

Issues paper

Regulatory sandboxing

November 2021

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Executive Summary

Innovative technologies are changing the energy landscape. The range of energy services available to consumers is expanding, from rooftop solar, battery storage and renewable gases to automated home energy management systems and virtual power plants. New technologies are also offering network businesses alternative, more efficient means to operate their networks.

This proliferation of technology across the grid offers new opportunities to add value and lower costs to consumers both directly, through improved home energy management, and indirectly, via lower costs of managing networks. Innovative business models, technologies and pricing arrangements that unlock these opportunities will become increasingly valuable as the penetration of distributed energy resources continues to grow.

However, it is not always straight forward to understand how innovations fit within the current rules and regulations under which energy market participants must operate. In some instances, the rules may pose a barrier to the trialling and/or roll-out of innovative new services that have the potential to benefit consumers.

The regulatory sandboxing mechanism will help address these issues and make it easier for innovators to trial their proposed services in a real world environment. There are three parts to this new mechanism, which will be accessed via a dedicated new website:

1. **An Innovation Enquiry Service.** This service provides innovators with guidance from the Australian Energy Regulator (AER) and other market bodies on how their new technologies or business models can be delivered under the current regulatory framework. The website will provide interactive tools and case studies to assist innovators, as well as allowing them to submit an enquiry form to seek informal feedback specific to their project.
2. **A trial waiver.** This function allows the AER to grant a time limited trial waiver for eligible trial projects, exempting an innovator from having to comply with specified rules for a period of time to allow a trial to proceed. Innovators will be required to submit a form via the sandboxing website explaining the details of their project and how it meets the necessary criteria. Trial waivers will be subject to a number of conditions, including consumer protection measures, reporting requirements and other obligations that may be specific to the trial.
3. **A trial rule change process.** This function allows the Australian Energy Market Commission (AEMC) to temporarily change existing rules or introduce a new rule to allow a trial to proceed. Trial rule change requests may be submitted via the sandboxing website and will be forwarded to the AEMC to be assessed.

The regulatory sandboxing mechanism will benefit individual current and future market participants by providing guidance on how current regulations may apply to their technology or business model and removing barriers to allow their innovations to proceed. However, we expect the wider industry to benefit from the use of the sandboxing function through knowledge sharing, allowing innovators to leverage off others' learnings and for innovation to occur more quickly. Insights from the enquiry service can also inform policy makers on the

future design of the regulatory arrangements and identify areas of regulation that are unnecessarily complex and may be reformed.

The purpose of this Issues Paper is twofold. First, it sets out how the AER will deliver the Innovation Enquiry Service. Second, it sets out how we propose to assess trial waiver applications, including the proposed content of the Trial Projects Guidelines that we are required to publish. The Issues Paper also explains our approach to key issues such as knowledge sharing, treatment of confidential information and consumer protections.

We welcome feedback on any aspect of this Issues Paper. Submissions are due on **28 January 2022**. We encourage stakeholders to attend our information session and innovator workshop, to be held in early December, and we are also available to meet one-on-one with stakeholders if preferred.

The AER is committed to making consumers better off, now and in the future. Our new function will help achieve that commitment by ensuring the regulatory framework does not present unnecessary barriers to innovators seeking to trial new business models, services and tariff designs that will deliver consumers improved value and lower cost energy bills. We look forward to working closely with innovators, consumer groups and industry as the market – and the regulatory framework – continues to evolve.

Request for submissions

Interested parties are invited to make written submissions to the AER by the close of business, **28 January 2022**.

The AER will be available to meet with interested parties on the issues raised in this paper. We will seek to publish the substance of all meetings unless a confidentiality claim is made.

Submissions should be sent electronically to: regulatorysandbox@aer.gov.au

We ask that all submissions sent in an electronic format are in Microsoft Word or other text readable document form.

To request a meeting or if you would like to ask a question about the AER's proposed regulatory sandbox, please email the AER at: regulatorysandbox@aer.gov.au

Confidentiality

To facilitate an informed and transparent consultative process we prefer all submissions to be publicly available. The AER will treat all submissions as public documents unless otherwise requested, and blanket confidentiality claims generally will not be accepted.

Parties wishing to provide a submission that contains confidential information are requested to:

- clearly identify the information that is the subject of the confidentiality claim, and provide reasons for the claim; and
- provide a separate, non-confidential version of the submission in a form suitable for publication.

The AER does not generally accept blanket claims for confidentiality over the entirety of the information provided and such claims should not be made unless all information is truly regarded as confidential. The identified information must be genuinely of a confidential information and not otherwise publicly available.

For further information regarding the use and disclosure of information provided to us, see the ACCC/AER Information Policy, published June 2014. Please direct any queries about this issues paper, or about lodging submissions, to regulatorysandbox@aer.gov.au

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1 Introduction

The Australian Energy Regulator (AER) is consulting on our proposed approach to delivering the regulatory sandbox toolkit that will make it easier for businesses to develop and trial innovative energy technologies and business models that improve services and lower costs.

1.1 What is regulatory sandboxing and what is it for?

Regulatory sandboxing is a policy tool that is designed to help regulatory frameworks adapt to rapid technological change and innovation. Sandboxes provide a structured framework within which innovative technologies, approaches, business models, products and services can be trialled in a real-world environment without having to meet all the regulatory requirements, while still protecting consumers. Trials are time limited but provide useful information to support potential future regulatory reforms that will benefit consumers.

Technological change and innovation are transforming the energy sector more quickly than in the past. Innovative technologies and approaches can help reduce the costs of providing reliable electricity supply and allow consumers to engage in the market in different ways. However, existing regulatory frameworks were not designed with these new approaches in mind, and it is not always clear how the rules apply. There may also be regulatory barriers to innovative approaches that would benefit consumers if they could be implemented.

Regulatory sandboxing provides a means by which proof-of concept trials can proceed. There is a range of regulatory tools that can be used to facilitate trials. An information service can help innovators – particularly those that have not previously operated in the energy market – both understand the sandbox waiver mechanism and navigate the complex regulatory landscape to launch business models feasible within the current rules, as well as helping regulators to understand emerging trends in the sector. A waiver can remove regulatory barriers to allow innovations to be trialled, and the outcomes of these can be analysed to drive evidence-based policy change.

Regulatory sandboxes have been established in other sectors and in energy markets internationally. In Australia, the Australian Securities and Investment Commission (ASIC) has established the Enhanced Regulatory Sandbox, which allows businesses to test innovative financial services or credit activities without having to first obtain the necessary licence.¹ To access ASIC's Enhanced Regulatory Sandbox, innovators must meet defined eligibility criteria and there are limits on the types of activities that can be explored.

Internationally, energy regulators in Europe and the UK as well as Canada and Singapore have introduced sandboxes to encourage innovation and inform changes to their regulatory framework as the sector transforms. While the way in which sandboxes are implemented differs across countries to suit their local needs, the common driver is an acknowledgement that existing energy market frameworks may not be able to accommodate innovations that would be of benefit to consumers.

¹ For more information see <https://asic.gov.au/for-business/innovation-hub/enhanced-regulatory-sandbox/info-248-enhanced-regulatory-sandbox/>

1.2 Implementing a sandboxing toolkit in Australia's energy markets

In February 2019 the Australian Energy Market Commission (AEMC) was tasked with providing advice to the then Senior Committee of Officials on how best to facilitate proof-of-concept trials and sandbox arrangements to support innovative projects that offer benefits to consumers, while managing risks.

The AEMC published its Interim Advice in September 2019, recommending three new tools be implemented in both the electricity and gas market frameworks that, combined with existing waiver and exemption mechanisms,² would make up a regulatory sandbox toolkit:³

- an innovation enquiry service (IES), to provide guidance and feedback that can help facilitate trials and business models that are feasible under current laws and regulations
- a new 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.

While the IES can be implemented without changes to the regulatory framework, the second two tools require changes to the National Electricity Law (NEL), National Energy Retail Law (NERL) and National Gas Law (NGL) (together referred to as the “Energy Laws”), as well as more detailed provisions to be made under the associated National Electricity Rules (NER), National Energy Retail Rules (NERR) and National Gas Rules (NGR) (together referred to as the “Energy Rules”).

The AEMC's advice was finalised in March 2020.⁴ The COAG Energy Council subsequently consulted on the proposed legislative and rule change package in September 2020.⁵ The consultation process has been completed, and the sandboxing legislation has been introduced into the South Australian Parliament.

1.3 What are we consulting on?

The purpose of this issues paper is to consult on the AER's intended approach to delivering the regulatory sandboxing toolkit. There are two specific aspects we are consulting on:

- how we will deliver the IES
- how we will assess trial waiver applications and the content of the Trial Projects Guidelines.

² The AER already has the power to waive the requirement for market participants to comply with certain rules. These include the AER's ring-fencing waivers and retailer and network exemptions. These existing powers will not change under the new sandboxing arrangements.

³ AEMC, Regulatory sandbox arrangements to support proof-of-concept trials, Final report, 26 September 2019, pi.

⁴ See <https://www.aemc.gov.au/market-reviews-advice/regulatory-sandboxes>

⁵ See <https://energyministers.gov.au/publications/regulatory-sandboxing-legislation-consultation>

In March 2022 we will publish and seek feedback on a draft of the Trial Projects Guidelines.

While the sandboxing legislation and associated rules have not yet come into effect, the AER considers there are benefits in undertaking early consultation.

As noted above, law and rule changes are not necessary for implementing the IES. As the entity responsible for coordinating the IES, we consider there is value in making the services available as soon as possible and consulting on our proposed delivery. However, to consult on how the IES will be implemented, it will be helpful for stakeholders to understand how the IES fits within the overall sandboxing toolkit. For this reason, we are commencing consultation on all aspects of the regulatory sandbox for which we are responsible.

Under the draft rules,⁶ the AER is required to develop Trial Projects Guidelines that will set out how the AER intends to perform its new functions of granting trial waivers and overseeing the conduct and outcomes of trial projects. In doing so, the AER will be required to follow the Rules Consultation Procedures under clause 8.9 of the NER. Commencing consultation early will not bypass this process in any way and, once the legislation is enacted, we will formally commence the Rules Consultation Procedures by publishing a notice on our website. We expect that conducting this initial consultation early will allow us to conduct the formal consultation process more efficiently once the legislation is enacted, and potentially reduce the time taken by the AER to finalise its draft and final report following consultation if the substantive issues have already been resolved, allowing the Trial Projects Guidelines to take effect sooner than would otherwise be the case.

1.4 Feedback from stakeholders

The AER welcomes feedback on any aspect of this issues paper. We are particularly interested in stakeholder views on the questions that we have posed throughout this paper. A summary of these questions is provided below for reference.

Table 1: Summary of questions

DELIVERING THE REGULATORY SANDBOX
<p>Question 1 – Trial waivers</p> <p>What Energy Rules have stakeholders encountered that have acted as a barrier to implementing an innovative technology or business model?</p> <p>What technologies or business models are most likely to benefit from trial waiver?</p>
<p>Question 2 – Prioritising enquiries and waivers</p> <p>What factors should the AER take into account if there is strong demand for the sandboxing services requiring enquiries and applications for waivers to be prioritised?</p>

⁶ In this issues paper, we refer to the draft rules as consulted on by the Energy Ministers (<https://energyministers.gov.au/publications/regulatory-sandboxing-legislation-consultation>). We note that the draft sandboxing legislation is still being considered by SA parliament and the draft rules may change prior to being made.

<p>Question 3 – Confidential information</p> <p>What issues does the AER need to consider in our approach to collecting, handling, and sharing confidential information when providing innovators with feedback on their enquiries and assessing trial waiver applications?</p>
<p>THE INNOVATION ENQUIRY SERVICE</p>
<p>Question 4 – Proposed Innovation Enquiry Service: what’s in and out of scope</p> <p>What information should the AER capture and publish about the use of the sandboxing website?</p>
<p>TRIAL WAIVERS AND THE TRIAL PROJECTS GUIDELINES</p>
<p>Question 5 – Timeline</p> <p>What factors should the AER consider in determining a timeline in which we will assess trial waiver applications?</p>
<p>Question 6 – Eligibility requirements</p> <p>Should trial waiver applicants be required to have an exit strategy to qualify for a trial project waiver? Why/why not?</p> <p>What additional eligibility requirements should be included in the Trial Projects Guidelines and that the AER should have regard to in assessing trial waiver applications?</p>
<p>Question 7 – Information requirements</p> <p>Should the form in which applications must be made be set out in the Trial Projects Guidelines? Why/why not?</p> <p>What information should applicants be required to provide in applying for a trial waiver? See Attachment A</p> <p>Should applicants be required to agree to their trial project confidential information being shared with the ESCV, AEMO and the AEMC? Why/why not?</p>
<p>Question 8 – Consultation regarding a proposed waiver</p> <p>Is the AER’s proposed timing for consultation on proposed waivers reasonable?</p> <p>What factors should the AER consider in specifying the procedures by which the AER will carry out public consultation in relation to a trial waiver?</p>
<p>Question 9 – Consumer protection measures</p> <p>What factors should the AER consider in assessing whether sufficient consumer protection measures are in place?</p>
<p>Question 10 – Duration of a trial</p> <p>What factors should the AER take into account in considering the appropriate duration of a trial?</p>

<p>Question 11 – Reporting obligations and monitoring conduct and outcomes of trial projects</p> <p>What content should trial waiver applicants be required to address as part of their reporting obligations?</p> <p>Are there any issues in relation to reporting that should be included in the Trial Projects Guidelines?</p> <p>Should trial waiver applicants be required to document the views and experiences of trial participants, AEMO and market participants? Why/why not?</p> <p>Should trial waiver applicants be required to report on compliance with the trial waiver conditions as part of their progress reports? Why/why not?</p> <p>What types of monitoring activities should the AER adopt?</p>
<p>Question 12 – Extension or variation of a trial waiver</p> <p>What factors should the AER consider in deciding whether to extend a waiver?</p> <p>Do you support extensions of trial waivers being conditional on submitting a rule change request to the AEMC? Why/why not?</p>
<p>Question 13 – Early termination</p> <p>What reasons for terminating a trial waiver early should be included in the Trial Projects Guidelines? What steps should be included in the termination process?</p>
<p>Question 14 – Opting out of trial projects</p> <p>What issues should the AER consider in setting out the process by and grounds upon which a customer may opt out of a trial project?</p>
<p>Question 15 – Any other matter</p> <p>Are there any other issues you think the Trial Projects Guidelines should address?</p>
<p>Question 16 – Conditions the AER may impose when issuing a trial waiver</p> <p>What trial waiver conditions do you think the AER should commonly apply to trial waivers?</p>

1.5 Timeframe and next steps

The publication of this issues paper begins our consultation on our approach to delivering the IES and how we assess trial waiver applications. We will consider stakeholder feedback provided in submissions in response to this issues paper and in any stakeholder meetings.

Stakeholder submissions to the issues paper are due on 28 January 2022.

In March 2022, we will publish a preliminary positions paper on the contents we intend to include in the Trials Projects Guidelines, which will include a preliminary draft of the guidelines for consultation.

Following consultation, the IES will be launched in Q2 2022. Applications for trial waivers will open once sandboxing legislation has been enacted.

Innovator workshop and information session

The AER will convene a facilitated workshop in December 2021 to provide innovators with an opportunity to discuss the issues raised in this paper and on the IES and the Trial Projects Guidelines more generally. The issues discussed in this workshop will be recorded and a note of the meeting will be published on the AER website (with no view attributed to any particular party). The information will be used to develop our understanding of how to deliver the IES and the content to be included in the Trial Projects Guidelines.

We will also host an information session for stakeholders in December 2021 to provide further information on the IES and Trail Projects Guidelines.

The facilitated workshop is open to any interested innovator. The information session is open to all stakeholders. We will publish further information on the AER website, where you will be able to register for either the facilitated workshop or the information session

1.6 Structure of this paper

The remainder of this issues paper is structured as follows:

- chapter 2 provides an overview of the regulatory sandboxing toolkit
- chapter 3 explains how we propose to set up the IES
- chapter 4 sets out how we propose to assess trial waivers and our initial views on the content of the Trial Projects Guidelines.

2 Delivering the regulatory sandboxing toolkit

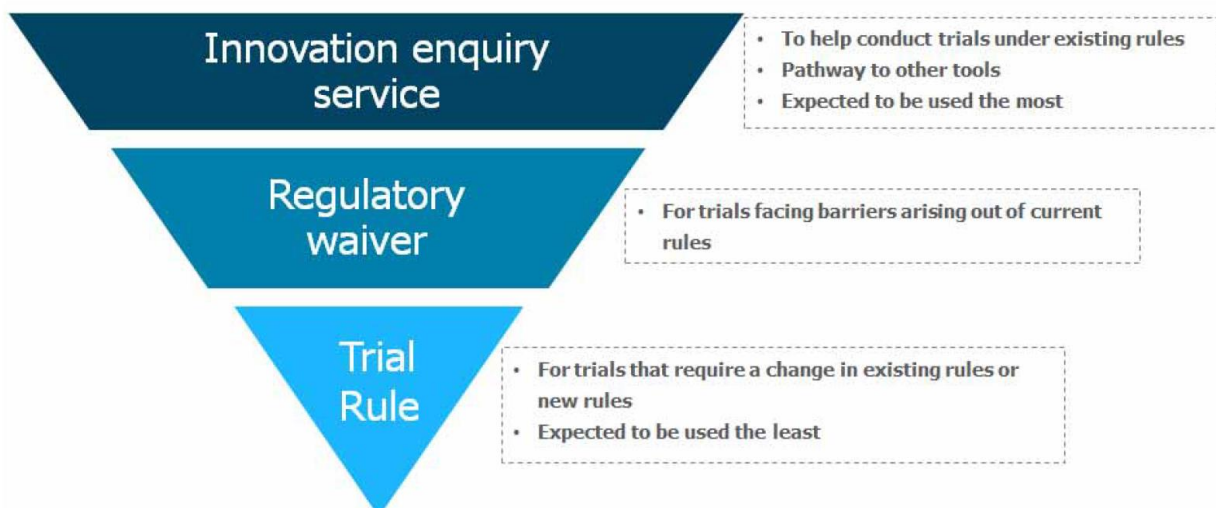
2.1 The regulatory sandboxing toolkit

The AEMC proposed three components to the regulatory sandboxing toolkit:

- **Innovation enquiry service** – innovators receive guidance on how their new technologies or business models can be delivered under the current regulatory framework
- **Regulatory waiver power** – trial waivers may be issued by the AER in accordance with Trial Projects Guidelines and the requirements specified in the national energy laws and rules⁷
- **Trial rule change process** – the AEMC may temporarily change existing rules or introduce a new rule of limited application to allow a trial to proceed.⁷

Experience from overseas suggests that the majority of enquiries can be resolved without requiring a trial waiver or trial rule change. Rather, innovators are often trying to understand whether their proposed approach is possible under the existing rules. We anticipate that a relatively small proportion of enquiries will proceed to a regulatory waiver application, and a smaller proportion still will proceed to the trial rule change process. This is consistent with the AEMC's expectations, as shown in Figure 2 below.

Figure 1: Overview of the sandboxing toolkit



Source: AEMC, *Final Report on Regulatory Sandboxing Arrangements to Facilitate Proof of Concept Trials*, 26 September 2019

The rest of this chapter provides an overview of our approach to the IES and provides a summary of our regulatory waiver power and the trial Rule change process. It also discusses key issues that relate to both the IES and trial waivers, including how we will prioritise

⁷ AEMC, *Regulatory sandbox arrangements to support proof-of-concept trials*, Final report, 26 September 2019, pi.

enquiries and waivers, our approach to confidential information, knowledge sharing and consumers experiencing vulnerability.

What the regulatory sandbox will not do

The regulatory sandbox will not provide funding or permanent waivers or rule changes. The legislative provisions and rules for which the AER may provide a waiver are clearly defined in the legislation. The AER will not have the ability to provide a waiver outside of these.

Any feedback or guidance provided by the regulatory sandbox will not provide legal, business, engineering or technical advice. Innovators should seek independent and specific advice from appropriate experts. While the AER will make every reasonable effort to ensure the quality of the feedback or guidance provided, it cannot guarantee and does not make any representations or warranty as to its accuracy, completeness, or suitability for any purpose.

Feedback and guidance will be provided on the condition that the innovator acknowledges and agrees that the AER shall have no liability whatsoever (including liability arising by reason of negligence or otherwise) in respect of feedback or guidance, including in respect of any statements or representations contained in the feedback or guidance provided, or any omissions from it, or for any use or reliance on the feedback or guidance provided.

Any feedback or guidance provided to an innovator or the granting of a trial waiver is not an endorsement by the AER of a particular business model or technology, and must not be portrayed to customers, trial participants or any other person as such.

Granting of a trial waiver should not be viewed as a guarantee of future regulatory changes. Any changes will be subject to existing frameworks for amending Rules, Guidelines and Procedures.

Box 1: What do other regulators offer?

In designing our sandboxing toolkit we have drawn from the approaches adopted by both Ofgem in the UK and the Ontario Energy Board (OEB) in Canada, among others. Both these regulators have offered sandboxing services for some years and, as such, can provide valuable insights and lessons learned from their experience. Ofgem, in particular, opted to redesign its approach and relaunch its Innovation Link in 2020, having identified a number of areas that could be improved.ⁱ

There are a number of areas of similarity between the approaches adopted by Ofgem and the OEB. Both offer a clean and accessible website that provides guidance on the scope of the sandbox toolkit and a FAQ section. Both also offer two types of services: an information service and trial project support, similar to our IES and regulatory waiver function.

Information service. While the exact nature of the service differs, both Ofgem and OEB will provide informal feedback or guidance to innovators. Innovators submit enquiries via email or a simple form, and guidance is provided via email or informal discussions with the innovator which are backed up with a written guidance document. Ofgem does not specify a response timeframe, while the OEB will offer an informal meeting within 20 days. The information service can clarify frameworks, but does not offer any guarantees to the innovator about the regulator's compliance approach to their activities, requiring the innovator to conduct their own due diligence. Feedback can be of a general nature or targeted to the innovator's proposal.

Sandbox or trial project support. Again, the exact service differs, but both are intended to support market entry or innovative trials. Both Ofgem and the OEB require those seeking custom support to submit a more detailed application form that covers information requirements such as justification of project innovation, consumer benefits and protections, exit plans and readiness for market entry. This approach helps manage demand for the service by ensuring that only those innovators that have a well thought through proposal that is close to being market-ready reach this stage.

For sandbox or trial project support services, Ofgem offers a response timeframe of 3 to 4.5 months, while the OEB will meet the proponent within 20 days and provide customised guidance to assist with market entry or offer a temporary exemption within 6 months (186 days). Where relevant, both will provide confirmation that an activity is permissible or does not raise regulatory concerns as a mechanism to help demonstrate to investors that the regulatory risk is low.

To assist in knowledge sharing, Ofgem requires that innovators participating in the sandbox toolkit consent to Ofgem using information about them, excluding commercially sensitive information or personal data, for specified purposes. This includes sharing information on how to launch new products and services in compliance with the rules, and sharing anonymised case studies and aggregated data.ⁱⁱ

- i. See: Ofgem, Insights from running the regulatory sandbox; and CEPA, Evaluation of the Innovation Link, 17 May 2021.
- ii. Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, p66.

2.2 Innovation Enquiry Service

The IES will provide innovators with informal feedback and guidance on business models that may be feasible within the current laws and rules, helping innovators enter the market or implement new approaches more quickly. Because sandbox trials take years to complete and have uncertain outcomes, the strongest impact on innovation from sandbox toolkits are made through enquiry services that help innovators navigate the rules and regulations.⁸

Best practice research on international sandboxing functions suggest that enquiry services and their associated web platforms can:⁹

- help innovators understand how regulation applies to their business models, allowing them to attract investors and enter the market quickly
- make sure innovators consider consumers in their business model arrangements
- provide support to new market entrants through feedback and guidance
- provide an opportunity to educate and learn from non-traditional players and smaller market participants, creating a more level playing field
- reach new stakeholders through innovative engagement methods
- promote transparency by making aggregated regulatory guidance publicly available, mitigating the risk of discrimination when advising individual businesses while respecting innovators' intellectual property rights
- provide an important platform for sharing knowledge, both amongst market participants as well as between policy makers.

IES knowledge sharing could include transmitting regulatory understanding through online guidance materials, interactive tools clarifying market entry requirements, and online educational events such as webinars.

Sharing insights and knowledge amongst the industry can allow innovators to leverage off others' learnings, allowing innovation to occur more quickly. Insights from the enquiry service can also inform policy makers on the future design of the regulatory arrangements and identify areas of regulation that are unnecessarily complex and suitable for policy reform. Knowledge sharing is discussed further in section 2.7.

The way in which we intend to implement the IES is set out in chapter 3.

2.3 Trial waivers

Existing regulatory frameworks can present a barrier to the adoption of new approaches, products and services that could deliver improved and lower cost services to consumers. Identifying these barriers and assessing whether they remain fit for purpose will be an

⁸ See for example Quest, *Enter the Sandbox: Developing Innovation Sandboxes for the Energy Sector*, 2020 p55 and 59.

⁹ See, for example: CEPA, *Evaluation of the Innovation Link 2021*, 17 May 2021; and Quest, *Enter the Sandbox: Developing Innovation Sandboxes for the Energy Sector*, 2020.

important outcome of the trial waiver process. The AER's new regulatory waiver power allows us to temporarily address certain regulatory barriers by exempting trial projects from complying with specified rules and laws and, in doing so, assess whether there would be benefit from more permanent change.

The trial waiver provides an opportunity for innovators to experiment in a real world context, without all the usual rules applying. At the same time, the eligibility requirements for receiving a trial waiver ensure that customers, the market and the system remain protected. In addition, knowledge sharing requirements also allow regulators and policy makers, as well as the wider industry, to benefit from the trials by gaining a better understanding of how the regulatory framework may need to change in order to facilitate greater innovation and how consumer outcomes may be improved through new approaches.

The Energy Laws and Regulations provide a list of principles that the AER must have regard to in deciding whether to grant a waiver that provide greater clarity on what may be considered a genuinely innovative trial project. The Energy Laws also set out the circumstances under which the AER must not grant a trial waiver¹⁰, and provides us with the ability to impose any conditions we think are appropriate.¹¹

The Energy Rules require us to establish Trial Projects Guidelines. The Rules identify elements to be included in the Guidelines, such as waiver assessment timeframes, eligibility and information requirements, consumer protection measures and reporting obligations the AER may require as a condition of granting a trial waiver. The reporting obligations may include a requirement for the applicant to publicly report on trial project outcomes.

Chapter 4 of this issues paper provides further detail on the proposed content of the Trial Projects Guidelines, as well as further detail on the trial waiver process generally.

Question 1:

What Energy Rules have stakeholders encountered that have acted as a barrier to implementing an innovative technology or business model?

What technologies or business models are most likely to benefit from trial waiver?

2.4 Trial rule change process

The sandboxing legislation provides the AEMC with a new power to make temporary rule changes to allow trials to proceed. This could be used to temporarily amend existing rules or to temporarily introduce a new rule of limited application. In deciding whether to make a trial Rule, the AEMC must take into account the same list of principles established in the Energy Laws and Regulations to determine whether a proposed trial Rule is genuinely innovative.¹²

¹⁰ Draft NEL section 18ZT; draft NERL section 121K; draft NGL section 30ZE

¹¹ Draft NEL section 18ZM; draft NERL section 121D; draft NGL section 30X.

¹² Draft NEL section 88C; draft NERL section 236A; draft NGL section 293A.

The Energy Rules set out the information that a request for a trial Rule must contain.¹³ We expect that requests for a trial Rule will be submitted through the Sandboxing website. The AER will then forward these requests to the AEMC.

It may be the case that both a trial waiver and a trial Rule will be required. In these instances, the AER and AEMC will work closely together to coordinate the two processes. Similarly, where assessment of a waiver application reveals that a project is more suitable to facilitate via a trial Rule change, the AER will forward these requests to the AEMC.

As the trial rule change function sits with the AEMC it is not addressed further in this paper other than in the context of our own regulatory sandboxing functions.

2.5 Prioritising enquiries and waivers

It is not clear at this stage how strong the demand for sandboxing services will be. Ofgem experienced higher than expected demand when their sandboxing function was first implemented, leading them to close the service after two months from 2017 to 2020 while they addressed the backlog of enquires and applications.

We are proposing a number of features for our sandboxing arrangements that will assist in managing demand. These are:

- market maps and case studies that will answer commonly asked questions (discussed in chapter 3)
- relatively extensive information requirements that trial waiver applicants must provide in order to access the trial waiver process, to demonstrate innovators are well-advanced in their thinking and preparation.

However, the AER considers it prudent to consider how we will prioritise enquiries and trial waiver applications should the need arise. The Energy Laws and Rules do not address the issue of prioritisation.

Ofgem generally takes the approach of assessing applications on a first-come first-served basis, although it reserves the right to prioritise applications differently. This could occur, for example, if multiple similar applications are submitted, or if applications are urgent. If demand for the service is high, Ofgem may pause receiving applications from time to time.¹⁴

In the Netherlands, a cap of 20 projects per year was set to help manage the burden of administering waiver applications.¹⁵

We propose to take a similar approach to Ofgem in prioritising both enquiries and applications, if required. That is, generally we will assess enquiries and applications on a first-in, first-served basis. However, if demand for the service is high, we propose to prioritise enquiries and applications that:

¹³ Draft NER clause 8.16; draft NERR clause 181; draft NGR clause 135N.

¹⁴ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, p29-30

¹⁵ See <https://fsr.eu.eu/regulatory-sandboxes-in-the-energy-sector-the-what-the-who-and-the-how/>

- have cross-industry support, for example trials that stem from the Distributed Energy Integration Program¹⁶
- are similar to other enquiries or applications currently being progressed and that can be grouped together
- will yield new or valuable regulatory insights
- are closer to being ready to commence or are more likely to succeed in the market
- will benefit consumers experiencing vulnerability.

We may also consider accelerating an enquiry or application if the applicant can provide a clear and reasonable justification for why their enquiry or application should be prioritised.

Innovators will not be required to demonstrate they meet these criteria as part of their enquiry or trial waiver application. The prioritisation criteria will only be used if the AER does not have sufficient resources to process all enquiries and trial waiver applications in a timely fashion.

Question 2:

What factors should the AER take into account if there is strong demand for the service requiring enquiries and applications for waivers to be prioritised?

2.6 Confidential information

By participating in the regulatory sandbox, an innovator may need to disclose to the AER confidential information supporting its enquiry or trial waiver application, potentially including intellectual property relating to its innovative project, for us to provide tailored guidance as well as to assess a trial waiver application. The AER will design a secure lodgement system that will enable innovators to submit all necessary information and distinguish information that is commercially sensitive or otherwise confidential.

To ensure an innovator receives appropriate guidance and to assess a trial waiver application, the AER may need to consult with and disclose certain confidential information to other government bodies and regulators, such as the Australian Energy Market Operator (AEMO), the AEMC and the Essential Services Commission of Victoria (ESCV) (the role of the ESCV is discussed in Box 2).

As such, in submitting an enquiry to the IES or a trial waiver application, the innovator must agree to the AER consulting with and providing necessary information (including confidential information) to other government bodies and regulators, on a confidential basis, for the purposes of responding to an enquiry or assessing a trial waiver application.

Information regarding a trial project that is submitted to the AER in relation to a trial waiver application (or to the AEMC in relation to a request for a temporary rule change) and is identified by the applicant as being confidential, will be regarded as *trial projects confidential information* under the Energy Laws and Rules. Such information is treated as confidential

¹⁶ The Distributed Energy Integration Program (DEIP) is a collaboration of government agencies, market authorities, industry and consumer associations aimed at maximising the value of customers' distributed energy resources (DER) for all energy users.

information received by the AER for the purposes of the NEL, NGL and NERL.¹⁷ The AER is only permitted to disclose such information in the circumstances set out in section 44AAF of the *Competition and Consumer Act 2010* (CCA), and the relevant sections of the NEL, NGL and NERL.¹⁸

The IES is not established under the Energy Laws or Rules and, as such the trial projects confidential information provisions do not apply in relation information provided to the IES. However, The AER will handle confidential information provided to the IES in accordance with the ACCC/AER Information Policy, available at <https://www.accc.gov.au/publications/accc-aer-information-policy>.

Box 2: Role of the Essential Services Commission of Victoria

In Victoria, the Essential Services Commission of Victoria (ESCV) has responsibility for licensing, exemptions and customer protections in the retail energy market which in other NEM jurisdictions is the responsibility of the AER under the NERL and NERR. ESCV also makes and enforces many rules and standards in its distribution codes with respect to the supply of energy. The ESCV is responsible for licensing various activities including energy retail, energy distribution, electricity transmission, and electricity generation.

For the purposes of regulatory sandboxing the ESCV will be able to consider applications for a trial waiver in place of a licence or licence exemption under the new framework. Trial waivers granted by the commission will contain bespoke conditions that respond to the unique characteristics of the innovative activity or project that an innovator is proposing to trial in Victoria..

An innovator whose project operates within both Victoria and within other states could require guidance and, where necessary, two separate waivers from both the AER and ESCV. The AER will work closely with the ESCV to promote consistency between the national and Victorian frameworks, and to streamline coordination to provide guidance and facilitate waivers through the sandbox toolkit. The AER will also work with the ESCV to develop clear guidance for innovators that want to apply for a trial waiver that spans both Victoria and other jurisdictions.

For the purposes of knowledge sharing, the AER will work with innovators to identify what information may be published. In doing so, we will also be guided by our obligations under the Energy Laws and Rules, CCA, the Privacy Act 1988 (Cth) and the general law.

¹⁷ For further information see NEL Part 3 Division 6; NGL Chapter 10 Part 2 Division 1; NERL Part 8 Division 3.

¹⁸ See, NEL Part 3 Division 6; NGL Chapter 10 Part 2 Division 1; NERL Part 8 Division 3.

Question 3:

What issues does the AER need to consider in our approach to collecting, handling, and sharing confidential information when providing innovators with feedback on their enquiries and assessing trial waiver applications?

2.7 Knowledge sharing

Knowledge sharing will be an important outcome of the regulatory sandbox. The industry as a whole will benefit from sharing findings not just from any trials that proceed as a result of a regulatory waiver, but from sharing the types of questions and enquiries the AER receives via the IES as well as the nature of the guidance that the AER provides. Sharing the learnings from these processes will help reduce barriers to entry to new participants as well as help clarify the opportunities and challenges that exist within current regulatory frameworks for new approaches.

Innovators will benefit from the sandboxing tools, either via guidance or a trial waiver allowing participants to test innovative approaches without having to comply with certain rules and/or obligations. In return, innovators will be required to share the learnings from their trials, particularly where new approaches have led to tangible benefits to consumers. Through this process we expect consumers to benefit from increased choice and value. However, we are aware of the commercial sensitivities that come with innovation. It is not our intention that commercially sensitive information, or an innovator's intellectual property, be disclosed to the wider industry. Rather, the AER will work closely with innovators to identify what information may or may not be published. Generally, we expect knowledge sharing to include aggregated and de-identified case studies and web guidance, follow-up surveys, internal sharing of projects to develop policy and invitations to participate in webinars.

To facilitate this knowledge sharing function, innovators will be required to agree to the knowledge sharing arrangements in order to access IES support. Knowledge sharing, including via regular reporting, will also be a requirement of the trial waiver conditions.

2.8 Sandboxing and consumers experiencing vulnerability

Anyone can experience vulnerability at some point in their lives. Circumstances can change quickly when people are impacted by life events or the wider economy. Further, the challenges that many Australians live with, such as not having literacy and numeracy skills to navigate everyday life, can make it difficult to engage with the energy market, particularly when markets are complex, or not inclusively and universally designed.

Consumers experiencing vulnerability will not be excluded from participating in trials. In fact, sandboxing could be used as an opportunity to explore products and services that improve outcomes for such consumers. A recent Consumer Policy and Research Centre report commissioned by the AER notes "While many regulators and legal frameworks have traditionally focused on debt and payment difficulty, some are also looking more closely at the design of products and services, to help create inclusive markets where people can

secure what they need at a fair price, without being excluded or taken advantage of”.¹⁹ It is not just regulators, but innovators that could improve outcomes for vulnerable consumers, and sandboxing could play a role in promoting new products and services that are specifically targeted at addressing the unique needs of consumers experiencing vulnerability.

Consumers experiencing vulnerability have additional protections under the Energy Laws and Rules to help them remain connected, including when they face difficulties paying their bills. In considering whether to grant a trial waiver the AER will need to assess whether the rules for which the waiver is sought provide essential protections for consumers experiencing vulnerability. At this stage we consider it unlikely that we would waive these types of rules, such as those relating to life support customers and payment and hardship schemes.

More generally, in assessing whether the potential risks associated with a granting a trial projects waiver are outweighed by the benefits, the AER will have particular regard to whether there might be potential consumer vulnerability impacts. This includes both the impact on consumers experiencing vulnerability, and whether by granting a trial waiver we could inadvertently cause or create new vulnerabilities.

Protecting vulnerable consumers while enabling consumers to participate in energy markets is a strategic priority for the AER. We will soon publish consultation documents that will assist us in developing our Consumer Vulnerability Strategy. We encourage stakeholders to review these documents and make submissions on issues of interest.

¹⁹ Consumer Policy Research Centre, Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator, February 2020, p3.

3 The Innovation Enquiry Service

3.1 Proposed Innovation Enquiry Service: what's in and out of scope

The AER intends to implement the IES as recommended by the AEMC in their *Final Report on Regulatory Sandboxing Arrangements to Facilitate Proof of Concept Trials*.²⁰

The IES will be accessed via a new regulatory sandboxing website, providing a central contact point and collaborative “first stop shop” for innovators seeking proof-of-concept trials and navigating the broader regulatory system. The website will include detailed guidance for innovators, provided through interactive tools and a series of case studies which will clarify market entry requirements for a range of innovative business models. The sandboxing website will also contain guidance on sandbox toolkit processes and scope.

The IES will also provide innovators with informal feedback on the regulatory implications of proposed trials and innovative products, services and business models. While the service will be available to all innovators, we expect that it will primarily be used by new market entrants rather than established market participants who are already familiar with the energy market frameworks. The scope of the service includes:

- the energy regulations that may apply to their specific project or business model
- informal steers on options available to progress a project or business model with respect to the regulations
- what formal regulatory processes or applications are required for market entry, and who an innovator can contact to progress the process
- referrals to apply for a trial waiver or trial rule change, noting this service would not provide a definite view on whether a trial would be possible within the rules, or if an application would result in successful receipt of a trial waiver or rule change
- referrals to other energy sector stakeholders, where the query falls outside AER responsibility

Based on the AEMC's recommendations, the IES will **not** provide:²¹

- legal advice, binding rulings, regulatory decisions, endorsements, or business incubation services (financial or technical advice related to launching a business)
- endorsement or certification that a product, service or business model is compliant with the rules
- an official organisational view from the AER.

²⁰ AEMC, Final Report on Regulatory Sandboxing Arrangements to Facilitate Proof of Concept Trials, 26 September 2019, pv.

²¹ AEMC, Final Report on Regulatory Sandboxing Arrangements to Facilitate Proof of Concept Trials (2019).

As such, the IES process will not include formal confirmation that a given innovation falls within the currently regulatory framework. This is similar to the approach in the UK, whereby feedback from Ofgem is to be considered a “regulatory steer” only, not a binding response.²²

The IES will be managed by a dedicated team within the AER that will work collaboratively with other government bodies and regulators to provide guidance to innovators. This will allow innovators to benefit from the appropriate expertise via a single contact point.

Providing accurate responses to enquiries from the appropriate experts may require sharing the innovator’s confidential information, potentially including intellectual property in relation to its innovative project, with other government bodies and regulators. As such, to access the feedback service innovators will be required to consent to the AER consulting with and disclosing information (including confidential information) to other government bodies and regulators, on a confidential basis, for the purposes of responding to the enquiry. The way in which the AER will handle confidential information is discussed further in section 2.6.

The time, effort and type of engagement dedicated to a particular query will be at the AER’s discretion. Indicative response timeframes will be provided when the query is submitted based on the complexity of the issues. During periods of high demand for the EIS, response timeframes will consider how an enquiry meets the prioritisation criteria, as discussed in section 2.5. Other government bodies and regulators will have the discretion to determine the amount of time and effort they dedicate to queries, which the AER will have no control over.

As recommended by the AEMC, the AER will capture and publish high level information regarding usage of the sandboxing website, including the use of the IES. This will include:

- the types and areas of innovation seeking guidance
- 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, sought a temporary rule change as a result of guidance, or didn’t proceed.

Subject to confidentiality and privacy obligations, we will also draw on enquiries to publish frequently asked questions and standard guidance, and update the market maps and case studies. This regulatory guidance will be anonymised, and case studies could be based on aggregated information. We could also publish success stories and interviews with businesses who have received IES guidance, where these businesses are comfortable with information about them and their innovative project being shared publicly.

Question 4:

What information should the AER capture and publish about the use of the sandboxing website?

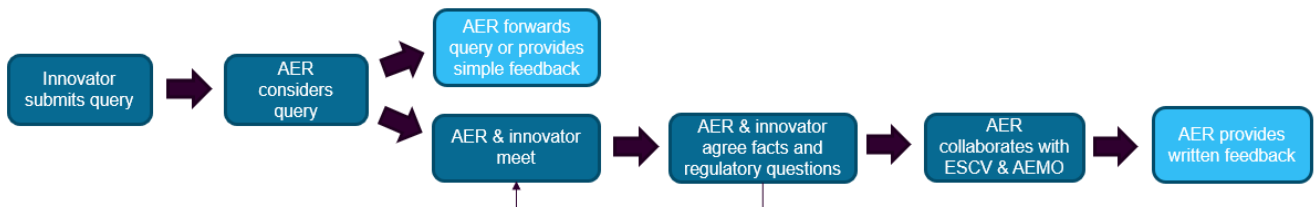
²²

Ofgem, What fast, frank feedback can and cannot offer, October 2018.

3.2 Engaging with the Innovation Enquiry Service

The way in which we expect innovators to engage with the IES is summarised in Figure 3 and explained in more detail below.

Figure 2: Summary of the IES process



The regulatory sandboxing website will be the first step for innovators seeking to engage with the IES. Innovators looking for further information on regulatory obligations will be directed to this website via links on the websites of the AER, AEMC, AEMO and state regulators.

The website will provide a range of guidance information to address common queries, as well as providing a secure lodgement system for innovators to submit enquiries about their specific innovation and submit applications for trial waivers and trial rule changes.²³ The type of guidance information we propose to publish is detailed below.

Innovators seeking guidance will submit a relatively simple enquiry form. The innovator will be encouraged to provide as much detail as possible, so the AER sandboxing team is able to assess the nature of the query, including whether it is simple or complex, and direct the query to the appropriate government bodies and regulators.

The innovator must acknowledge and agree to a legal disclaimer in order to submit the form via a secure lodgement system and access the enquiry service. The purpose of the legal disclaimer is for the innovator to acknowledge the scope and nature of the feedback that the AER is able to provide, as noted above, as well as for the innovator to agree to conditions on the AER's use and disclosure of their information (including confidential information) and their participation in knowledge sharing, as discussed in sections 2.6 and 2.7 respectively.

Simple queries, which only require an explanation of regulations without interpretation or customised application, may be referred back to guidance information on the sandboxing website, or have their question addressed via email or a telephone call accompanied by a written guidance summary which includes a legal disclaimer. Simple queries could also include referrals to market bodies, the Australian Renewable Energy Agency (ARENA) and jurisdictional regulators. Following the appropriate action, the query will be closed.

More complex queries are likely to require tailored guidance to assist in identifying regulatory barriers, possible project adaptations, or clarification of pathways to market entry. The AER may ask for further detailed information to help inform its consideration of the query, and an initial meeting may be held with the innovator. Relevant AER internal teams and other market bodies, as appropriate, will be contacted for input and/or will attend the initial meeting. The

²³ Trial rule changes are not a feature of the Victorian sandboxing framework.

initial meeting will clarify the innovation or trial project and set expectations for the length and output of the IES process.

Following the initial meeting or email exchange, the AER sandboxing team will draft a guidance pre-requisite document that sets out our understanding of the proposed innovation or trial project and the regulatory questions being asked, to be agreed with the innovator. This may require a number of iterations with the innovator but will be important to get right as this will form the foundational context and assumptions on the basis of which our feedback will be provided. This guidance pre-requisite document will also explicitly set out the scope of the feedback the IES provides and will include a legal disclaimer. Once signed, this document will be shared with the relevant parties that are providing expert input. Confidential information will be treated in accordance with section 2.6.

The AER will provide the consolidated feedback in writing to the innovator. The feedback will comprise three parts:

- our understanding of the innovation or trial project and regulatory questions, as agreed with the innovator
- the consolidated feedback from the AER and other relevant parties
- a legal disclaimer reiterating the nature and scope of the feedback and how the feedback may be used.

The feedback could include a suggestion that the innovator apply for a trial waiver and/or a trial rule change. In this instance, the AER sandboxing team will also be available to provide feedback on the innovator's application(s).

3.3 Proposed web guidance

The sandboxing website will provide a range of information on market entry requirements and obligations through a series of market maps and case studies.

The market maps will provide a high-level summary of:

- the electricity and gas activities that require a licence, authorisation or registration
- who is responsible for issuing these market entry requirements
- what types of exemptions are available in relation to that requirement
- links to the relevant organisation's website to obtain more detailed information.

In addition to some general summary material, the market maps will be structured as an interactive tool on the IES website where innovators answer a series of questions about their proposed service and then the website generates an output summarising relevant information. The questions will cover issues like the type of activities they intend to provide, the jurisdictions they intend to operate in and the types of customers they intend to serve.

The case studies will explore the applicable regulatory obligations in more detail for specific business models and innovative technologies. The initial case studies are expected to include:

- microgrids (in all of their various forms)

- community batteries
- virtual power plants / Distributed Energy Resources (DER) aggregation
- electric vehicle charging services.

The case studies will provide more detailed information for new entrants and innovators on the regulatory requirements for each technology and its associated business models, including requirements for market entry and the key regulatory obligations. The aim is to help innovators identify regulatory hurdles that may require them to either adapt their business model or seek guidance, waivers or trial rules through the IES service.

The website will also provide information on the scope of the sandboxing toolkit, issues that the AER can assist with, and details on how the innovator can seek further regulatory support through the IES. The website will also provide a guide to innovators on using other elements of the Regulatory Sandbox toolkit, including waivers and trial rule changes.

4 Trial Waivers and the Trial Projects Guidelines

4.1 Introduction

The AER will be given the power to waive the requirement to comply with certain laws and rules for a fixed period of time, known as a trial waiver. The purpose of the trial waiver is to allow innovative trial projects to proceed where there is currently a regulatory barrier that can be addressed through a waiver and where the trial meets certain conditions specified in clause 8.15.4 of the draft rules (eligibility requirements).²⁴

For specific trial projects, the AER will have the power to exempt an innovator from having to comply with requirements relating to registration or exemption of persons participating in national electricity market.²⁵

To provide guidance on how the AER will assess trial waiver applications, the AER is required to develop and make the Trial Projects Guidelines. These guidelines will provide details on how we will consider and grant trial waivers, as well as how we will oversee the conduct and outcomes of trial projects.²⁶ The Trial Projects Guidelines must be developed and amended in accordance with the Rules Consultation Procedures.²⁷

The AER may amend the Guidelines from time to time, and is permitted to make minor or administrative amendments without complying with the Rules Consultation Procedures.²⁸ The AER expects to review the Guidelines once we have gained experience in assessing and monitoring trial waivers. There are a number of issues that must be addressed in the Guidelines that would benefit from practical experience, such as the length of time required to assess trial waiver applications and the appropriate eligibility and information requirements.

Figure 4 provides a summary of how trial waiver applications will be assessed and implemented.

The fundamental challenge that the AER has in considering whether or not to grant a waiver is striking an appropriate balance between encouraging innovation and protecting consumers, particularly consumers experiencing vulnerability, as well as protecting the operation of the market and system. In addition to setting out the process for granting waivers, the Trial Projects Guidelines will help define the criteria that we will consider to help us carry out this balancing act.

This chapter sets out the issues that the Trial Projects Guidelines are required to address under the Energy Laws and Rules, as well as our preliminary views on the content of the

²⁴ Please note this differs to the *Eligibility Requirements* as defined in the draft rules which refers to the Innovative Trial Principles as specified in draft NEL section 7B.

²⁵ Specifically, the AER may exempt an innovator from having to comply with the following: section 12 of the NEL and/or the NER or a provision of the NER (Draft NEL section 18ZL(1)); section 88 of the NERL and/or the NERR or a provision of the NERR (Draft NERL section 121C(1); and sections 91BJ, 91BRD, 91BRR and/or 91LB of the NGL and/or the NGR or a provision of the NGR (Draft NGL section 30W).

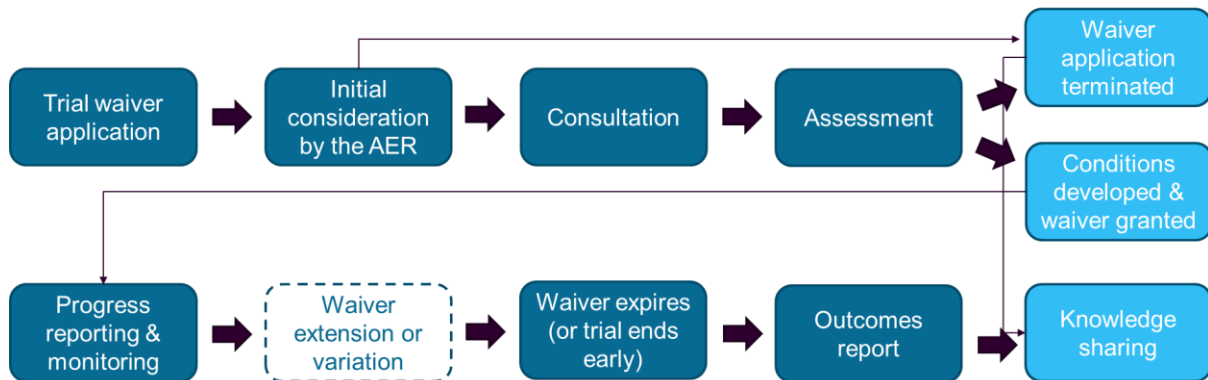
²⁶ Draft NER clause 8.14.

²⁷ NER Rule 8.9

²⁸ Draft NER clause 8.14(c).

Guidelines. To inform our views we have considered how these issues are addressed internationally and, where relevant, in other industries.

Figure 3: The trial waiver assessment and implementation process



The Trial Projects Guidelines are required to include:

- the approach the AER proposes to follow in considering and granting trial waivers, including:
 - the timeline within which the AER will determine applications for trial waivers (see section 4.2)
 - the AER’s proposed approach to assessing whether the applicant has satisfied the information requirements and the eligibility requirements (see sections 4.4 and 4.5)
 - consumer protection measures that the AER may require as a condition of granting a trial waiver (see section 4.7); and
 - reporting obligations required by the AER as a condition of granting a trial waiver, which may include a requirement for the applicant to publicly report on trial project outcomes (see section 4.9)
- the approach that the AER proposes to follow in overseeing the conduct and outcomes of trial projects (see section 4.9)
- each of the other matters required or permitted under the Energy Rules to be specified in the Trial Projects Guidelines
- any other matter that the AER considers appropriate in relation to the grant of trial waivers and the monitoring of trial projects conducted under trial waivers or trial Rules (see section 4.13).²⁹

The remainder of this chapter first provides an overview of our intended approach to assessing waivers, then sets out the issues that the Trial Projects Guidelines is required to address. For each issue we set out:

- the relevant draft legislative and rule requirements
- precedents from international approaches to sandboxing

²⁹ Draft NER rule 8.14(a).

- our initial views
- questions to help guide stakeholder responses, noting that the AER welcomes feedback on any aspect of this issues paper.

4.2 Overview of our approach to assessing waivers

Trial waiver applications will be submitted to the AER through the sandboxing website. After receiving an application, the AER will undertake initial consideration of the application. This will involve a series of steps that the AER must comply with:³⁰

1. **Assessing whether the information requirements have been met.** As discussed in section 4.5, this process will be aided using a comprehensive and standardised application form. The AER may request further information from the applicant if required. If the information provided does not comply with the information requirements or the applicant does not respond to a request for further information, the AER may terminate the application. Once the information requirements are met, the AER will move to the next step.
2. **Forming an initial view on whether the trial project can be carried out satisfactorily without a trial waiver.** The AER will form an initial view on whether a trial waiver is required for the trial project to proceed. If a trial project could proceed without a waiver, the application will be terminated. If the trial project cannot proceed without a waiver or it is not clear whether the trial could proceed without undertaking further analysis, the AER will move to step 3. At any time, if the AER finds that the trial project can proceed without a trial waiver, the AER may terminate the application.
3. **Considering whether the application is misconceived or lacking in substance.** The AER will consider whether the application is genuine, relevant and provides a basis on which to make a decision about whether to grant a trial waiver. If found to be misconceived or lacking in substance, the application may be terminated.
4. **Considering whether the trial project could be carried out under an existing or prospective trial Rule.** The AER may not grant a waiver for a trial project that is materially similar to a trial project for which a trial Rule has been made or is the subject of a request for a trial Rule.
5. **Verify whether the trial project is likely to be carried out.** The AER may not grant a waiver for a trial project if it is unlikely to be carried out.

If the AER considers that we should terminate an application, we will notify the applicant of our intentions to terminate the application and the reasons why. The applicant will have seven business days to provide further information in support of its application. The AER is required to take account of any submissions or information provided by the applicant before deciding to terminate our consideration of the application.³¹ The AER will also consider whether the process has elicited any information about the regulatory arrangements that may

³⁰ Draft NER clause 8.15.2(a), Draft NERR clause 176(1); Draft NGR clause 135MA(1); NEL section 18ZT; NERL section 121K; NGL section 30ZE.

³¹ Draft NER clause 8.15.2(b); draft NERR clause 176(2); draft NGR clause 135MA(2).

be incorporated in the knowledge sharing arrangements. This information would be anonymised or used with the applicant's permission.

Once the initial assessment is completed, in most instances we expect that we will consult on whether a trial waiver should be granted. The consultation process is discussed in further detail in section 4.6.

In assessing the application, the AER will test the application against the eligibility requirements contained in the Energy Rules and the innovative trial principles contained in the Energy Laws and Regulations. These are set out in section 4.4, which also provides further detail on how we propose apply them.

If the AER is satisfied that the trial project satisfies the eligibility requirements and innovative trial principles, the next step will be to develop trial waiver conditions, including the duration of the waiver. Some of these conditions may be standard and apply to all trial waivers, others will be unique to the trial project to address specific project risks. Trial waiver conditions are discussed further in section 4.14.

The AER is not permitted to grant a trial waiver to a trial project that is materially similar to a trial project for which a trial Rule has been made or which is the subject of a request for a trial Rule. However, there is no requirement for the AER to consider whether the trial project is materially similar to a trial project that is already the subject of a trial waiver. As such, we expect that if we have multiple applications for similar projects that all meet the eligibility requirements and innovative trial principles, we may grant multiple trial waivers.

Once the trial conditions are completed the waiver may be granted. The AER will issue the applicant with a certificate that sets out the extent and duration of the trial waiver and any conditions subject to which the trial waiver was granted.³² The AER is required to establish, maintain and publish a register of all trial waiver certificates issued.³³

4.3 Timeline for trial waiver applications

What do the draft legislation and rules require?

The Guidelines must specify the timeline within which the AER will determine applications for trial waivers.³⁴ Neither the Energy Laws nor Rules place any bounds on what that timeline should be.

In their final advice, the AEMC acknowledged “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.”³⁵ As such, the AEMC concluded that the timeframe within which applications would be assessed was best addressed in the Trial Projects

³² Draft NER clause 8.15.6(a); draft NERR clause 180(1); draft NGR clause 135ME(1) *The reference in the draft rules to clause 135MD(4) appears to be a typographical or formatting error.*

³³ Draft NER clause 8.15.6(b); draft NERR clause 180(2); draft NGR clause 135ME(2) *The reference in the draft rules to clause 135MD(5) appears to be a typographical or formatting error.*

³⁴ Draft NER clause 8.14(a)(1)(i).

³⁵ AEMC, Regulatory sandbox arrangements to support proof-of-concept trials, Final report, 26 September 2019, p44.

Guidelines. The AEMC also noted that 10 weeks was a reasonable timeframe, but noted the AER may need the ability to extend this for more complex applications.

International precedents

There is no consistent precedent for how long a regulator will take to consider a trial waiver. Many do not offer even an indicative timeframe. For those that do, they are clear that the timeframe is only indicative, and they will use their best endeavours to meet it. For example:

- In the UK, Ofgem provides an indicative timeframe of 98 to 143 business days from receiving an application to notifying the applicant of their decision, but note that it is difficult to give a precise time estimate due to the diversity and potential complexity of applications.³⁶
- In Singapore, the Energy Market Authority (EMA) will endeavour to provide an initial assessment of an application within 30 business days after receiving all the necessary information. They do not provide a timeframe for the more formal evaluation stage, noting that the time required to evaluate an application will depend on its complexity.³⁷
- For innovators who request a meeting with the Ontario Energy Board (OEB) staff, this will occur within 20 days.³⁸ Custom guidance and confirmation of advice will be provided within 185 days (6 months), although OEB will aim to work to project deadlines where possible.

Our initial views

As noted by other regulators that carry out regulatory sandboxing functions, it is difficult to determine in advance how long it will take to process trial waiver requests. While some applications may be relatively straightforward, others may require technical and legal expertise across multiple market bodies. However, we recognise that applicants will want some certainty about how quickly their applications will be progressed. We will encourage applicants with more complex applications to meet with AER staff first to ensure the applications contain all the relevant information.

Our initial view is that we **will aim to finalise applications within 3 months**. The timing of the application will begin when we notify the applicant that the application meets the information requirements and has been accepted.

However, based on international experience and our own experience in assessing network service provider and retail licence exemption applications, we recognise some applications will be more complex and may require public consultation. For this reason, our initial view is that the Guidelines will specify that **the AER will determine applications for trial waivers within 6 months**. We propose to finalise waiver extensions within eight weeks.

³⁶ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, p40-43

³⁷ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019 p12.

³⁸ See <https://www.oeb.ca/html/sandbox/process.php>

We propose to include provision for us to “stop the clock” if additional information is required to assess the application. This could occur even after an application is accepted as complete if, during our assessment, additional information is necessary to finalise our decision.

We also propose to collect data on how long each application takes to assess in practice and will update the Guidelines if appropriate once we have gained experience and therefore a better understanding of the required timeframes.

Question 5:

What factors should the AER consider in determining a timeline in which we will assess trial waiver applications?

4.4 Eligibility requirements

What do the draft legislation and rules require?

The AER must make and publish Trial Projects Guidelines that specify the AER’s proposed approach to assessing whether the applicant has satisfied the information requirements and eligibility requirements.³⁹ This section focuses on the eligibility requirements, while the next section discusses information requirements. In practice the two are linked, as the information that an applicant is required to provide will assist in determining whether their proposed trial project meets the eligibility requirements for a trial waiver.

The Energy Rules require the AER to have regard to the following when considering whether a project may be eligible for a trial waiver (note these are specific to the NER, but equivalent requirements are set out in the NERR and NGR):⁴⁰

- whether the carrying out and monitoring of the trial project is likely to contribute to the development of regulatory and industry experience
- 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, and the measures that the applicant will take to avoid or mitigate such adverse effects; and
- whether the extent and nature of the trial project confidential information claimed by the applicant may impair:
 - the AER's ability to provide appropriate public transparency in relation to the conduct and outcomes of trial projects, or
 - the appropriate development of regulatory and industry experience arising from the trial project.

³⁹ Draft NER clause 8.14(a)(1)(ii). We have taken *Eligibility Requirements* to mean those specified in draft NER clause 8.15.4.

⁴⁰ Draft NER clause 8.15.4(a); Draft NERR clause 178(1); Draft NGR clause 135MC(1).

The AER may have regard to any other matter it considers relevant, including (but not limited to) any matters specified in the Trial Projects Guidelines.⁴¹

The Energy Laws and Regulations also require the AER to have regard to the *innovative trial principles*, set out in the box below. Together, these principles are intended to ensure that only genuinely innovative trial projects that are capable of being trialled, scaled up and reported on are provided waivers.

Innovative Trial Principles

Under the Energy Rules, the AER is required to take into account the following innovative trial principles in determining whether a trial project is “genuinely innovative” and therefore may be considered for a trial waiver. Note these are contained in the NEL, but equivalent principles are set out in the NERL and NGL:ⁱ

- whether the trial project is focused on developing new or materially improved approaches to the use or supply of, or demand for, electricity;
- whether the trial project is likely to contribute to the achievement of the national electricity objective;
- whether the trial project is able to demonstrate a reasonable prospect of giving rise to materially improved services and outcomes for consumers of electricity;
- whether the trial project maintains adequate consumer protections, including whether the trial project may involve risks to consumers and (if so), how those risks might be mitigated;
- whether the trial project is unable to proceed under the existing regulatory framework;
- whether the trial project has moved beyond research and development stages but is not yet established, or of sufficient maturity, size or otherwise commercially ready, to attract investment;
- whether the trial project may negatively impact AEMO’s operation of the national electricity system and national electricity market and, if there are impacts, how those impacts can be mitigated;
- whether the trial project may impact on competition in a competitive sector of the national electricity market;
- any other principle prescribed by the Regulations.

The Energy Regulations stipulate the following additional principles:ⁱⁱ

- whether the trial project is able to be trialled and evaluated
- whether there is potential for the trial project to be successfully expanded
- whether the trial project will provide for public sharing of knowledge, information and data resulting from the trial project.

- i. Draft NEL clause 7B, Draft NERL clause 13A, Draft NGL clause 24A
- ii. Draft National Electricity Regulations regulation 5B, Draft National Energy Retail Regulations regulation 9A, Draft National Gas Regulations regulation 5B.

⁴¹ Draft NER clause 8.15.4(b) Draft NERR clause 178(2); Draft NGR clause 135MC(2).

International precedents

Table 2 below provides a summary of the eligibility requirements for sandboxing trials in the UK, Singapore and Ontario. An asterisk indicates that the issue is not listed as an eligibility requirement but is included in the information requirements.

Table 2: International eligibility requirements

Eligibility requirement	UK ⁴²	Singapore ⁴³	Ontario ⁴⁴
Demonstrate the trial is genuinely innovative	✓	✓	✓
There is a good prospect of consumer benefit	✓	✓	✓
There's a clear regulatory barrier	✓	✓	✓
The sandbox can deliver what the innovator needs	✓	–	–
The innovator is ready to make use of the support	✓	✓	✓
The innovator has a sandbox exit strategy	✓	✓	*
Defined boundary conditions	*	✓	*
Defined monitoring and evaluation procedure	*	✓	*
Risk assessment and mitigation	*	✓	*
Relevance	*	–	✓

Other requirements used in the Netherlands include: participation must be open and voluntary; the organisation must have financial, technical and organisation expertise; and arrangements must be in place in case a party goes bankrupt.⁴⁵

Our initial views

This section first considers whether the AER will have regard to any other matter we consider relevant in assessing eligibility, as permitted under the Energy Rules, and then considers how we intend to apply the eligibility requirements and innovative trial principles.

Our analysis of international approaches to regulatory sandboxing suggests that the innovative trial principles are comprehensive and cover the majority of eligibility requirements commonly applied by energy regulators elsewhere. This analysis is set out in the Table 3 below. Note that we have compared the innovative trial principles, rather than the eligibility requirements under the Energy Rules, as these more closely align to the requirements used internationally.

⁴² Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, pp26-27.

⁴³ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019, pp8-9.

⁴⁴ See <https://www.oeb.ca/html/sandbox/process.php>

⁴⁵ International Smart Grid Action Network (ISGAN), Smart Grid Case Studies: Innovative Regulatory Approaches with Focus on Experimental Sandboxes, Casebook, May 2019, p51

Our initial view is that we will include an additional eligibility requirement in the Trial Projects Guidelines that obliges the applicant to have an exit strategy in place in order to qualify for a trial project waiver. We consider this is important to provide certainty about what will happen to trial participants should a permanent change not be made prior to the trial project ending. The exit strategy should be able to be implemented in the event that the trial ends early, as well as where the trial ends due to the waiver expiring. The exit strategy should also consider circumstances where an individual trial participant chooses to opt out of the trial early.

We are interested in stakeholder feedback on whether additional eligibility requirements should apply, and note that we may revisit the factors that we may take into account in assessing eligibility once we have gained some experience in assessing applications.

The defined boundary conditions, such as duration of the trial and customer target segments, will be included in the information requirements, as discussed in section 3.4.

Table 3: Comparison of the Innovative Trial Principles and international eligibility requirements

NEM Innovative Trial Principles	Eligibility requirements used internationally
Whether the trial project is focused on developing new or materially improved approaches to the use or supply of, or demand for, electricity	Demonstrate the trial is genuinely innovative
Whether the trial project is able to demonstrate a reasonable prospect of giving rise to materially improved services and outcomes for consumers of electricity	There is a good prospect of consumer benefit
Whether the trial project is unable to proceed under the existing regulatory framework	There's a clear regulatory barrier
Whether the trial project is able to be trialled and evaluated	The sandbox can deliver what the innovator needs
Whether the trial project has moved beyond research and development stages but is not yet established, or of sufficient maturity, size or otherwise commercially ready, to attract investment	The innovator is ready to make use of the support
–	The innovator has a sandbox exit strategy
–	Defined boundary conditions
Whether the trial project will provide for public sharing of knowledge, information and data resulting from the trial project	Defined monitoring and evaluation procedure
Whether the trial project maintains adequate consumer protections, including whether the trial project may involve risks to consumers and (if so), how those risks might be mitigated; and	Risk assessment and mitigation

NEM Innovative Trial Principles	Eligibility requirements used internationally
Whether the trial project may negatively impact AEMO's operation of the national electricity system and national electricity market and, if there are impacts, how those impacts can be mitigated	
Whether the trial project is likely to contribute to the achievement of the national electricity objective	Relevance
Whether the trial project may impact on competition in a competitive sector of the national electricity market	–
Whether there is potential for the trial project to be successfully expanded	–

As discussed in the next section, we propose to require trial waiver applicants to address each of the eligibility requirements and innovative trial principles as part of the information requirements in applying for a trial waiver. In deciding whether the applicant meets the requirements criteria and innovative trial principles, we will assess their responses to these issues. To do so we will draw on our internal expertise, as well as from AEMO, the AEMC and the ESCV as required.

The AER is required to have regard to whether a trial project meets the eligibility requirements and innovative trial principles in deciding whether to grant a waiver, but there is no requirement that the AER must be satisfied that all requirements and principles are met in order to grant a waiver. This flexibility is appropriate, since there may be circumstances where not all requirements and principles are met, but there is merit in a trial proceeding.

As this is a new area of regulation, it is difficult to foresee what ideas will be presented or what trial projects will prove to have the greatest public benefits in terms of facilitating better regulatory innovation and reform over the long term. Importantly, we do not want to discourage applications by imposing standards and conditions that are difficult to meet in practice, particularly where outcomes of trials may be difficult to predict.

On the other hand, the AER must be satisfied that a trial project has a reasonable prospect of achieving the underlying purpose of the sandboxing tools. That is, the AER must be satisfied that the trial project cannot proceed under the current regulatory arrangements and has a reasonable prospect of improving customer services and outcomes in the long term and contributing to regulatory and industry experience, while ensuring that risk to consumers, the market and the system are low or can be appropriately managed.

This approach allows us to take into account the differences between proposed trial projects and avoid a 'one size fits all' approach, which we consider inconsistent with the underlying philosophy of the sandboxing tools to trial innovative new ideas.

Ultimately, the AER considers that it will need to be satisfied that the trial project is likely to contribute to the national energy objectives. This is reflected in the innovative trial principles

and is also the basis on which the AER is generally required to perform its functions or exercise its powers.⁴⁶

Question 6:

Should trial waiver applicants be required to have an exit strategy to qualify for a trial project waiver? Why/why not?

What additional eligibility requirements should be included in the Trial Projects Guidelines and that the AER should have regard to in assessing trial waiver applications?

4.5 Information requirements

What do the draft legislation and rules require?

The Energy Rules set out the information that an application must contain, which includes.⁴⁷

- 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.

The Energy Rules also permit the Trial Projects Guidelines to prescribe the form in which applications must be made.⁴⁸

Any information that the applicant wishes to remain confidential must be identified as *trial project confidential information*. If the trial waiver applicant does not identify trial project confidential information in an application, it is not regarded as information given to the AER in confidence for the purposes of Part 3 Division 6 of the NEL, Part 8 Division 3 of the NERL, or Chapter 10 Part 2 Division 1 of the NGL.⁴⁹

The Guidelines must specify our proposed approach to assessing whether the applicant has satisfied the information requirements within which the AER will determine applications for trial waivers.⁵⁰

The AER may, by notice in writing, ask for additional information in respect of the trial project and requested trial waiver.⁵¹

⁴⁶ See, NEL section 16(1)(a); NERL section 205; NGL section 28(1).

⁴⁷ Draft NER clause 8.15.1(b); Draft NERR clause 175(2); Draft NGR clause 135M(2).

⁴⁸ Draft NER clause 8.15.1(a); Draft NERR clause 175(1); Draft NGR clause 135M(1).

⁴⁹ Draft NER clause 8.15.1(d); Draft NERR clause 175(4); Draft NGR clause 135M(4).

⁵⁰ Draft NER clause 8.14(a)(1)(ii).

⁵¹ Draft NER clause 8.15.1(c); Draft NERR clause 175(3); Draft NGR clause 135M(3).

International precedents

Many international energy regulators provide a form that applicants are required, or encouraged, to use in order to apply for a trial waiver. These vary in length and required detail but have a number of common features.

Applicants are generally required to document how their proposed trial meets each of the eligibility requirements, including the specific regulatory barriers that prevent the trial from proceeding without a waiver. In addition to general company and contact information, applicants must provide details of their proposed trial, such as:

- the scope, goals and expected outcomes from the trial
- duration of the trial
- how many and what types of customers will participate, and how, and plans to recruit participants
- how the trial will be undertaken, including project timelines
- how insights will be used and shared.

Some regulators require additional information such as a description of the expertise or experience of the applicants with the type of project being proposed and details of any trial partners.

Our initial views

Our initial view is that the Trial Projects Guidelines should require applicants to use an online form to submit applications for a trial waiver via the regulatory sandboxing website, and that the online form should be relatively detailed. Requiring applicants to use a detailed, pre-determined form has a number of benefits, including:

- assisting applicants in demonstrating the trial concept is well thought through and sufficiently advanced to potentially qualify for a trial waiver
- allowing the AER to review forms more quickly to determine whether the information requirements have been met
- minimising the need for the AER to request further information from the applicant, thereby providing a faster process.

The form itself would not be part of the Trial Projects Guidelines. This allows the AER to update the form as required without having to conduct time consuming consultation to address largely administrative issues, particularly as we learn from early trial waiver applications and use these learnings to improve the process. We have included a draft of the application form in Attachment A to indicate the type of information we may require.

In addition to the information requirements stipulated in the Energy Rules, we consider the information requirements should include details of how the applicant's project meets the eligibility requirements and provide a detailed description of the project. More specifically, the categories of information that at this stage we consider should be included in the form are:

- General company and contact details

- A description of the project, including:
 - objectives of the project
 - what the project is testing
 - number and type of consumers involved
 - proposed duration
- Why the project is genuinely innovative, including how it meets the innovative trial principles set out in the Energy Laws and Regulations
- Consumer impacts, including:
 - a demonstration of the benefits to consumers from the trial
 - how consumers experiencing vulnerability will be impacted/supported
 - whether, and if so how, explicit informed consent will be obtained and recorded
 - if it is intended that explicit informed consent will not be obtained, why this should not be required
 - how consumer protections will be maintained through the trial
 - how consumers will be able to opt out of the trial
 - a process for resolving consumer disputes that may arise through the trial
- Details of the Law/Rules for which a waiver is sought, and why.
- Demonstration of readiness for testing
- How the trial will be monitored, reported on and evaluated, including success criteria, and how learnings will be shared
- Provide a risk assessment and, as required, mitigation measures. The risk assessment must cover risks to consumers participating in the trial, other consumers, other market participants such as network businesses and AEMO
- Evidence that the applicant has the operational and financial ability to carry out the trial
- How the applicant and customers participating in the trial will transition to their pre-existing supply arrangements once the waiver expires.

We recognise that some of the information listed above may be commercial in confidence. However, it is likely that we will require some confidential information in order to assess whether the proposed trial is likely to meet the eligibility requirements to receive a trial waiver. Applicants will be asked to identify trial project confidential information, which is a defined term in the Energy Rules, and this will be treated in accordance with our confidential information procedures, outlined in section 2.6.

However, as a condition of entry into the sandboxing process, the applicant must agree to allow the AER to share certain trial project confidential information with the other sandboxing parties, including the ESCV, AEMO and the AEMC. This will be necessary to ensure that the trial waiver application can be mirrored in Victoria, and that we are able to draw on the

appropriate expertise from AEMO and the AEMC in assessing applications for trial waivers as required.

To assess whether the applicant has met the information requirements, the AER will first consider whether all fields in the application form have been satisfactorily addressed. We will then consider whether the information provided is sufficient to form a view on whether the trial waiver application should progress to the consultation and assessment phases. This includes whether there is sufficiently detailed information to determine whether the eligibility requirements and innovative trial principles are met.

After receiving an application, we may request the applicant to provide further information if necessary to enable us to review the application.⁵²

Question 7:

Should the form in which applications must be made be set out in the Trial Projects Guidelines? Why/why not?

What information should applicants be required to provide in applying for a trial waiver? See Attachment A

Should applicants be required to agree to their trial project confidential information being shared with the ESCV, AEMO and the AEMC? Why/why not?

4.6 Consultation regarding a proposed waiver

What do the draft legislation and rules require?

The Trial Projects Guidelines must specify the procedures by which the AER will carry out public consultation in relation to a proposed trial waiver.⁵³

The AER is required to consult publicly in respect of a trial waiver, unless it is unlikely to have an impact on other registered participants or a direct impact on retail customers, other than those who have provided explicit informed consent to participate in the trial.⁵⁴ The AER must also consult with AEMO in relation to any potential impact on AEMO's operation of the power system, declared distribution systems and declared transmission system for gas and energy markets.⁵⁵

International precedents

Ofgem allows for consultation with third parties, including code administrators and industry participants, to ascertain their views of the risks and benefits of trials. Consultation typically occurs for more complex trials and those where waivers from licence conditions or codes are requested.⁵⁶

⁵² Draft NER clause 8.15.1(c); Draft NERR clause 175(3); Draft NGR clause 135M(3).

⁵³ Draft NER clause 8.15.3(c); Draft NERR clause 177(3); Draft NGR clause 135MB(3).

⁵⁴ Draft NER clause 8.15.3(a); Draft NERR clause 177(1); Draft NGR clause 135MB(1).

⁵⁵ Draft NER clause 8.15.3(b); Draft NERR clause 177(2); Draft NGR clause 135MB(2).

⁵⁶ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, p61.

Our initial views

The test for whether or not the AER is required to consult is whether registered participants or consumers, other than trial participants, are likely to be impacted. As such, we will generally expect to consult except where a case is made by the trial waiver applicant that there is unlikely to be an impact on other registered participants or a direct impact on retail customers, other than those who are participating.

Our initial view is that the process for public consultation will include:

- Developing an issues paper to facilitate consultation. This will be done in conjunction with the applicant to ensure that the issues paper provides sufficient detail to consult while avoiding divulging commercially sensitive information or intellectual property.
- Invite written submissions, to be provided within 20 business days of the AER publishing the trial waiver application.
- Publish written submissions on our website.

The AER will consider any responses in making its final decision.

Question 8:

Is the AER's proposed timing for consultation on proposed waivers reasonable?

What factors should the AER consider in specifying the procedures by which the AER will carry out public consultation in relation to a trial waiver?

4.7 Consumer protection measures

What do the draft legislation and rules require?

The Energy Laws require that in granting a trial waiver the AER consider whether the trial project maintains adequate consumer protections, including whether the trial project may involve risks to consumers and (if so), how those risks might be mitigated.⁵⁷

The AER must publish Trial Projects Guidelines that specify, among other things, consumer protection measures that the AER may require as a condition of granting a trial waiver.⁵⁸

International precedents

Our understanding is that Ofgem, as a starting point, requires all consumer protections to apply. They then consider which of those they may allow an innovator to be non-compliant with in order to facilitate market entry or a trial. Additional conditions may then be imposed, such as requiring trials to “make good” at the end to ensure consumers are no worse off after the trial than they were before.

⁵⁷ NEL section 7B(d).

⁵⁸ Draft NER clause 8.14(a)(1)(iii).

In the FinTech space, Denmark requires that an innovator have a plan to ensure that no consumer is left worse off as a result of the innovation.⁵⁹ Denmark also requires full disclosure by innovators to participants of the potential risks involved and redress mechanisms if they suffer detriment.

Our initial views

A critical purpose of the Energy Laws and Rules is to safeguard consumers. In deciding to provide a trial waiver, consumers – both those participating in the trials and potentially other consumers – could be exposed to additional risks. The AER's role will be to assess whether the potential risks associated with providing the waiver are outweighed by the potential benefits of the trial, and whether risks are appropriately allocated between the trial waiver applicant, the trial participants and, if relevant, other parties.

If the AER considers the risks to consumers are too great, we will not provide a waiver. For example, we consider it unlikely that we would waive aspects of the current Rules that provide critical protections to consumers relating to safety and security, including for life support customers. Similarly, we are unlikely to waive conditions that support consumers experiencing vulnerability such as payment and hardship schemes.

Where a trial may impose new risks on consumers that are not envisaged in the current Energy Laws and Rules we will consider whether any conditions may be necessary to address those risks in granting the trial waiver. It is difficult to predict the types of risks that could arise from potential trials, and we consider it likely that projects will need to be assessed on a case-by-case basis. As such, we propose to reserve the right to impose additional consumer protection measures on individual trial waivers as we see fit.

As noted in section 2.8, in assessing whether the potential risks associated with a granting a trial projects waiver are outweighed by the benefits, the AER will have particular regard to whether there might be potential consumer vulnerability impacts. This includes both the impact on consumers experiencing vulnerability, and whether by granting a trial waiver we could inadvertently cause or create new vulnerabilities.

In assessing risks to consumers, we will draw on the Consumer Risk Assessment tool developed by the Energy Security Board. This tool is designed to provide a process for assessing benefits and risks for consumers and allows market bodies to identify “where new consumer protections or other measures may be needed, reflecting the potential of a new arrangement, product or service to cause harm”.⁶⁰ We consider this tool will be useful in the context of sandboxing, which is intended to encourage innovative new products and services while ensuring consumers are appropriately protected.

The types of factors we propose to consider in assessing the risk to consumers include:

- the type of risk, such as financial, safety or security

⁵⁹ Policy Department for Economic, Scientific and Quality of Life Policies, Regulatory Sandboxes and Innovation Hubs for FinTech: Impact on innovation, financial stability and supervisory convergence, September 2020, p36, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU\(2020\)652752_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU(2020)652752_EN.pdf)

⁶⁰ Energy Security Board, Post-2025 Market Design: Final advice to Energy Ministers, Part C – Appendix, 27 July 2021, p26.

- the magnitude of the risk
- the probability of the risk eventuating
- the complexity of the trial and associated risks and whether it is reasonable for consumers to give their explicit informed consent to take on that risk
- whether the risk can be appropriately managed or mitigated.

We propose that all trial waiver applicants be required to set out a dispute resolution process as part of the information requirements that trial participants can access.

The following aspects of the trial waiver framework will also provide comfort that consumers will be appropriately protected.

- In most instances we expect to carry out public consultation on the waiver applications. This will provide an opportunity for any concerns about consumer protections not already identified by the AER to be raised and assessed.
- Trial waiver applicants will generally be required to obtain the explicit informed consent of retail customers to participating in the trial project. The applicant will be required to maintain records of each explicit informed consent obtained and the AER will be able to audit those records. This is discussed further below.
- Trial participants can opt out of the trial at any time (see section 4.12).

Explicit informed consent

The Energy Rules provide that where explicit informed consent is required to be obtained from retail customers to participating in a trial project, the consent may be given in writing, electronically or verbally, but the record of each consent must be capable of being stored for at least two years.⁶¹ The record may be used by the AER to verify a trial waiver applicant's compliance with the requirements relating to explicit informed consent. Access to a copy of the record of any explicit informed consent given by a retailer customer must be provided to the customer on request at no cost.

The AER's initial view is that our default position will require trial waiver applicants to obtain explicit informed consent from retail customers to participating in the trial project. If a trial waiver applicant proposes not to obtain explicit informed consent from retail customers to participating in the trial project, they will need to provide strong justification for this position.

The AER proposes to require a trial waiver applicant to provide information on how they will obtain and record explicit informed consent of retail customers participating in the trial project. We also propose to request those records be provided to us from time to time for the purposes of assessing compliance with the explicit informed consent provisions.

Additional monitoring may be carried out to determine compliance with these obligations, as discussed further below.

⁶¹ Draft NER clause 8.13(b); Draft NERR clause 174(2); Draft NGR clause 135L(2).

Question 9:

What factors should the AER consider in assessing whether sufficient consumer protection measures are in place?

4.8 Duration of the trial

What do the draft legislation and rules require?

The Energy Laws permit a trial waiver to be issued for up to five years. The Laws and Rules do not provide any further guidance on the appropriate duration of a trial.

International precedents

A number of countries have a trial duration of between 2 and 4 years. At the shorter end of the spectrum, 24 months was initially proposed in the UK, although flexibility was provided. In future it will be up to the applicant.⁶² France⁶³ and Germany⁶⁴ have trial durations of up to 4 years, and in France the trial waiver could be renewed.

Similarly, in Italy, the length of a trial is typically limited to between 2 and 4 years, depending on the complexity of the project.⁶⁵ Based on their experience to date, the Italian Regulatory Authority has found that a period of 2-3 years is typically appropriate as, beyond this, new technologies become available. As such, they recommend not exceeding 3 years.⁶⁶

The Netherlands is the only outlier, where the duration of exemption from provisions in their Electricity Act generally had a duration of 10 years.⁶⁷ However, the types of projects facilitated under the exemption tend to be large and involve communities combining renewable energy production and supply, allowing local communities to share electricity. These types of projects may lend themselves to longer timeframes.

Our initial views

The AER is constrained by legislation to issuing a waiver for a maximum of five years, with a possibility of one extension of a duration of one year (see below). Trial waiver applicants will be required to propose a trial length in their application for the waiver, and include a justification for the nominated duration.

We propose to take into account of the following factors in considering the reasonableness of the proposed duration of the trial:

- the complexity of the project

⁶² Quest, Enter the Sandbox: Developing Innovation Sandboxes for the Energy Sector, 2020, p59

⁶³ Quest, Enter the Sandbox: Developing Innovation Sandboxes for the Energy Sector, 2020, p42.

⁶⁴ Quest, Enter the Sandbox: Developing Innovation Sandboxes for the Energy Sector, 2020, p45

⁶⁵ ISGAN, Smart Grid Case Studies: Innovative Regulatory Approaches with Focus on Experimental Sandboxes, Casebook, May 2019, p34.

⁶⁶ ISGAN, Smart Grid Case Studies: Innovative Regulatory Approaches with Focus on Experimental Sandboxes, Casebook, May 2019, p46.

⁶⁷ ISGAN, Smart Grid Case Studies: Innovative Regulatory Approaches with Focus on Experimental Sandboxes, Casebook, May 2019, p48.

- the minimum timeframe likely required to obtain useful results
- the degree and nature of any risks posed for consumers participating in the trial
- the type of upfront investment required for the trial
- the applicant's market exit strategy
- feedback obtained during the consultation process, if relevant.

Question 10:

What factors should the AER take into account in considering the appropriate duration of a trial?

4.9 Reporting obligations and monitoring conduct and outcomes of trial projects

What do the draft legislation and rules require?

The AER must include in the Trial Projects Guidelines any reporting obligations required by the AER as a condition of granting a trial waiver, which may include a requirement for the applicant to publicly report on trial project outcomes.⁶⁸ The AER must also include the approach that we propose to follow in overseeing the conduct and outcomes of trial projects.⁶⁹

International precedents

In the UK, Ofgem agrees on data gathering and reporting requirements with innovators based on their circumstances. Reporting requirements are a condition of a waiver to allow Ofgem to monitor a trial.

The scope and frequency of reporting depends on the nature and duration of the trial. In general, Ofgem expects formal reporting including statistical performance data, and customer views/complaints where appropriate. Ofgem may also expect innovators to monitor external sources of information such as social media. For trial waivers Ofgem expects progress reports to be submitted quarterly at most. An evaluation report is required at the end of a trial or within 2 years of the trial's commencement.⁷⁰ Ofgem may also meet with the innovator periodically.

If an innovator does not meet the reporting requirements, Ofgem may withdraw or amend the Sandbox support.⁷¹

Similarly, in Singapore the EMA requires that all trial applicants submit regular progress reports in a pre-determined format that is "clear, quantified and digestible for EMA's

⁶⁸ Draft NER clause 8.14(a)(1)(iv).

⁶⁹ Draft NER clause 8.14(a)(2).

⁷⁰ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, pp45-46.

⁷¹ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, p45

analysis".⁷² The proponent and the EMA assess the trial against pre-defined indicators, established at the start of the trial, halfway through and at the end of the trial period.⁷³ As part of the application process, trial applicants are required to set out their proposed reporting schedule.

The EMA also has the ability to conduct periodic audits and spot checks to ensure there are proper controls and compliance frameworks in place. Trial participants must cooperate with the regulator in providing the necessary information for such audits.⁷⁴

Our initial views

The AER is conscious that to be successful, the administrative processes associated with using the sandboxing tools must not be unnecessarily cumbersome or burdensome. On the other hand, reporting will be an important means for the AER to monitor trials and to inform knowledge sharing.

To strike the appropriate balance between ensuring trials are appropriately monitored while minimising administrative burden for trial waiver applicants, our initial view is that we will:

- determine reporting requirements on a case-by-case basis using a risk-based approach; and
- leverage third-party reporting requirements wherever possible.

We expect the scope of trials and the associated risks to the market, grid and consumers will differ depending on the nature of the trial, and so a one size fits all approach to progress reporting is unlikely to be fit for purpose. Riskier trials may warrant more active monitoring and reporting, while trials that pose little risk to parties other than the trial waiver applicant may not require frequent or extensive reporting. As such, we propose to determine reporting requirements on a case-by-case basis. If the risk profile of the project changes over time, we propose to retain an option to amend the reporting requirements part way through a trial.

In considering the appropriate progress reporting requirements and milestones for individual projects we also propose to take into account any reporting that is already required as a result of other processes. For example, trials that are funded by ARENA or state governments will likely already be required to meet detailed reporting requirements in order to meet milestone payments. We will not seek to duplicate these reports provided we are able to have full access to them. However, we may require information in addition to third-party reporting requirements to ensure we are able to appropriately monitor the trial.

Both the frequency of reporting and the level of detail required in the reports will depend on these factors.

⁷² Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019, p14.

⁷³ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019, p14

⁷⁴ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019, p11

We propose to include guidance in the Trial Projects Guidelines on the content requirements of the progress reports. This is likely to include measures such as:

- how the trial is tracking against the agreed indicators, milestones and success criteria
- details of any consumer complaints or issues
- effectiveness in promoting benefits to consumers
- any new risks that have arisen or changes in the risk profile of the trial
- insights about the identified barriers to the relevant innovation
- insights for potential Rule changes or changes in policy
- compliance with the trial waiver conditions.

We expect that in most cases the reports will be made publicly available, subject to trial project confidential information being omitted. As discussed further below, we expect that trial waiver applicants will need to demonstrate the effectiveness of the innovation early on in the trial in order to submit a rule change request in sufficient time for the rule to be made by the time the trial ends (noting the trial may be extended once by up to one year). We consider the regular progress reports will provide important evidence to support the rule change request, and that this information should be available to all market participants to inform their own views on the relative benefits of any proposed rule change.

At the conclusion of the trial, participants will be required to submit to the AER and publish a final report documenting the trial outcomes. This will address similar issues to the progress reports. In addition, we propose the final report will be required to include a survey of the experiences of trial participants and, if relevant, the views of AEMO and other market participants affected as a result of the trial. This will be important to document not just the trial waiver applicant's view of the success or otherwise of the trial, but to understand the impact on the trial participants and wider market.

Knowledge sharing, including via regular reporting, will be a requirement of the trial waiver conditions. The trial waiver allows participants to test innovative approaches without all of the usual rules and obligations applying. In return, innovators will be required to share the learnings from their trials with the wider industry, particularly where new approaches have led to tangible benefits to consumers. Through this process we expect consumers to benefit from increased choice and value.

Our approach to knowledge sharing is discussed in section 2.7.

Trial waiver applicants will be subject to the AER's Compliance Procedures and Guidelines in relation to any conduct or activities that are already covered by these. For any conduct or activities permitted under the trial waiver but not subject to the Compliance Procedures and Guidelines, the AER may impose additional obligations as part of the trial waiver conditions to require trial waiver applicants to report on their compliance.

Non-compliance with reporting milestones or conditions of the trial waiver or concerns raised by AEMO, market participants and/or customers may also trigger more extensive monitoring, a review of the trial and/or a compliance audit. If required, any compliance audits would be carried out in accordance with our Compliance Procedures and Guidelines. Ongoing or

significant compliance breaches could result in a variation to the conditions of the trial waiver or ultimately the early termination of a trial, as discussed below.

Question 11:

What content should trial waiver applicants be required to address as part of their reporting obligations?

Are there any issues in relation to reporting that should be included in the Trial Projects Guidelines?

Should trial waiver applicants be required to document the views and experiences of trial participants, AEMO and market participants? Why/why not?

Should trial waiver applicants be required to report on compliance with the trial waiver conditions as part of their progress reports? Why/why not?

What types of monitoring activities should the AER adopt?

4.10 Extension or variation of a trial waiver

What do the draft legislation and rules require?

The AER may extend a trial waiver for up to 1 year provided we remain satisfied that the trial project continues to meet the innovative trial principles.⁷⁵

If it extends a trial waiver the AER may impose further conditions, or modify or retain the existing conditions of the trial waiver, as it considers appropriate.⁷⁶

The Trial Projects Guidelines may provide for additional mandatory requirements and any relevant considerations for the extension of a trial waiver.⁷⁷

Trial waivers may also be varied prior to the scheduled expiration of the trial waiver. The AER may impose further conditions, or modify the existing conditions of the trial waiver with the agreement of the applicant.⁷⁸

The AER may also vary or revoke a condition of, or impose further conditions on, the trial waiver if the applicant has not complied with any conditions of the trial waiver.⁷⁹

International precedents

In the UK, Ofgem awards waivers from the Balancing and Settlement Code for a period of two years. At the end of that period, the trial participant may request a permanent change to the Code. If a request for change is made, Ofgem can provide an extension for an additional

⁷⁵ Draft NER clause 8.15.5(a); Draft NERR clause 179(1); Draft NGR clause 135MD(1); Draft National Electricity Regulations regulation 5D, Draft National Energy Retail Regulations regulation 9C, Draft National Gas Regulations regulation 5D.

⁷⁶ Draft NER clause 8.15.5(c)(2); Draft NERR clause 179(3)(b); Draft NGR clause 135MD(3)(b)

⁷⁷ Draft NER clause 8.15.5(b); Draft NERR clause 179(2); Draft NGR clause 135MD(2).

⁷⁸ Draft NER clause 8.15.5(c)(1); Draft NERR clause 179(3)(a); Draft NGR clause 135MD(3)(a).

⁷⁹ Draft NEL section 18ZR; Draft NERL section 121I; Draft NGL section 30ZC.

year.⁸⁰ Waivers under the Distribution Connection and Use of System Agreement rules are for two years only.

In Singapore, the EMA encourages proponents to apply as early as possible but at least one month in advance if they wish to extend a trial. They must justify the extension.⁸¹ Examples as to why a project may need to be extended include if additional time is required to make changes to the product or service to rectify flaws in the approach, or if the innovator requires additional time to fully comply with the necessary legal and regulatory requirements.

Our initial views

The AER is only permitted to extend a waiver once for a maximum of one year. Given the limited nature of any extension, we consider that an extension is only likely to be appropriate in very limited circumstances.

In applying for a trial waiver, applicants will be required to provide information on how the applicant will exit the trial and return to BAU and how trial participants will return to their previous supply arrangements. An exit strategy is important to ensure the applicant does not operate in a way that is non-compliant following the expiry of the waiver. It is also important to ensure continuity and certainty of supply for trial participants in the event that the trial is not successful and/or does not lead to a permanent change in regulatory arrangements.

Typically, when a trial waiver is scheduled to expire, we would expect the exit strategy to be implemented. However, there may be circumstances in which the trial waiver may be extended for up to one year.

Our initial view is that we will only issue an extension where the applicant has already submitted a rule change request to enable the trial to be rolled out on a permanent basis, in addition to continuing to meet the eligibility requirements and innovative trial principles. The purpose of the extension will be to provide the applicant with an opportunity to continue to operate while the waiver becomes a permanent change.

- Trial waivers will only be issued where the applicant has an appropriate exit strategy, which will be based on the approved duration and will not assume an extension will be granted.
- Because the AER can only extend the trial once, if the applicant has not submitted a rule change request, then it is unlikely a permanent change to the rules could be made before the trial must be wound up.
- Requiring a rule change request to have been submitted before an extension is granted ensures that the AEMC will have sufficient time to consider the rule change request prior to the (extended) trial waiver expiring.

Due to the time it takes for a rule change to be made, in practice it is likely that a trial waiver applicant will need to submit a rule change request well in advance of the trial's scheduled end date. The implications of this are that trials are not going to be guarantees of a

⁸⁰ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020, p28

⁸¹ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019, p15

permanent business model – at least not ones that can be rolled into a permanent approach – unless there are demonstrable benefits relatively early on in the trial.

While we will not rule out providing an extension under other circumstances, the applicant will need to provide a compelling reason as to why the trial should be extended in the absence of a strong prospect of a permanent regulatory change being made prior to the end of the trial. This could include, for example, demonstration that an extra year could deliver valuable insights, irrespective of whether the trial must subsequently be wound up.

As part of the extension application, we consider the applicant should be required to submit a revised exit strategy in the event that the rule change is delayed or not made.

Extensions to the trial waiver could be issued under the same conditions as the initial waiver, or the AER may vary, revoke or introduce new conditions.

Our initial view is that trial waiver applicants should be required to submit a request for extension as early as possible and at least 6 months prior to the initial trial waiver expiring.

The AER is also able to vary the conditions of a trial waiver during the course of the trial. We expect this to occur either with the agreement of the trial waiver applicant or in circumstances where the applicant has not complied with the existing conditions of the trial waiver.

Question 12:

What factors should the AER consider in deciding whether to extend a waiver? Do you support extensions of trial waivers being conditional on submitting a rule change request to the AEMC? Why/why not?

4.11 Early termination

What do the draft legislation and rules require?

The Energy Laws permit the AER to revoke a trial waiver in accordance with the Rules.⁸²

The Trial Projects Guidelines must provide a process by and grounds upon which the AER may:⁸³

- terminate a trial waiver before its scheduled expiry, or
- recommend to the AEMC that a trial Rule be repealed before its scheduled expiry,

including provision for the AER to do so either on its own motion, or upon application by the trial waiver applicant, a retailer customer or Registered Participant affected by the trial project, or AEMO.

⁸² Draft NEL section 18ZS; Draft NERL section 121J; Draft NGL section 30ZD.

⁸³ Draft NER clause 8.17.3(2); Draft NERR clause 184(b); Draft NGR clause 135OB(b).

International precedents

In Singapore, the EMA reserves the right to terminate a trial early if the proponent breaches its obligations or if there is no prospect for a successful outcome or regulatory change. The EMA may also terminate a trial early if the trial is very successful, and move straight to adopting the proposed policy.⁸⁴ Other reasons include that a substantial flaw has been discovered or there are unintended consequences that pose risks to customers or the system and the proponent acknowledges the flaw cannot be rectified within the trial timeframe, and if the proponent itself decides to terminate the trial early.⁸⁵

Our initial views

The ability to terminate a trial early is critical to ensure the ongoing safe and secure operation of the system and to protect consumers. Neither the Energy Laws nor Rules place any boundaries or conditions on the AER's ability to terminate a trial before its scheduled expiry.

Our initial view is that the reasons we would terminate a trial early will include, but will not be limited to:

- non-compliance with any condition(s) of the trial waiver
- non-compliance with other obligations under the Laws, Rules and/or Regulations
- concerns about the ongoing safe, secure and reliable operation of the energy system
- safety issues for trial participants
- other risks to trial participants, other consumers or market participants that may emerge during the trial and cannot be mitigated to the AER's satisfaction through new trial waiver conditions
- a permanent change is made that addresses the identified barrier and so the trial waiver is no longer required
- the waiver has been granted on the basis of false or misleading information
- the trial waiver applicant notifies the AER that it wishes to end the trial early.

Concerns about a trial project and so the possibility of early termination may be identified by us through the reporting and monitoring requirements. Concerns may also be raised by a customer or registered participant affected by the trial, AEMO, or any other concerned party.

To terminate a trial waiver early, the AER proposes to notify the trial waiver applicant advising them that it intends to terminate the trial waiver and the reason(s) for the proposed revocation. The trial waiver applicant may make a submission setting out why the AER should not terminate the trial. Should the AER decide, following receipt of the trial waiver applicant's submission, to revoke the trial waiver, the revocation will include a requirement that the trial waiver applicant implements its exit strategy by a date nominated in the notice. Where there is a safety or security of supply issue, we may require the applicant to cease the

⁸⁴ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019, p14

⁸⁵ Energy Market Authority, Framework for a regulatory sandbox for the energy sector in Singapore, Version 2.0, 3 December 2019 p15

trial at the same time we notify the trial waiver applicant that we intend to revoke the trial waiver. We will also publish on our website a notice that the trial waiver has been revoked and the reason why the project was terminated.

Our initial view is that we would use a similar process and grounds to recommend to the AEMC that they repeal a trial Rule before its scheduled expiry. In this instance we would notify the AEMC that we recommend the trial Rule should be repealed and the reasons why. This could be on the recommendation of the trial Rule applicant, a customer or registered participant affected by the trial, AEMO, or any other concerned party.

Question 13:

What reasons for terminating a trial waiver early should be included in the Trial Projects Guidelines? What steps should be included in the termination process?

4.12 Opting out of trial projects

What do the draft legislation and rules require?

The Trial Projects Guidelines must provide a process by and grounds upon which:

- a retail customer participating in a trial project may apply to the AER to opt out of a trial project⁸⁶
- a person to whom a trial waiver is granted must allow a retail customer to opt out of a trial project.⁸⁷

International precedents

In the Netherlands, a requirement of any trial is that trial participants must be allowed to leave the experiment. Similarly, Ofgem typically requires participants to be able to opt out.

Our initial views

We consider that customers participating in a trial must be able to opt out of the trial at any time and for any (or no) reason. The trial waiver applicant may identify an opt-out process as part of the trial waiver application process, which will be subject to approval by the AER.

In the absence of the trial waiver applicant nominating their own process, our initial view is that they must permit a customer to opt out of the trial by notifying the trial waiver applicant that they no longer wish to participate in the trial.

The trial waiver applicant must remove the customer from the trial as soon as practicable, and provide the customer with confirmation they are no longer participating in the trial. Where relevant, the customer must be placed on the same supply arrangements they were on before they began participating in the trial, or any alternative arrangement that the customer agrees to or nominates. The customer should not face any costs associated with exiting the

⁸⁶ Draft NER clause 8.17.3(1); Draft NERR clause 184(a); Draft NGR clause 135OB(a).

⁸⁷ Draft NER clause 8.17.3(3); Draft NERR clause 184(c); Draft NGR clause 135OB(c).

trial early, unless these were stipulated upfront and agreed to by the customer as part of the explicit informed consent process. This process must be stipulated in the exit strategy.

To ensure trial participants are aware of their ability to opt out, we propose to include as a condition of the trial waiver that all trial participants are informed of their ability to opt out.

The AER considers it unlikely that a retail customer participating in a trial project would apply to the AER to opt out of a trial project. However, to meet the draft rule requirement our initial view is that the Trial Project Guidelines would include provision for the AER to refer the retail customer to the trial waiver applicant in order to initiate the opt out process.

Question 14:

What issues should the AER consider in setting out the process by and grounds upon which a customer may opt out of a trial project?

4.13 Any other matter

The Trial Projects Guidelines may specify any other matters that the AER considers appropriate in relation to the grant of trial waivers and the monitoring of trial projects conducted under trial waivers or trial Rules.⁸⁸

At this stage we are not proposing to specify any other matter in the Trial Projects Guidelines. However, we are able to amend the Guidelines from time to time, subject to consultation. We may specify further matters in future versions of the Guidelines based on learnings from running the trial waiver process and overseeing subsequent trials.

Question 15:

Are there any other issues you think the Trial Projects Guidelines should address?

4.14 Conditions the AER may impose when issuing a trial waiver

What do the draft legislation and rules require?

The Energy Laws permit the AER to impose any conditions on the trial waiver that the AER considers appropriate.⁸⁹

International precedents

Ofgem makes trial waivers conditional on providing feedback on the sandboxing tool.⁹⁰ They also set out legal disclaimers that the applicant must agree to in submitting an application form. This covers issues such as Ofgem may withdraw the sandboxing service at any time,

⁸⁸ Draft NER clause 8.14(a)(5).

⁸⁹ Draft NEL section 18ZM, Draft NERL section 121D, Draft NGL section 30X.

⁹⁰ Ofgem, Energy Regulation Sandbox: Guidance for Innovators, 20 July 2020

Ofgem is not liable for any loss suffered by an applicant or third party as a result of an application not being approved or any action or inaction by Ofgem in providing the sandboxing facility. It also covers a requirement that an applicant not describe their proposition as “Ofgem approved” or otherwise suggest Ofgem endorses their product.

Our initial views

The AER is permitted to impose any conditions on trial waivers that we consider appropriate. We are not required to include these in the Trial Projects Guideline, and we do not propose to limit the conditions that we might impose since the nature and scope of individual trials could vary widely and therefore the appropriate conditions could also vary. However, for transparency, we have included a list of conditions that we may consider imposing.

Conditions identified elsewhere in this chapter include:

- a requirement for innovators to inform trial participants of their ability to opt out of the trial at any time (see section 4.12)
- a requirement for innovators to implement a dispute resolution mechanism that trial participants may access in the event of a dispute (see section 4.7)
- reporting obligations, including a regular progress report and an end of project knowledge sharing report (see section 4.9)
- potential additional obligations as part of the trial waiver conditions to require trial waiver applicants to report on their compliance (see section 4.9).

In addition, the AER may impose conditions requiring trial waiver applicants to:

- allow the AER to share certain trial project confidential information included in progress reports with the ESCV, AEMC, and AEMO, to assess trial progress
- complete a survey providing feedback on the trial waiver tool
- report immediately any changes to the circumstance of the trial, the basis on which the trial waiver was approved

Finally, we note that it may be difficult to define trial waiver conditions upfront in some circumstances where limited information is known in advance of the trial. There is therefore a risk that any conditions imposed by the AER could be too light or too burdensome. This issue has been addressed in other jurisdictions by enabling the regulator to adjust the trial conditions during the course of testing.⁹¹

The Energy Laws and Rules enable us to vary the conditions of trial waivers with agreement of the trial waiver applicant or where the trial waiver applicant has not complied with the trial waiver conditions. We may consider including a condition on the trial waiver that allows us to vary the trial waiver conditions where the circumstances under which the trial waiver was granted have changed substantially and so alternative conditions may be appropriate.

⁹¹ Policy Department for Economic, Scientific and Quality of Life Policies, Regulatory Sandboxes and Innovation Hubs for FinTech: Impact on innovation, financial stability and supervisory convergence, September 2020, p36.

We will consider developing a general suite of waiver conditions ahead of opening to waiver applications as a means to deliver the waiver service more quickly once the service goes live. We are interested in stakeholder feedback on whether there are other standard conditions that you consider should apply to trial waivers.

Question 16:

What trial waiver conditions do you think the AER should commonly apply to trial waivers?

Attachment A

Proposed application form for trial waivers

Note that this form will include additional explanatory content if required, as well as legal disclaimers that the AER considers necessary for any trial waiver applicants to agree to in order to submit a trial waiver application. For the purposes of consultation, we have focused on the categories of information that we consider are necessary to allow us to assess an application for a trial waiver against the eligibility criteria and innovation trial principles.

Please highlight or shade confidential information		
General information		Notes on type of information required
Organisation name		
Organisation address		
Organisation website		
Name of contact		
Contact person's role		
Contact telephone number		
Contact email address		
Do you hold any licenses or exemptions from having to hold a licence to operate in		Choose from (multiple choices possible): <ul style="list-style-type: none"> • Electricity retail license/exemption • Electricity distribution license/exemption • Electricity transmission license/exemption

the electricity and/or gas industry? If so, which ones?		<ul style="list-style-type: none"> • Gas retail license/exemption • Gas distribution license • Gas transmission license Generation registration
Does your parent company or company group hold any licenses or exemptions from having to hold a license to operate in the electricity and/or gas industry? If so, which ones?		[As above]
Partner organisation – if applicable		Notes on type of information required
Organisation name		
What role are is the partner organisation performing in the project?		
[Repeat questions from section above for each partner organisation]		
Project description		Notes on type of information required
Description of project		Is your innovation a product, service, new business model, or other? Will any assets be installed? If so, which ones?

		<p>Which market(s) will it operate in?</p> <p>What is the project testing?</p> <p>What are the trial phases and timelines?</p> <p>How long until you are able to commence your trial?</p>
Summary for publication		Provide a summary of the project that can be made available publicly and used as the basis for consultation, if required (see the Trial Project Guidelines for further information).
What are the aims, objectives and success criteria for the project?		These will be the aims, objectives and success criteria that you will report against during and at the end of the trial.
What is the number and what type of consumers are/will be involved?		<p>Are they household, small business, C&I customers or other energy sector participants?</p> <p>Are you targeting particular customers within these segments?</p> <p>How will you engage consumers?</p>
Proposed duration		<p>Choose from:</p> <ul style="list-style-type: none"> • 1 year • 2 years • 3 years • 4 years • 5 years
Why the trial project meets the eligibility criteria		Notes on type of information required
How is the trial project likely to contribute to the		

development of regulatory and industry experience?		
Could the trial project have an adverse effect on the safety, reliability or security of supply of electricity? If so, what measures will you take to avoid or mitigate such risks?		
Why the trial project meets the innovation trial principles		Notes on type of information required
<p><i>Note these Innovation Trial Principles reflect the National Electricity Rules. The form will have boxes that the applicant can tick depending on whether they're seeking a waiver from the NER, NERR and/or NGR. This will bring up the relevant Innovation Trial Principles.</i></p>		
How will the trial project develop new or materially improved approaches to the use or supply of, or demand for, electricity?		<p>What are the overall benefits of your innovation?</p> <p>In what ways might the trial enhance processes, improve system management and/or improve efficiency?</p>
How will the trial project contribute to the achievement of the national electricity objective?		<p>Will the trial project improve the efficient investment in and/or operation of electricity services?</p> <p>Do the improvements relate to the price, quality, safety, and reliability and security of supply of electricity?</p> <p>Do they relate to the reliability, safety and security of the national electricity system?</p>

<p>Will the trial project be able to demonstrate a reasonable prospect of giving rise to materially improved services and outcomes for consumers of electricity?</p>		<p>Demonstrate how will the trial will provide benefits to consumers</p> <ul style="list-style-type: none"> • E.g. will the trial improve engagement, quality of service, lower bills, provide better protection? <p>How will vulnerable consumes be impacted and supported?</p>
<p>How will the trial project maintain adequate consumer protections, including whether the trial project may involve risks to consumers and (if so), how those risks might be mitigated?</p>		<p>Considering financial, safety, and any other risks:</p> <ul style="list-style-type: none"> • What are the risks for trial participants and how are these being mitigated? • What are the risks for end-use consumers and how are these being mitigated? <p>How will consumer protections be maintained throughout the trial?</p> <p>How will explicit informed consent from trial participants be obtained and recorded?</p> <p>How will participants be informed of their ability to opt out at any time?</p> <p>Please set out the process you will use to resolve any consumer disputes that may arise through the trial.</p>
<p>Why is the trial project unable to proceed under the existing regulatory framework?</p>		<p>Have you sought third party advice on whether or not your project can proceed under the existing regulatory framework? If so, what was the result of that advice?</p> <p>What is preventing your innovation from being implemented now? <i>Please provide a description of the research you have</i></p>

		<p><i>done that has led to this conclusion, as well as the specific laws and/or rules that pose a barrier.</i></p> <p>What would need to happen to enable you to implement your innovation? <i>Please be specific, including any laws/rules that you would need to be exempt from as well as how you plan to address any other barriers outside of these.</i></p> <p>Please detail any other options you have considered and why these were dismissed.</p>
<p>Has the trial project moved beyond research and development stages but is not yet established, or of sufficient maturity, size or otherwise commercially ready, to attract investment?</p>		<p>Please provide evidence that the project is ready for testing.</p>
<p>Is there a risk that the trial project may negatively impact AEMO's operation of the national electricity system and national electricity market and, if there are impacts, how do you propose to mitigate those impacts?</p>		<p>What are the risks to the overall system and how are these being managed?</p> <p>Have you engaged with AEMO on this project? If so, what was their advice?</p>
<p>Could the trial project impact on competition in a</p>		<p>Will the trial project promote competition?</p>

competitive sector of the national electricity market?		Is there any risk that competition in any relevant energy market could be stifled as a result of the trial project?
Please explain how the trial project will be trialled and evaluated		How will the trial project be monitored, noting the requirements set out in the Trial Projects Guidelines? What data will be gathered? How will data be collected? How will you measure the consumer experience? How will you analyse the data? How will you evaluate the trial's success?
Is there potential for the trial to be successfully expanded?		What evidence do you have that the trial could be scaled up?
How will the trial project provide for public sharing of knowledge, information and data resulting from the trial project?		How will the trial project be reported on, noting the requirements set out in the Trial Projects Guidelines? Do you have any other reporting or knowledge sharing obligations for this project e.g. if it is funded by another party? If so, please detail these.
Risk management		
What are the risks for other market participants and how are these being mitigated?		Consider distribution and transmission networks, generators, retailers, demand response service providers and any other market participants as relevant.
What processes do you have in place to monitor		

and respond to potential risk events?		
Operational and financial capability		
Please provide evidence of your operational and financial ability to carry out the trial		
Exit and opt-out strategy		
How will you support trial participants to exit the trial, either at the end of the trial or if they opt out of the trial?		
How will your business transition to BAU when the trial ends so that your business is compliant with the laws and rules when the trial waiver expires?		
What measures do you have in place if the trial must end early e.g. because it isn't working, risks have increased or		

tolerances have been breached?		
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