

Australian Energy Market Commission

FINAL REPORT

REGULATORY SANDBOXES - ADVICE TO COAG ENERGY COUNCIL ON RULE DRAFTING

26 MARCH 2020

REVIEW

INQUIRIES

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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 At its meeting on 22 November 2019, the COAG Energy Council (Council) agreed to the Australian Energy Market Commission's (AEMC or Commission) recommendations to introduce a regulatory sandbox toolkit. This was based on the AEMC's final report on regulatory sandbox arrangements to support proof-of-concept trials in the national energy markets, published on 26 September 2019.
- 2 As requested by the Council, the AEMC conducted an additional round of stakeholder consultation on the proposed rule drafting to implement the regulatory sandbox toolkit and received 15 stakeholder submissions.
- 3 This report provides the AEMC's further advice to the Council on rule changes to implement regulatory sandbox arrangements. It discusses issues raised in stakeholder submissions and the AEMC's response. The proposed drafting of the rules to implement the regulatory sandbox toolkit can be found on the AEMC website.
- 4 Note that this advice and proposed drafting is based on the assumption that law changes will be made that are similar to those described in the AEMC's final report. This law change process will be subject to stakeholder consultation led by the Council, approval by Council and passage through South Australian parliament. As such the law changes may be different to our assumptions and hence the rule drafting will need to be updated to reflect the final form of law changes.

Background

- 5 A regulatory sandbox is a framework within which participants can test innovative concepts in the market under relaxed regulatory requirements at a smaller scale, on a time-limited basis and with appropriate safeguards in place.
- 6 The introduction of a regulatory sandbox toolkit aims to make it easier for businesses to develop and trial innovative energy technologies and business models. Innovation in the energy sector can lead to better services and lower costs for consumers. It is important that the regulatory framework supports emerging technologies and business models that have the potential to deliver these benefits to consumers.
- 7 The recommended regulatory sandbox toolkit includes three new tools designed to be used sequentially:
1. an innovation enquiry service to provide guidance and feedback that can help facilitate trials that are feasible under current laws and rules
 2. a new regulatory waiver power for the Australian Energy Regulator (AER), that can provide temporary exemption for trials from regulatory obligations arising out of the existing rules or from the registration requirements in the laws
 3. 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.
- 8 The innovation enquiry service can be operated within the existing regulatory framework. The AER will be responsible for its implementation including determining when the service

will be launched and resourcing requirements. The new regulatory waiver and trial rule change tools will require changes to the national energy laws and the national energy rules.

- 9 The final report recommended changes to the energy laws with more detailed provisions to be made under the rules and under a new trial projects guideline. These changes were included in the final report as recommended drafting instructions for amendments to the national energy laws. The final report also recommended initial drafting for changes to the national energy rules to give effect to the toolkit.
- 10 In November 2019, the Council agreed to progress changes to the National Electricity Law (NEL), National Energy Retail Law (NERL) and National Gas Law (NGL) to introduce regulatory sandbox arrangements. The Council will develop draft law changes and conduct separate stakeholder consultation before the law changes are submitted to the South Australian Parliament.
- 11 The Council also agreed to make changes to the National Electricity Rules (NER), National Energy Retail Rules (NERR) and the National Gas Rules (NGR) for regulatory sandbox arrangements through the South Australian Minister, following the passage of law changes.
- 12 The Council asked the AEMC to provide further advice on rule changes, including stakeholder feedback on the proposed rule drafting provided in the AEMC's final report and a final recommended package of rule changes.
- 13 Following passage of the law and rule changes the AER will develop the *Trial Projects Guideline* in consultation with stakeholders.

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1 INTRODUCTION

At its meeting on 22 November 2019, the COAG Energy Council (Council) agreed to the AEMC's recommendations to introduce a regulatory sandbox toolkit. The Council asked the AEMC to provide further advice on rule changes, including stakeholder feedback on the proposed rule drafting provided in the AEMC's final report and a final recommended package of rule changes.

This report summarises the outcome of the AEMC's consultation on the proposed rule drafting and additional changes made in response to submissions received.

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.¹ 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)² 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.

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.

1.2 The COAG Energy Council request

Following on from recommendation 2.8 of the Finkel Review, in October 2018 the Commission received a request for interim advice from the Senior Committee of Officials (SCO) on “how to best facilitate coordination of proof-of-concept trials and the need for formal regulatory sandbox arrangements” as part of the [2019 Electricity networks economic regulatory frameworks review](#).

On 20 December 2018, the Commission published a [consultation paper](#). The Commission received 28 submissions on the consultation paper, with most stakeholders supporting the development of regulatory sandbox arrangements.

On 7 March 2019, the Commission published its [interim advice](#) to SCO which proposed 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.

On 11 July 2019, the Commission published its [draft report](#) recommending the introduction of regulatory sandbox arrangements including different tools aimed at providing solutions to the various regulatory barriers to trials. In response to the draft report, the Commission received 21 submissions from stakeholders, with 20 supporting the introduction of the sandbox toolkit. Most stakeholders also provided recommendations to adjust the design of each of the sandbox tools, which were taken into account.

On 26 September 2019, the AEMC published the [final report](#) on regulatory sandbox arrangements to support proof-of-concept trials, alongside recommended drafting instructions for amendments to the national energy laws and initial drafting for changes to the national energy rules to give effect to the toolkit.

The Commission collaborated with the AER, Australian Energy Market Operator (AEMO), Energy Consumers Australia (ECA) and Australian Renewable Energy Agency (ARENA) to develop the final recommendations.

2 WHAT IS THE SANDBOX TOOLKIT

In September 2019, the AEMC published a final report recommending the introduction of a regulatory sandbox toolkit to make it easier for businesses to develop and trial innovative energy technologies and business models.

A regulatory sandbox is a framework within which participants can trial innovative concepts in the market under relaxed regulatory requirements at a smaller scale, on a time-limited basis and with appropriate safeguards in place.

Innovation in the energy sector can lead to better services and lower costs for consumers. It is important that the regulatory framework supports emerging technologies and business models that have the potential to deliver these benefits to consumers.

The objective of the regulatory sandbox toolkit is 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.

2.1 What are the sandbox tools?

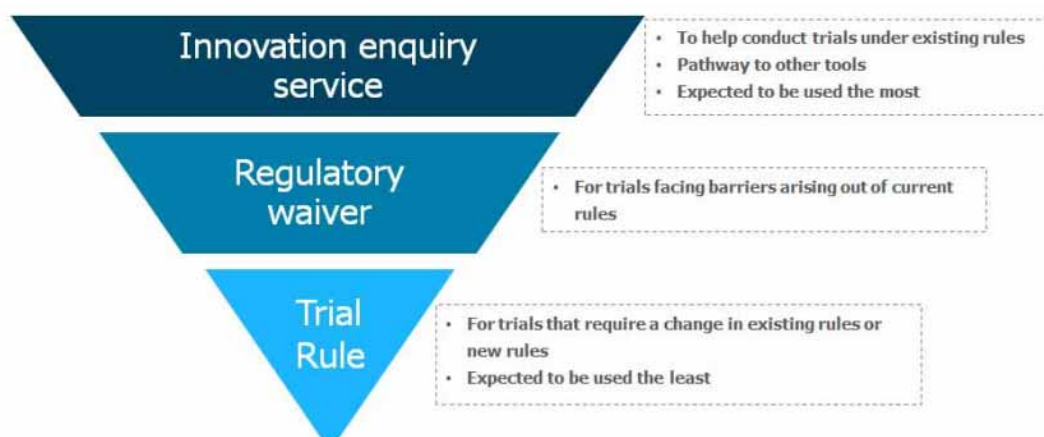
In its final report, the Commission proposed a regulatory sandbox initiative that makes use of a variety of existing and new tools that could be applied according to their suitability to a proposed trial. The regulatory tools in the sandbox initiative include the following:

- 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.

Figure 2.1 shows how the sandbox tools are linked. Further information on the design of the regulatory sandbox tools is included in the September 2019 final report.

Figure 2.1: The sandbox toolkit



Source: AEMC

2.2 How will the sandbox toolkit be implemented?

In light of the stakeholder support for these reforms, the Commission has developed a package of recommendations having regard to the benefits of timely implementation. This package was included with the final report.

The Commission considered 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 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.³

³ AEMC, *final report regulatory sandbox arrangements to support proof-of-concept trials*, September 2019, 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 recommended drafting instructions proposed 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.

The Commission also proposed drafting for changes to the national energy rules setting out detailed provisions to give effect to the toolkit, published as a separate document with the final report.⁴

The purpose of this report is to summarise the additional stakeholder consultation the AEMC undertook and any changes to the proposed drafting of the national energy rules setting out detailed provisions to give effect to the toolkit.

⁴ https://www.aemc.gov.au/sites/default/files/documents/regulatory_sandboxes_-_draft_rules_for_consultation_-_epr0079.pdf

3 RESULTS OF STAKEHOLDER CONSULTATION

The AEMC received 15 submissions to its consultation on the proposed rule drafting to implement regulatory sandbox arrangements. Stakeholders were very supportive of the proposed sandbox arrangements. This section summarises the issues identified in stakeholder submissions and the AEMC's response on energy laws and rules:

- section 3.1 summarises stakeholder submissions requiring changes or additions to the proposed rule drafting
- section 3.2 summarises stakeholder submissions not requiring any further changes or additions.

The amended proposed draft rules can be found on the AEMC website.

3.1 Additional changes to the drafting of rules

The AEMC has received a number of submissions requesting changes or additions to the proposed rule drafting to implement regulatory sandbox arrangements. This section summarises the relevant issues raised in submissions and provides the AEMC's response.

3.1.1 Definition of consumer organisation

The proposed drafting included provision for the AER's *Trial Projects Guideline* to include processes allowing a retail customer affected by the trial project, a consumer organisation or AEMO to apply to the AER regarding termination of a trial waiver or advice to the AEMC regarding repeal of a trial rule (clause 8.17.3 of the NER).

PIAC requested a change to the definition of 'consumer organisation' as the current drafting may be interpreted to include organisations representing generators and network businesses:⁵

In the proposed drafting, PIAC considers that part a) of the definition would capture industry organisations like ENA, AEC or CEC, given that the clause refers to the provision of electricity services, which could be broad and include generation or transportation. While we appreciate that industry associations may need standing to apply to have trials terminated early, we strongly feel that doing so under the definition of consumer organisation is entirely inappropriate.

Similar comments were also received from other stakeholders.⁶

The AEMC has considered submissions on the definition of 'consumer organisation' and decided to remove the definition altogether (including associated references in the body of

⁵ PIAC, submission on the proposed rule drafting, p. 1-2.

⁶ See submissions on the proposed rule drafting: AER, p. 3; Brotherhood of St Laurence, p. 1; EUAA, p. 1; Ausgrid, p. 4; Lumo Energy, p. 3.

the rules). The intention with this proposed rule was to limit the parties that could apply regarding termination, however the AEMC now considers that this restriction is not necessary as the AER can use its discretion to reject applications from parties that are not appropriate. The updated proposed rule drafting refers to applications from retail customers, registered participants affected by a trial, AEMO or the trial proponent.

3.1.2 Definition of retail customers

The AER submitted that the proposed rules should use the definition of the term 'retail customer' as per section 5 of the NERL⁷ and retail customers' ability to opt out could be strengthened.⁸

The AEMC has reviewed the AER's submission and notes that the term 'retail customers', as used in the proposed NER and NERR drafting, already include customers proposing to purchase energy from retailers. This is because the term *retail customer* under the NER and NERR is defined by reference to the NERL (which includes both customers purchasing energy and proposing to purchase energy).

The term *retail customer* under the NGR is defined by reference to the NGL, which defines the term as 'a person to whom natural gas is sold for premises by a retailer'. Accordingly, customers of exempt sellers are now included in the definition of retail customers, and consequently, those customers are able to both participate in, and opt out of, trials. The AEMC consequently amended clauses 8.13(b)(4) of the NER; 174(2)(d) of the NERR and 135L(2)(d) of the NGR.

3.1.3 Trial waiver applications

AEMO submitted that clause 8.16(a)(10) should be consistent with clause 8.15.3(b) of the NER so that it reads:⁹

...an explanation of how the trial project may have an effect on AEMO's operation of the power system and the market, and how these risks will be avoided or mitigated.

It considers that this would have a greater effect by requiring the AER to take into account AEMO's operation of the electricity power and settlement systems.

Evoenergy considered that the AEMC should approve or reject trial rule application within four calendar weeks unless public consultation required then eight calendar weeks.¹⁰

The AEMC agrees with AEMO's submission that a trial applicant should be required to include an explanation in their application on whether a proposed trial project could affect AEMO's

7 AER, submission on the proposed rule drafting, p. 3.

8 AER, submission on the proposed rule drafting, p. 3.

9 AEMO, submission on the proposed rule drafting, p. 5.

10 Evoenergy, submission on the proposed rule drafting, p. 2.

operation of the electricity power system and financial operation of the NEM. The AEMC, rather than changing the wording of clause 8.16(a)(10), added a new clause 8.16(a)(11) that requires a trial applicant to explain whether the trial project may have an adverse effect on AEMO's operation of the power system and the market, and if so, how such adverse effects will be avoided or mitigated.

In response to Evoenergy's submission on the application processing time frame, the AEMC points out that the final report indicated that:¹¹

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 AEMC found that the processing times for trial waivers should be considered in the AER's trial projects guideline. This allows sufficient flexibility to the AER and trial proponents to cater for different types of trials. Similarly, the AEMC's statutory time frame for processing a trial rule change is 10 weeks and the AEMC is able to extend this if necessary. While the AEMC will always strive to process rule changes as quickly as possible, it does not consider it to be necessary to impose a tighter processing time for trial rules.

3.1.4

Confidentiality

AEMO submitted that:¹²

Clause 8.16(b) provides that for the purposes of section 24 of the Australian Energy Market Commission Establishment Act 2004 (SA), information provided to the AEMC as part of a request for a trial Rule is not confidential, unless it is identified as trial project confidential information. AEMO submits that, since the AEMC will make the trial Rule under section 96B of the National Electricity Law (NEL), section 108 of the NEL will apply to confidential information (including trial project confidential information). Accordingly, clause 8.16(b) should also reference section 108 of the NEL.

¹¹ AEMC, *final report regulatory sandbox arrangements to support proof-of-concept trials*, September 2019, p. 44.

¹² AER, submission on the proposed rule drafting, p. 5.

In its submission, the AER suggested that the AEMC make some amendments to strengthen the treatment of confidential information in the draft proposed rules and recommended that:¹³

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

The AEMC has reviewed AEMO's submission and notes that section 108 of the NEL relates to submissions to rule changes. Clause 8.16(b) on the other hand is only intended to relate to information provided to the AEMC as part of a trial rule request. The AEMC therefore decided to retain the current wording of clause 8.16(b).

In response to the AER's submission, the AEMC notes that Section 44AAF of the Competition and Consumer Act applies for the purposes of the energy laws. It authorises the AER to disclose confidential information to certain parties, including the AEMC and AEMO. The AEMC has included drafting to clarify that disclosure of information, that is not identified as confidential by an applicant, is "authorised use and disclosure" for the purposes of section 44AAF.

3.1.5

Eligibility criteria

Powerlink submitted that it considers that the threshold for the eligibility criterion 'genuinely innovative' is too high.¹⁴

Similarly, AGL submitted that it considers that the proposed innovation and consumer requirements ('genuinely innovative and 'having the potential to lead to better services and outcomes for consumers') should be reframed to a 'fit-for-purpose in serving the long-term interest of consumers' test.¹⁵

EnergyAustralia submitted that:¹⁶

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

¹³ AER, submission on the proposed rule drafting, p. 2.

¹⁴ Powerlink, submission on the proposed rule drafting, p. 3.

¹⁵ Powerlink, submission on the proposed rule drafting, pp 2-3.

¹⁶ EnergyAustralia, submission on the proposed rule drafting, p. 3.

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

It further submitted that the two terms “genuinely innovative” and “better services and outcomes” are not defined and it asks that the AEMC make final rule/s that require definitions to be included for these two terms in the Guidelines made by the AER.¹⁷

In its submission, Lumo Energy requested the AEMC to provide further guidance and define the term 'innovative' so that the AER will be better placed to determine which projects are genuinely innovative.¹⁸

The AEMC does not consider that these submissions require any additional changes to the proposed drafting of the rules. The trial project guidelines will outline the approach taken by the AER in assessing the eligibility criterion, which will be subject to stakeholder consultation.

AEMO submitted in relation to eligibility criteria that:¹⁹

...the proposed rule requires the AER to be satisfied that ‘the proposed trial waiver and the proposed trial project will not affect AEMO’s operation of the power system and the market’. In AEMO’s view, this provision has greater effect than the requirement for an assessment of whether the project ‘may have an adverse effect on the safety, reliability or security of supply of electricity’. This is because the former takes into account AEMO’s operation of the electricity power system and financial operation of the NEM. In AEMO’s view, such consideration is always appropriate. Accordingly, AEMO submits that the drafting of clause 8.15.4(b) should be consistent with cl 8.15.3(b).

The AEMC has considered AEMO's submission and came to the conclusion that rather than deleting clause 8.15.4(b)(2) it is preferable to leave it and include an additional clause 8.15.4(b)(3) requiring the AER to consider any adverse effect on AEMO's operation of the power system and market. This will then require the AER to consider both, the effect on the safety, reliability or security of supply of electricity and the effect on AEMO’s operation of the power system and market. Similar changes have been made in response to AEMO's submission to the NGR (addition of clause 135MC(2)(c)) and the NERR (addition of clause 178(2)(c)).

In considering AEMO's submission, the AEMC also noted that when assessing a waiver application, the AER has to balance any potential costs to AEMO against the potential for a trial to lead to better services and outcomes for consumers.

17 EnergyAustralia, submission on the proposed rule drafting, p. 3.

18 Lumo Energy, submission on the proposed rule drafting, p. 3.

19 AEMO, submission on the proposed rule drafting, p. 4.

3.1.6 Explicit informed consent

The AER submitted that the existing framework for explicit informed consent in the NERL and NERR is broadly sufficient (in particular, provisions allowing explicit informed consent laws to apply to other transactions specified in the NERL or NERR), and therefore, defining a separate explicit informed consent section of the NERR to apply to trial projects may not be necessary. They noted however, that:²⁰

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

The AER further submitted that:²¹

With respect to the NER and NGR, we agree with establishing a new rule that replicates the explicit informed consent framework in the NERL.

Evoenergy submitted that it believes that affected parties, for example, network utilities, relevant customers, retailers should be informed of any trial.²²

Ausgrid submitted that for trials such as broad network-based trials, it would be inappropriate to seek explicit consent from parties who are unaware that the trial is taking place.²³

The AEMC considered the suggestions it received from the AER and agreed to expand the explicit informed consent provisions to reflect section 41 of the NERL. The AEMC has, however, retained a separate explicit informed consent framework for trial projects under the NERR. This is because the existing framework under the NERL would have required a number of amendments (for example, it applies to “transactions”) and accordingly, it was considered to be a better approach to have a separate framework applying to trial projects specified in the NERR.

In response to Evoenergy's submission, the AEMC considers that a requirement to notify all affected parties may be onerous and that this could be up to the AER to specify in the guideline and could potentially vary depending on the nature of a trial.

20 AER, submission on the proposed rule drafting, p. 3.

21 AER, submission on the proposed rule drafting, p. 3.

22 Evoenergy, submission on the proposed rule drafting, p. 1.

23 Ausgrid, submission on the proposed rule drafting, p. 3.

The AEMC notes, in response to Ausgrid's submission, that the proposed rule drafting in relation to obtaining consent refers to customers 'directly affected' and consequently this would be unlikely to cover network-based trials.

3.1.7

Public consultation

In its submission, Evoenergy requested additional wording be added to the provisions relating to public consultation. In particular, they requested the addition of the wording below to NER Chapter 8, 8.15.3 (a) after (2); NERR Part 13 177 (1) after (b); and NGR Part 15E 135MB (1) after (b):²⁴

...is considered by the application to have a minor impact and the applicant conducts consultation with affected registered participants.

Evoenergy further submitted that it considers that for the purpose of clauses 8.15.3(c) of the NER, 177(3) of the NERR and 135MB(3) of the NGR, it should not be mandatory for the AER to carry out public consultation in relation to a proposed trial waiver for which AEMO is the applicant. It suggested the substitution of "must" with "may" in the relevant provisions.²⁵

AEMO submitted that it considers that clause 8.15.3 of the NER should be modified to require the AER to conduct a public consultation in relation to a proposed trial waiver unless it is satisfied that it is unlikely to have an impact on registered participants or retail customers, no matter the identity of trial waiver applicant. It further submitted that the AER should be required to consult with AEMO about the potential for any proposed trial waiver to impact AEMO's operation of the market and the power system. The AEMC has agreed with this suggestion and has amended the relevant provisions.

AEMO submitted that clause 8.15.3(a) of the NER may contain an error:²⁶

...the start of sub-clause (a) should read "Subject to paragraph (c), the AER must carry out public consultation in relation to a proposed trial waiver, unless it is satisfied that the proposed trial waiver trial project" meets the criteria set out therein. AEMO takes this view because it is the trial project (not the trial waiver) that may have an impact on other registered participants or retail customers.

It further noted that:²⁷

24 Evoenergy, submission on the proposed rule drafting, p. 1.

25 Evoenergy, submission on the proposed rule drafting, p. 2.

26 AEMO, submission on the proposed rule drafting, p. 3.

27 AEMO, submission on the proposed rule drafting, p. 3.

Clause 8.15.3(b) places an obligation for the AER to consult with AEMO where the AER believes the trial will impact AEMO's operation of the power system and the market. However, the clause also grants the AER the power to unilaterally reach a state of satisfaction that the trial will not impact AEMO's operation of the market and the power system and, in such cases, not consult with AEMO. AEMO does not support this provision and submits that the AER should be required to consult with AEMO about the potential for any proposed trial waiver to impact AEMO's operation of the market and the power system.

In response to Evoenergy and AEMO submissions, the AEMC agrees that the mandatory requirement for public consultation where AEMO is the proponent of a trial should be removed. The AEMC has opted to remove the provision entirely, rather than replace the word "must" with "may". It is sufficient that the AER has discretion as to whether it carries out public consultation, depending on the likely impact of the trial waiver and trial project on registered participants and retail customers. Further, there is nothing precluding the AER from carrying out public consultation where AEMO is the applicant. The AEMC has consequently deleted clause 8.15.3(a)(c) of the NER; rule 177(3) of the NERR; and rule 135MB(3) of the NGR.

The AEMC has amended the proposed rules to:

- add the words 'trial project' to clause 8.15.3 (a) of the NER, rule 177(1) of the NERR and rule 135MB(1) of the NGR, so that the AER must be satisfied that both the trial project and the trial waiver are unlikely to have an impact on registered participants and retail customers (other than those who provide explicit informed consent)
- amend clause 8.15.3(b) of the NER, rule 177(2) of the NERR and rule 135MB(2) of the NGR to require the AER to consult with AEMO in relation to any proposed impact of a trial waiver on its operation of the power system and market.

In its submission, AEMO pointed out that clause 135MB(2) of the NGR has been written as though it applies to electricity rather than gas. The AEMC agrees with AEMO's submission and redrafted clause 135MB accordingly so that it applies more relevantly to the gas market.

3.1.8

Public register of regulatory waivers

AGL, Evoenergy and AEMO submitted that they believe that the rules should include provision to require that all approved regulatory waivers be published on a public register on the AER website.²⁸ AEMO also submitted that evidence that the trial waiver has been granted also be available through a public register.²⁹

²⁸ Submissions on the proposed rule drafting: AGL, p. 4; Evoenergy, p. 2.

²⁹ AEMO, submission on the proposed rule drafting, p. 5.

The AEMC agrees with these stakeholder submissions and included drafting to this effect in the proposed rules (NER, clause 8.15.6 (b); NERR, rule 180 (2); NGR, rule 135ME (2)). The proposed drafting now requires the AER to establish and maintain on its website a register of all regulatory waivers it issued.

3.1.9 Reporting obligations

The AER submitted that the AEMC should consider whether the final rules should:³⁰

...consider whether the final rules should contain an additional power for the AER to report on the outcomes of a trial project under a trial waiver or trial rule, and to compel information from waiver recipients for the purposes of reporting on the outcomes of a trial project under a trial waiver or trial rule.

In its submission, the CEC noted that it is important to provide an indication of the number of successful trials or other benchmarks needed to support ongoing change in industry.³¹

AGL submitted that all waiver applicants and trial rule change proponents should be required by the rules to report on the outcome of trials.³²

The AEMC notes that the AER may have new reporting functions/powers under the additional law changes proposed to give effect to the regulatory sandbox toolkit. Therefore, this issue is a matter for the laws and not for the rules. However, the AEMC understands the importance of public reporting of sandbox trial outcomes for innovations support ongoing change in the industry. The AEMC has included a new provision in the NER, clause 8.14(a)(iv), requiring that the trial projects guideline must specify reporting obligations that the AER requires as a condition of granting a *trial waiver*, which may include a requirement for the applicant to publicly report on trial outcomes. The AEMC also included a new clause 8.16(a)(14), requiring a trial rule change proponent to provide an explanation of how the trial rule is likely to contribute to the development of regulatory and industry experience.

3.1.10 Extension of trial waiver

Lumo Energy submitted that it does not support the inclusion of extensions for trial waivers. They consider that, "...by its very nature, a trial waiver should only be granted for a limited time frame and should not be extendible."³³

In their submission, AEMO noted that clause 8.15.5(a)(2) provides that the AER may extend a trial waiver for a specified period if it remains satisfied of the relevant eligibility criteria. AEMO considers however, that:³⁴

³⁰ AER, submission on the proposed rule drafting, p. 2.

³¹ CEC, submission on the proposed rule drafting, p. 1.

³² AGL, submission on the proposed rule drafting, p. 4.

³³ Lumo Energy, submission on the proposed rule drafting, p. 3.

³⁴ AEMO, submission on the proposed rule drafting, p. 4.

...the AER should also need to have regard to the considerations set out in sub-clauses 8.15.4(b) and (c), but most particularly the substance of clause 8.15.4(b)(2). However, the eligibility requirements are only those set out in proposed clause 8.15.4(a). They do not include the AER's consideration of whether the trial project may have an adverse effect on the safety, reliability or security of supply of electricity.

AEMO therefore suggests that the AER should also need to have regard to the considerations set out in sub-clauses 8.15.4(b) and (c) of the NER, but most particularly the substance of clause 8.15.4(b)(2).³⁵

The AEMC considers that this is a worthwhile addition and included relevant drafting in clause 8.15.5(a) of the NER, rule 179(1) of the NERR and rule 135MD(1) of the NGR. This requires the AER, when considering extension of a regulatory waiver to remain satisfied of the relevant eligibility requirements, including:

- whether the trial project may have an adverse effect on the safety, reliability or security of supply of electricity and the measures that the applicant will take to avoid or mitigate such risks
- whether the trial project may have an adverse effect on AEMO's operation of the power system and market.

3.1.11 Variation of trial waivers

In its submission, the AER noted that the AER should have the ability to vary trial waivers.³⁶

The AEMC noted that under clause 8.15.5(c)(1) of the NER, the AER may if it extends a trial waiver, impose further conditions, or modify existing conditions of the trial waiver. The AEMC agrees to expand this more generally to allow the AER to impose further conditions or modify existing conditions with the agreement of the applicant and added a new clause 8.15.5(c)(2) to this effect.

3.2 Other submissions not requiring changes to the drafting of rules

The AEMC also received a number of submissions where the AEMC considered that the issue is either:

- already covered in the proposed provisions
- not consistent with the AEMC's policy intent of the proposed sandbox toolkit.

These issues are discussed below.

³⁵ AEMO, submission on the proposed rule drafting, p. 4.

³⁶ AER, submission on the proposed rule drafting, p. 3.

3.2.1 Definition of natural gas

AGIG submitted that the definition of natural gas under the NGL excludes hydrogen and hence hydrogen trials may not be able to access the sandbox toolkit.³⁷

The AEMC acknowledges the AGIG submission and the potential barriers, however consider this issue is out of scope of the design of the regulatory sandbox toolkit and may require broader consideration. Further, this advice is on the proposed drafting of the rules, rather than issues with the energy laws.

3.2.2 Innovation inquiry service

Powerlink submitted that there is no specific obligation in the rules for the AER to provide innovation inquiry service.³⁸ The AEMC notes that it decided not to include specific provisions in the law or rules for the provision of this service. In their submission, Powerlink also inquired if it would be possible to have an interim solution to allow regulated businesses to include trials in upcoming revenue determinations.³⁹ While the AEMC understands that this is an important matter for a regulated network business, it does not consider interim measures are appropriate for the sandbox toolkit given there is a process already underway to implement the toolkit.

3.2.3 Rules should include implementation and release deadlines

The CEC submitted that it believes the rules should include draft time frames for the implementation steps and the innovation inquiry service.⁴⁰

Other stakeholders submitted that the rules should specify a target date to release guidelines⁴¹ and the commencement of the sandbox toolkit.⁴²

The AEMC has reviewed these submissions and notes stakeholder interest in the sandbox arrangements commencing soon. The AER will be responsible for the implementation of the innovation inquiry service including determining when the service will be launched and resourcing requirements. The establishment of trial waivers and the trial rules will be subject to the law change process being led by the COAG Energy Council and passage through the South Australian parliament.

3.2.4 Trial waiver applications

In its submission Evoenergy queried if trial waiver applicants need to demonstrate financial and operational credibility.⁴³

The proposed rules include provisions for trial applicants to provide evidence of their operational and financial capability to carry-out the trial project (NER, clause 8.16.(a) (12);

37 AGIG, submission on the proposed rule drafting, p. 2.

38 Powerlink, submission on the proposed rule drafting, p. 2.

39 Powerlink, submission on the proposed rule drafting, p. 1.

40 CEC, submission on the proposed rule drafting, p. 1.

41 EnergyAustralia, submission on the proposed rule drafting, p. 3.

42 Powerlink, submission on the proposed rule drafting, p. 2.

43 Evoenergy, submission on the proposed rule drafting, p. 1.

NERR rule 181 (1)(l); NGR Division 3 rule 135N (1)(l)). The AEMC considers this an important part of the application so that the AER can be confident that the applicant can carry out the trial as proposed.

Evoenergy also queried if applicants could be more than one entity making the application, such as a group and if a trial has to revert to pre-trial conditions if an outcome is negotiated with customers.⁴⁴

The AEMC notes that the proposed rules are not prescriptive in terms of who can apply for a trial waiver.⁴⁵ In terms of whether a trial has to revert to pre-trial conditions if an outcome is negotiated with customers, the AEMC notes that the intention of the proposed rules is to require trial applicants to outline how customers will revert to pre-trial conditions. There is no explicit requirement that customers must revert to pre-trial conditions.

3.2.5 Notification of impacted parties and consent

Evoenergy submitted that it understands that:⁴⁶

During the trial the default is that customers continue to pay the charges agreed with their retailer unless otherwise negotiated with retailer. Retailers still pay network charges.

The AEMC has reviewed Evoenergy's submission and concluded that this is a very specific matter which is not appropriate to be covered in the sandbox rules, but potentially could be clarified in a trial waiver application.

3.2.6 Monitoring of trials

Evoenergy submitted that it considers that the AER's monitoring activity should be focused on the applicant's compliance with the rules and any conditions imposed. It further notes that the AER should not be overlooking or monitoring the conduct of the trial in general.⁴⁷

The AEMC notes that the AER's monitoring obligation in the rules would be subject to, and consistent with, its functions and powers under laws. For example, currently, this would likely fall within the AER's broad compliance monitoring functions. However, this will also depend on what new functions or powers the AER is granted as part of any law changes. Changes to the laws are not subject to this consultation.

Evoenergy further submitted that there is not a need for the guideline to include any other matter the AER considers appropriate in relation to the grant of trial waivers and monitoring of trial projects.⁴⁸

44 Evoenergy, submission on the proposed rule drafting, p. 1.

45 For example NER, Section 8.15.

46 Evoenergy, submission on the proposed rule drafting, p. 1.

47 Evoenergy, submission on the proposed rule drafting, p. 1.

48 Evoenergy, submission on the proposed rule drafting, p. 1.

The AEMC considers that this is appropriate to be at the discretion of the AER. The AEMC notes that the AER may want to include additional factors depending on the nature of a trial, but it does not have to.

3.2.7 **Early termination of trials**

Evoenergy submitted that in its view, early termination may jeopardise a trial. It considers that the AER must discuss with the applicant and see if issues can be modified or resolved.⁴⁹

The AEMC has reviewed this submission and concluded that the trial projects guidelines will provide the process by which a trial can be terminated.⁵⁰

AEMO also provided a submission on clause 8.17.3, noting that:⁵¹

...that it will be important that these processes give adequate time for AEMO to be consulted, most particularly in situations where AEMO is the applicant, but also where the trial project affects AEMO's work as market operator. If a trial project was terminated early, steps would need to be taken to ensure that trial participants did not suddenly become non-compliant and in breach of the Rules.

The AEMC has considered AEMO's submission and notes that this is a matter for the AER to include in the guidelines as required by clause 8.17.3 of the NER (and associated provisions under the NERR and NGR).

Also in its submission, AEMO noted that it considers it unnecessary for the rules to require AEMO to have to apply to the AER to contact the AEMC to recommend that trial rules be repealed before their scheduled expiry.⁵²

The AEMC notes that clause 8.17.3 specifies that the Trial Projects Guidelines must provide for processes by which and grounds upon which the AER may recommend to the AEMC that the AEMC repeal a trial rule before its scheduled expiry and includes provisions for AEMO to apply to the AER to repeal a trial rule. The AEMC notes that clause 8.17.3 does not prevent AEMO to apply directly to the AEMC to repeal a trial rule.

3.2.8 **Opting out of a trial**

In its submission, Evoenergy noted that:⁵³

It could be difficult for the trial if customers opt-out of the trial. Applicants can ask

49 Evoenergy, submission on the proposed rule drafting, p. 2.

50 NER, 8.17.3 (2); NERR 184 (b); NGR 135OB (b).

51 AEMO, submission on the proposed rule drafting, p. 5.

52 AEMO, submission on the proposed rule drafting, pp 5-6.

53 Evoenergy, submission on the proposed rule drafting, p. 2.

customers to agree to stay in the trial until it is completed. Customers should be able to opt in.

The AEMC noted Evoenergy's submission and considers that this issue can be covered by the AER in the trial projects guideline.

3.2.9 Jurisdictional regulations

Origin submitted that it does not support states to have similar sandbox arrangements. It considers that jurisdictional regulations should be included in the sandbox toolkit.⁵⁴

The AEMC notes that separate jurisdictional sandboxes are a matter for state legislation, or otherwise jurisdictional derogations from the uniform NEM rules. It therefore decided that this does not require any additional changes.

3.2.10 Participation of regulated gas networks

AGIG also submitted that it wants to make sure that the rules and the law enable trials to be incorporated within fully regulated gas networks.⁵⁵

The AEMC has reviewed this submission and does not consider that any further changes to the proposed rules are required.

⁵⁴ Origin, submission on the proposed rule drafting, p. 1.

⁵⁵ AGIG, submission on the proposed rule drafting, p. 2.

ABBREVIATIONS

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
Commission	See AEMC
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NEO	National electricity objective
NERL	National Energy Retail Law
NERO	National energy retail objective
NGL	National Gas Law
NGO	National gas objective