

Making of National Energy Retail Rules

National Energy Retail Law (South Australia) – Section 238AA

I, Anastasios Koutsantonis, Minister for Energy and Mining for the Crown in right of the State of South Australia, as the Minister administering the *National Energy Retail Law (South Australia) Act 2011* of South Australia, hereby make the National Energy Retail Amendment (Regulatory sandboxing) Rule 2022 under section 238AA(1) of the National Energy Retail Law (South Australia) Act on the unanimous recommendation of the Ministers of the participating jurisdictions sitting as the Ministerial Council on Energy for the purposes of that section.

This Rule has been signed by me for the purposes of identification as the National Energy Retail Amendment (Regulatory sandboxing) Rule 2022 and commences operation on 15 December 2022 (the commencement date).



Hon Tom Koutsantonis MP
Minister for Energy and Mining

14 / 12 /2022

National Energy Retail Amendment (Regulatory sandboxing) Rule 2022

1 Title of Rule

This Rule is the *National Energy Retail Amendment (Regulatory sandboxing) Rule 2022*.

2 Commencement

This Rule commences operation on the date specified in the notice published under section 238AA(4)(a) of the National Energy Retail Law.

3 Amendment to the National Energy Retail Rules

The National Energy Retail Rules are amended as set out in Schedule 1.

Schedule 1 Amendment to the National Energy Retail Rules

(Clause 3)

[1] Rule 3 Definitions

In rule 3, insert the following new definitions in alphabetical order:

eligibility requirements means the requirements specified in rule 178 that the AER must have regard to when considering whether to grant a trial waiver;

information requirements means the information that is required to be contained in an application for a trial waiver in accordance with rule 175(2);

trial project confidential information means information regarding a trial project and submitted to:

- (a) the AER in, or in connection with, an application for a trial waiver;
or
- (b) the AEMC in, or in connection with, a request for the making of a trial Rule,

which is identified by the applicant as being confidential;

Trial Projects Guidelines has the same meaning as in the NER.

[2] New Part 13 Trial waivers, trial Rules and trial projects

After Part 12, insert:

Part 13 Trial waivers, trial Rules and trial projects

Division 1 Preliminary

174 Purpose

- (1) The purpose of this Part 13 is to make provision for:
 - (a) the granting of trial waivers by the AER to enable trial projects to be carried out;
 - (b) the information that is required to be provided to the AEMC in a request for the making of a trial Rule; and
 - (c) oversight and monitoring by the AER of trial projects that are carried out under trial waivers or trial Rules.
- (2) For the purposes of this Part 13:

- (a) **explicit informed consent** to participating in a trial project is given by a retail customer to a person carrying out, or involved in the carrying out, of a trial project where:
 - (i) the person, or another person acting on behalf of that person, has clearly, fully and adequately disclosed all matters relevant to the consent of the retail customer, including each specific purpose or use of the consent; and
 - (ii) the retail customer gives consent to participating in the trial project:
 - (A) in writing signed by that retail customer;
 - (B) by electronic communication generated by that retail customer; or
 - (C) verbally, so long as the verbal consent is recorded in such a way that it can be verified and made the subject of a record under paragraph (b).
- (b) whenever a person is required to obtain explicit informed consent of a retail customer under this Part or under the *Trial Projects Guidelines*, the person must:
 - (i) create a record of each explicit informed consent in such format and including such information as will enable:
 - (A) the AER to verify the person's compliance with the relevant requirements under this Part or under the *Trial Projects Guidelines* relating to explicit informed consent; and
 - (B) the person to answer enquiries from a retail customer relating to the customer's explicit informed consent;
 - (ii) retain that record for at least the duration of the trial waiver or trial Rule (as applicable); and
 - (iii) on request by a retail customer and at no charge, provide the customer with access to a copy of the record of any explicit informed consent given by that customer.
- (c) it is established that the required explicit informed consent is not obtained if:
 - (i) the retail customer raises the issue with the trial applicant either by asserting that the consent was not obtained or by requesting production of a record of the consent; and
 - (ii) the issue is so raised within 12 months after the date of commencement of the trial project; and

- (iii) the trial applicant either admits that the consent was not obtained or does not produce a satisfactory record of the informed consent as soon as practicable, but in any event within 10 business days, after the issue is so raised.
- (d) **retail customer** means a person who is a customer of a retailer or an exempt seller.

Division 2 Trial waivers

175 Application for a trial waiver

- (1) An application for the grant of a trial waiver must be made to the AER in the form (if any) prescribed in the *Trial Projects Guidelines*.
- (2) An application must contain the following information (the **information requirements**):
 - (a) details of the particular provisions of *the Law* and/or provisions of the Rules in respect of which the person seeks a trial waiver;
 - (b) identification of the *trial project confidential information*; and
 - (c) any other information specified in the *Trial Projects Guidelines*.
- (3) After receiving an application for the grant of a trial waiver, the AER may, by notice in writing, request the applicant to provide, by a specified date, such further information as the AER may require in connection with the proposed trial project and the requested trial waiver.
- (4) For the purposes of Part 8 Division 3 of *the Law*, information provided by an applicant to the AER in, or in connection with, an application for a trial waiver that is not identified as *trial project confidential information* is not information given to the AER in confidence. Disclosure of such information by the AER is authorised use and disclosure for the purposes of section 44AAF(2) of the *Competition and Consumer Act 2010* (Cth).

176 Initial consideration of a proposed trial waiver

- (1) Subject to subrule (2), after receiving an application for the grant of a trial waiver, the AER may terminate its consideration of the application at any time if:
 - (a) the AER considers that the application does not comply with the information requirements;
 - (b) the applicant does not respond to a request for further information under rule 175(3) by the specified date, or the AER considers that the applicant has not provided a sufficient response to such a request;
 - (c) the AER considers that the proposed trial project can be carried out satisfactorily without a trial waiver; or

- (d) the AER otherwise considers that the application is misconceived or lacking in substance.
- (2) If, having regard to the matters set out in subrule (1), the AER considers that it should terminate its consideration of an application, the AER:
- (a) must notify the applicant in writing that it has, and the reasons why it has, formed that view, and invite the applicant to make submissions or to provide further information within 5 business days; and
 - (b) must take account of any submissions or information so provided by the applicant before deciding to terminate its consideration of the application.

177 Consultation regarding a proposed trial waiver

- (1) Subject to subrule (3), the AER must carry out public consultation in relation to a proposed trial waiver, unless it is satisfied that the proposed trial waiver and trial project:
- (a) is unlikely to have an impact on other regulated entities; and
 - (b) is unlikely to have a direct impact on retail customers other than those who provide explicit informed consent to participate in the trial project.
- (2) The AER must consult AEMO in relation to any potential impact of a proposed trial waiver and trial project on AEMO's operation of:
- (a) the power system (as defined in the National Electricity Rules);
 - (b) the market (as defined in the National Electricity Rules);
 - (c) the declared distribution systems and declared transmission system for gas (as defined in the National Gas Law); or
 - (d) markets for natural gas.
- (3) The *Trial Projects Guidelines* must specify the procedures by which the AER will carry out public consultation in relation to a proposed trial waiver.

178 Eligibility requirements

- (1) In considering whether to grant a trial waiver, the AER must have regard to:
- (a) whether the carrying out and monitoring of the trial project is likely to contribute to the development of regulatory and industry experience;
 - (b) whether the trial project may have an adverse effect on the safety, reliability or security of supply of energy and the measures that the applicant will take to avoid or mitigate such risks;

- (c) whether the extent and nature of the *trial project confidential information* claimed by the applicant may impair:
 - (i) the AER's ability to provide appropriate public transparency in relation to the conduct and outcomes of trial projects; or
 - (ii) the appropriate development of regulatory and industry experience arising from the trial project; and
 - (d) any other matter required by *the Law*.
- (2) In considering whether to grant a trial waiver, the AER may have regard to any other matter it considers relevant, including (but not limited to) any relevant consideration that may be specified in the *Trial Projects Guidelines*.

Note

Section 121C(2) of *the Law* requires the AER to have regard to the innovative trial principles (as defined in *the Law*) and any matter required by the Rules before making a determination on whether to grant a trial waiver.

179 Extension or variation of a trial waiver

- (1) The AER, having regard to the matters set out in rules 178(1) and (2), may extend a trial waiver for a further specified period.

Note

Under section 121H(2) of *the Law*, the AER must have regard to the innovative trial principles (as defined in *the Law*) before granting an extension of a trial waiver. Under section 121H(1) of *the Law*, an extension of a trial waiver cannot exceed the period prescribed by the National Energy Retail Regulations.

- (2) The *Trial Projects Guidelines* may provide for any additional mandatory requirements and any relevant considerations for the extension of a trial waiver.
- (3) The AER may:
- (a) prior to the scheduled expiry of a trial waiver, impose such further conditions, or modify the existing conditions, of the trial waiver with the agreement of the applicant; or
 - (b) if it extends a trial waiver, impose such further conditions, or modify or retain the existing conditions of the trial waiver, as it considers appropriate.

180 Evidence of a trial waiver

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

- (b) any conditions subject to which the trial waiver was granted, is evidence of the trial waiver.
- (2) The AER must establish, maintain and publish on its website a register of all certificates issued under subrule (1).

Division 3 Trial Rules

181 Request for a trial Rule

- (1) For the purposes of section 249(1)(a)(i) of *the Law*, a request for the making of a trial Rule must contain the following information:
 - (a) the name and address of the person making the request;
 - (b) a detailed outline of the proposed trial project;
 - (c) an explanation of how the proposed trial project will or is likely to lead to the achievement of the national energy retail objective;
 - (d) an explanation of the expected benefits and costs of the trial project for consumers and other market participants and the innovation that it may lead to;
 - (e) a description of the proposed trial Rule;
 - (f) a summary of the person's previous engagement with the AER, AEMO or any jurisdictional regulator in relation to the trial project;
 - (g) an explanation of why the trial Rule is needed in order to conduct the trial project;
 - (h) 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;
 - (i) the applicant's approach to consumer engagement and dispute management;
 - (j) an explanation of how risks to the safety, reliability and security of supply of energy will be avoided or mitigated;
 - (k) an explanation of whether the trial project may have an adverse effect on AEMO's operation of:
 - (i) the power system (as defined in the National Electricity Rules);
 - (ii) the market (as defined in the National Electricity Rules);
 - (iii) the declared distribution systems and declared transmission system for gas (as defined in the National Gas Law); or
 - (iv) markets for natural gas,

and if so, how such adverse effects will be avoided or mitigated;

- (l) evidence that the person has the operational and financial ability to carry out the trial project;
 - (m) identification of the *trial project confidential information*;
 - (n) an explanation of how the trial Rule is likely to contribute to the development of regulatory and industry experience; and
 - (o) 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.
- (2) For the purposes of section 24 of the *Australian Energy Market Commission Establishment Act 2004* (SA) (as applied by section 223 of *the Law*), information provided by an applicant to the AEMC in, or in connection with, a request for the making of a trial Rule that is not identified as *trial project confidential information* is not information given to the AEMC in confidence.

Division 4 Monitoring of trial projects

182 Application

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

183 Early termination and opting out of trial projects

- (1) The *Trial Projects Guidelines* must provide for processes by which and grounds upon which:
- (a) a retail customer participating in a trial project may opt out of a trial project;
 - (b) the AER may:
 - (i) terminate a trial waiver before its scheduled expiry; or
 - (ii) recommend to the AEMC that the AEMC revoke a trial Rule before its scheduled expiry,including provision for the AER to do so either on its own motion, or upon application by the trial applicant, a retail customer or Registered Participant (as defined under the National Electricity Rules) affected by the trial project, or AEMO; and
 - (c) a person to whom a trial waiver is granted must allow a retail customer to opt out of a trial project.