

REGULATORY SANDBOX ARRANGEMENTS TO SUPPORT PROOF-OR-CONCEPT TRIALS

INTRODUCTION AND SUMMARY

The Energy Users Association of Australia (EUAA) is the peak body representing Australian energy users. Our membership covers a broad cross section of the Australian economy including significant retail, manufacturing and materials processing industries. Combined they employ over 1 million Australians, pay billions in energy bills every year and are desperate to see all parts of the energy supply chain making their contribution to the National Electricity Objective. Our members are highly exposed to movements in both gas and electricity prices and have been under increasing stress due to escalating energy costs.

A key characteristic of the current rapid energy transition is the way new technologies and business models are being developed. We recognise that not all will work. That is the nature of a competitive market. But many do work and many more could work with the appropriate regulatory framework to facilitate their proof of concept phase.

Success at that phase can lead to full scale implementation that increases competition and lowers technology costs. This brings benefits to consumers in a lower cost and more efficient transition and helps facilitate achievement of the NEO and the NGO. The need for a flexible and innovative regulatory framework was highlighted by the Finkel Review and we welcome the Commission's work in this matter to implement the Review's recommendation 2.8.

The EUAA strongly support the direction the Commission is heading in developing the sandbox toolkit. The sequential three stage trial components - regulatory guidance to regulatory waiver to a new trial rule making - are a logical progression in seeking to facilitate proof-of-concept trials. The framework presented in the paper provides a transparent view of what new trial proponents should expect at each stage.

SPECIFIC COMMENTS

We offer the following comments on the specific questions:

Question 1 – Innovation Inquiry Service

Will the proposed design of the innovation inquiry service improve the level of guidance available to proof-of-concept trial proponents?

The existing rules are very complex and sometimes difficult to interpret and lack of knowledge can be a barrier to innovation. The ability to get an opinion on whether a particular a trial is possible within the existing rules should help innovators considerably. We support the Draft's recommendations on how the inquiry service will operate eg establishing a shop front, providing the service for free, need for appropriate resourcing and knowledge sharing, need to provide guidance on the sequential tools available to the innovator.

Our main question for the Commissions consideration is around the coordination role of the AER. The Draft describes the response to an inquiry to the innovation line as:

“The AER provides guidance and feedback in coordination with AEMO and AEMC where needed.” (Table 2.1 p.12)

and later as:

“The AER will be the first point of contact for trial proponents and innovators to seek guidance on matters related to regulation. The AER will support guidance seekers in their understanding of the relevant regulatory arrangements and where appropriate refer guidance seekers to other institutions. Once a guidance seeker is referred to them, the other institutions will support guidance seekers in their understanding of the matters administered by them.” (p.15)

“The service provided will be an informal steer that represents staff views rather than a regulatory decision or an organisational view.” (p. 16)

Coordination between the market bodies will work:

“Appropriate referrals of request for guidance within market bodies and ARENA is required to avoid the need for one market body to provide advice on behalf of another organisation.” (p.19)

A point of discussion at the Public Forum was the extent to which the AER is simply a “post box” for the “other institutions” and to what extent is it a co-ordinator or one stop shop for coordinated advice to go to innovator. What if the advice from different institutions is confusing or appears inconsistent to the innovator? One response given at the Forum was that the AER was concerned that it not be seen to be giving formal advice on matters covered by the other institutions’ jurisdiction. This was seen to have a potential legal risk. We understand this perspective and accept the coordinated advice:

“...will not provide legal advice, binding rulings, regulatory decisions, endorsements or business incubator services.” (p.16)

However, if a particular inquiry requires a response from say, three different institutions, will the inquirer get three separate pieces of advice from the AER? If the inquirer then has a question that straddles more than one piece of advice, what is the coordination role for the AER? Will the AER seek to resolve and inconsistencies between the different pieces of advice?

Question 2: AER Sandbox Waivers Scope of Power

(a) Do you agree with the proposed extension of the powers of the AER to grant regulatory relief to innovative trials facing a regulatory barrier?

Yes. We agree with the regulatory waivers’ principles framework set out on p. 22. We think that the bar should be set relatively high for a proof-of-concept trial to obtain a regulatory waiver. That is it genuinely innovative with a potential to lead to a “material” (which would be defined) improvement for consumers consistent with the NEO and NGO. We look forward to working with the AER to determine the entry and eligibility criteria.

In particular we would focus on the consumer protection provisions applying to any trial. Participation should be voluntary and provide the same consumer protection as under the existing law and rules.

(b) Do you agree the waiver power should encompass the National Gas Rules? Why or why not?

Yes. While the scope for innovation may be less in gas than electricity, it should be encouraged and facilitated.

Question 3: Regulatory Waivers Implementation

(a) Should there be a time-limit on the waiver application process, if so, what time-frame would be appropriate?

Yes, there should be a time limit. The limit should depend on the particular trial with milestones on reporting that mean:

- if the trial is not successful it could be terminated early
- if the trial is successful it could be extended to enable sufficient data to support a rule change application

(b) Should the AER be able to extend regulatory waivers to allow successful trials to become fully compliant with the rules?

Yes.

(c) Are the proposed provisions made in the regulatory waiver framework sufficient to protect customers from unintended consequences of participating or being impacted by the conduct of a trial?

The measures outlined in the Draft (p.32) appear to provide an appropriate balance. We look forward to commenting on this aspect in the detailed AER entry and eligibility criteria.

(d) Is the proposed process of stakeholder consultation sufficient to allow market participants and consumers and their representatives to fully engage with the AER as part of the waiver application process?

There is only limited discussion of this issue in the Draft – apart from a general statement around the AER retaining some discretion on whether to undertake public consultation for a waiver application. Here there is a balance between speed of testing (and potential benefits to consumers) and then need to ensure consumer interests are protected. Given that the waiver recipient will be bound by all existing consumer protections under the law and rules, this should give some comfort to consumers that the AER will exercise its discretion appropriately. Nevertheless, we look to the AER’s consultation process as it develops the entry and eligibility criteria:

- the circumstances when consumer input is possible in the waiver application process, and
- the requirements for consumer engagement once the waiver has been granted.

Question 4: Trial Rule Making Process

(a) Is the proposed process necessary and appropriate for a trial rule change?

Yes, we agree with the framework principles set out on p.32. Depending on the flexibility of the waivers, there might be little call for this third stage, but nevertheless we support its availability.

(b) Should there be an opportunity to make submissions or for other prospective participants to join the trial? Why or why not?

Yes, there should be an opportunity to make submissions. And yes there should be an opportunity for other prospective participants to join the trial.

Question 5: National Gas Rules

Do you agree that the trial rule making process should encompass the National Gas Rules? Why or why not?

Yes

Question 6: Rule Making Tests

Do you agree that the existing rule making tests are the most appropriate test for trial rule changes? Why or why not?

Yes, the correct test is whether the trial is in the long term interests of consumers.

Question 7: Lodging a Rule Change Proposal

Do you agree with the Commission's draft recommendation that any person should be able to submit a trial rule change proposal? Why or why not?

Yes – subject to the provisions preventing forum shopping.

Question 7: Rule Lodgement Preconditions

Are the existing rule change request requirements appropriate? Should additional requirements, such as demonstrating that the trial cannot otherwise be carried out, be met prior to a rule change process commencing?

Question 9: Applicability of the Trial Rule Change Process

Should the trial rule change process be restricted to a time limited trial, where the trial has a reasonable prospect of delivering a material benefit to consumers and where consideration of a permanent rule change would otherwise be hampered through inadequate information or experience? Why or why not?

We agree with the Commission having additional criteria to a normal rule change request. In particular the rule change proponent should be able to demonstrate that:

- they have gone through the first two stages of the sandbox toolkit to show that its proof-of-concept idea can only be undertaken with a trail rule change, and
- that their proposal is truly innovative and not simply a variant on what another company has undertaken.

Question 10: Trial Rule Scope

Should a trial rule be restricted to a particular participant in a manner similar to participant derogations or should it be accessible to other parties conducting similar trials? Does it depend on the circumstances? Why or why not?

Question 11: Information Requirements

What additional information requirements should attach to the trial rule change process? Why?

We see benefits in the Commission having the flexibility to make a trial rule change that is applicable to a particular kind of trial and accessible to all parties seeking to conduct relevant trials. This has the benefit of providing much more data if the trials are successful and lead to a subsequent rule change. The additional data could well support an expedited rule change process so the benefits to consumers come more quickly.

We support the Commission having the power to set out the information requirements it may require a proponent to submit. This should also include the ability of the Commission to require different standards of information from different proponents of similar trials.

Question 12: Trial Rule Change Conditions

Should the AEMC have the ability to impose conditions on the use of the trial rule and the trial proponent? Why or why not?

Yes.

Question 13: Process Termination

Should the Commission have the ability to terminate a trial rule change process that is in progress? If so, what criteria should apply?

Yes. It is difficult to lay down a specific timetable as all situations will be different. It should be up to the discretion of the Commission in consultation with the trial proponent. One criteria for termination should be when the level of detriment is greater than what participants had agreed to prior to the start of the trial.

As we noted above in discussing regulatory waivers, the Commission should have the discretion to extend the time of the trial rule change if the trial seems to be successful and further data is required to support a full rule change process.

Question 14: Pathway to Rule Change

Do the current rule change process options (standard, fast-track and expedited) provide an appropriate pathway for successful trials to lead to full rule change? Is there another appropriate pathway for trials to lead to rule changes?

Yes, we think the current pathways are appropriate.

Question 15: Trial Rule Change Fees

Should the Commission recover some or all of its costs through a fee paid by trial rule change proponent?

We agree with the application of the current rules where the COAG Energy Council can require a payment. However this would need to be tightly defined so as to not act as a “barrier to entry” for trail proponents.

Question 16: Consumer Consent Requirements

Will consumer consent requirements unduly inhibit trials that may otherwise be worthwhile? If so, what alternative arrangements would be preferred and why?

We agree with the Commission's view that where consumers have even a small chance of suffering a loss then their explicit and informed consent should be obtained. This should be obtained prior to the application for the trail rule change.

CONCLUDING COMMENTS

We welcome the collaborative approach that the Commission has taken to this matter with involvement from not just the AER and AEMO, but also ARENA and the ECA. The EUAA, which represents consumers not represented by the ECA, would welcome the opportunity to work collaboratively with the Commission, where appropriate, on future rule change projects.

Sincerely,



Andrew Richards
Chief Executive Officer