections 98 to 101 (which relate to the making of draft Rule determinations in the standard Rule-making process: it is intended that the AEMC will not be required to make a draft determination in respect of a trial Rule request),  
and as if:
  - e. in section 301(1)(a)(i), the word "Regulations" were omitted and substituted with "Rules"; and
  - f. the period of time within which the final Rule determination in respect of the trial Rule must be published were 10 weeks (rather than 8 weeks, in s 304(1)) from the date of publication of the notice under section 303.
5. A provision empowering the AEMC not to progress a trial Rule change request if it considers that:
  - a. the trial project is unlikely to be carried out;
  - b. the trial project offers no reasonable prospect of leading to better services and outcomes for consumers;
  - c. the requested trial Rule is unnecessary to enable the trial project to be carried out, including because the trial project could be carried out under a trial waiver. (This is intended to require applicants to apply for a trial waiver unless the trial project can only be carried out with the benefit of a trial Rule change);



- d. the requested trial Rule is unlikely to enable the trial project to be carried out; or
  - e. the requested trial Rule should more appropriately be considered for a Rule change other than a trial Rule change.
6. A provision adding two further matters that the AEMC must be satisfied of before making a trial Rule (in addition to being satisfied that the making of the trial Rule will or is likely to contribute to the achievement of the NGO: s. 291(1)), namely that the trial project:
    - a. is genuinely innovative; and
    - b. has the potential to lead to better services and outcomes for consumers. (These requirements mirror eligibility requirements that are also proposed to apply to the AER's granting of trial waivers, under proposed NGR rule 135MC(1)(a) & (b).)
  7. A provision empowering the AEMC to impose additional obligations on the person applying for a trial Rule as it considers appropriate (in the nature of the AER's power to grant a trial waiver subject to specified conditions). This provision might be expressed to include (without limitation) an obligation to submit one or more reports in relation to the trial project to the AER.
  8. A provision requiring that a trial Rule must be expressed to expire on a specified date, or upon the expiry of a specified length of time after its commencement.
  9. A provision empowering the AEMC to extend the operation of a trial Rule for a further specified length of time if:
    - a. a request to extend the operation of the trial Rule is made to the AEMC at least 60 days before the scheduled expiry of the trial Rule; and
    - b. the request specifies the length of the extension requested.
  10. A provision that, upon receiving a request to extend the operation of a trial Rule, the AEMC must consult with the AER and may consult with AEMO, if the AEMC considers it appropriate to do so.
  11. A provision requiring that, if the AEMC determines to extend the operation of a trial Rule, it must publish notice of the extension (specifying the revised expiry date of the trial Rule), in the South Australian Government Gazette and on the AEMC's website. (These obligations replicate the publication requirements following the making of a Rule, including a trial Rule, under ss. 313(2) and 315(a)).
  12. A provision empowering the AEMC to repeal a trial Rule prior to its expiry, if the AEMC receives a recommendation from the AER to do so. (This is intended to mirror proposed NGR rule 135OB(b)(ii), which would enable the AER to recommend that the AEMC repeal a trial Rule before its scheduled expiry.)
  13. A provision confirming that (subject to item (6) above), nothing in this section modifies or limits the application of Chapter 2, Part 2 and Chapter 9, Parts 1 and 4 to the making of a trial Rule.
  14. A provision requiring that, while any trial Rule is in force, the AER must:
    - a. monitor the trial project in accordance with the Rules and in accordance with any applicable guideline made under the NER (that is, the Trial Projects Guidelines are proposed to be developed under the NER); and

- b. otherwise administer and enforce the trial Rule in the performance of its statutory functions under section 27.