

# Regulatory Sandboxing Legislative Amendments

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Explanatory note for stakeholder consultation

September 2020

## Acronyms

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
COAG	Council of Australian Governments
NEL	National Electricity Law
NEM	National Electricity Market
NGL	National Gas Law
NER	National Electricity Rules
NERL	National Energy Retail Law
NERR	National Energy Retail Rules

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## 1. Introduction

The emergence of innovative technologies and business models in the national energy markets can bring significant benefits to consumers. Following on from recommendation 2.8 of the Independent Review into the Future Security of the National Electricity Market (Finkel Review), in October 2018 the AEMC received a request for interim advice from the former COAG Energy Council's Senior Committee of Officials on "how to best facilitate coordination of proof-of-concept trials and the need for formal regulatory sandbox arrangements".

A formal regulatory sandbox is a framework within which participants can trial innovative business models, products and services in the market under relaxed regulatory requirements on a time-limited basis and with appropriate safeguards in place. There are a variety of other regulatory tools that could be used to facilitate proof-of-concept trials, such as provision of information, exemptions and waivers, a number of which are already in place in the national energy markets.

On 26 September 2019, the Australian Energy Market Commission (AEMC) published its final report on Regulatory Sandbox arrangements to support proof-of-concept trials, which recommended the introduction of a regulatory sandbox toolkit to better facilitate and coordinate proof-of-concept trials.

The AEMC provided advice that a regulatory sandbox initiative would provide for a regulatory framework that is better equipped to respond to the rapid change in the energy sector and deliver customer benefits through innovation. It recommended to access regulatory relief, proof-of-concept trials would need to be time-limited and meet appropriate eligibility criteria, and appropriate consumer safeguards under the National Energy Retail Law (NERL) must remain in place during the trial.

The AEMC recommended three new sandbox tools to facilitate trials:

- an innovation enquiry service, to provide guidance and feedback and help businesses get trials up and running quickly where they are feasible under current laws and regulations
- a new regulatory waiver power for the Australian Energy Regulator (AER) so they can temporarily exempt trials from existing rules where this is creating a barrier
- 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.

The objective of the AEMC's recommendations is to encourage innovation which has the potential to contribute to the long-term interests of consumers, rather than simply to facilitate an increased number of trials.

It was considered innovations that are in consumers' interests could be encouraged by establishing a clearer process for proponents of proof-of-concept trials to approach energy market regulatory bodies for feedback and guidance on regulatory issues and regulatory options to avoid unnecessary delays and costs for eligible trials. This approach to facilitating trials can help reduce the barriers to the introduction of more efficient approaches to the delivery of energy services.

On 22 November 2019, the COAG Energy Council considered the findings of *the Regulatory Sandbox Arrangements to Support Proof-of Concept Trials Final Report* and agreed to amend the national energy laws and rules to implement the AEMC's recommendations to introduce a regulatory sandbox kit, subject to further work by officials.

Law and rule changes will not be necessary for implementation of the AER's innovation enquiry service.

Implementation of the other two recommended sandbox tools will require a package of changes to the national energy laws and rules and minimal changes to the national Regulations.

Trials that can be conducted under current regulatory arrangements will still be able to proceed without using the sandbox tools.

In progressing these reforms, senior officials have released the draft *Statutes Amendment (National Energy Laws) (Regulatory Sandboxing) Bill 2020* (Draft Bill).

Overall, the Draft Bill seeks to achieve the following intended outcomes:

- the introduction of a set of innovative trial principles in the national energy laws;
- amending the functions and powers of the AER to make trial waivers for trial projects;
- provision for the AEMC to make trial rules for trial projects;
- introduction of a more streamlined process for the assessment and making of trial rules;
- provision for the AER to monitor and enforce trial waivers, and associated conditions, and trial rules and any requirements as set by the AEMC.

The Draft Bill amends the following energy legislation:

- the National Electricity Law (NEL) set out in the schedule to the *National Electricity (South Australia) Act 1996*;
- the National Energy Retail Law (NERL) set out in the schedule to the *National Energy Retail Law (South Australia) Act 2011* (SA); and
- the National Gas Law (NGL) set out in the schedule to the *National Gas (South Australia) Act 2008*.

The Draft Bill is published alongside this consultation paper. These documents do not represent final government policy and have not been endorsed by Energy Ministers or any government participating in the national process at this stage.

## 1.1. Consultation

To assist in understanding the draft amendments, the key outcomes of the Draft Bill are outlined in further detail below. Stakeholders are encouraged to provide feedback, preferably through a written submission, on the draft amendments.

Submissions will be published on the COAG Energy Council website. If the submission contains confidential information (or a confidential attachment) please make this clear in writing what should or should not be published.

Submissions are requested to be provided by Wednesday 14 October 2020.

For more information, please contact the Secretariat:

- e-mail: [energycouncil@industry.gov.au](mailto:energycouncil@industry.gov.au)
- phone: (02) 6243 7844
- web: <http://www.coagenergycouncil.gov.au/contact-us/contact-us>

## 2. Defining Trial Projects

The proposed regulatory sandboxing arrangements will include the ability for the AER to grant specific waivers and the AEMC to apply specific rules to an innovative trial project that may benefit from time-limited regulatory relief.

Trial projects are intended to be projects that the AER or AEMC are satisfied are genuinely innovative taking into account the innovative trial principles, and that tests an approach in relation to:

- the supply of, or demand for, electricity;
- customer connection services or customer retail services;
- natural gas services; or
- models for plans or pricing.

The Draft Bill therefore includes new defined terms in the NEL, NERL and NGL defining trial projects.

## 3. Innovative Trial Principles

Officials consider that the proposed regulatory sandboxing arrangements should include a set of principles that the AER and AEMC must take into account when determining whether to grant trial waivers or make trial rules respectively.

The intent of the principles is to define what is considered a genuinely innovative trial project under the national energy laws. The principles will also ensure consistency between the AER and AEMC when determining what constitutes a genuinely innovative trial project.

The Draft Bill therefore amends the NEL, NERL and NGL to include a set of innovative trial principles that the AER and AEMC must take into account when determining whether a trial project is genuinely innovative.

The Draft Bill also includes amendments to the national energy laws to provide a power to include other principles that may be prescribed in Regulations, which the AER and AEMC must also take into account. This provides some flexibility to include additional principles that may be more administrative in nature without having to amend the Laws.

Amendments to the National Electricity Regulations to include that the AER and AEMC must take into account whether the trial project:

- Is able to be trialed and evaluated;
- Has the potential to successfully scale up for broader application;
- Will have provisions to provide for public sharing of any knowledge and learnings.

The innovative trial principles may be found in new sections 7B, 13A and 24A of the NEL, NERL and NGL respectively.

**Issue for Stakeholder consideration**

Stakeholders are requested to consider and provide feedback on innovative trial principles.

## **4. Trial Waivers**

As noted above the regulatory sandboxing arrangements will include the ability for the AER to grant specific waivers to an innovative trial project that may benefit from time-limited regulatory relief.

This section summarises amendments to the national energy laws to implement an ability to grant trial waivers.

### **Trial Waiver Functions**

The national energy laws confer on the AER its various functions and powers. This includes powers to exempt persons from having to register where required, and compliance monitoring and investigations in relation to the national energy laws, regulations and rules.

The Draft Bill provides for the AER to undertake trial waiver functions by amending the functions and powers of the AER in the NEL, NERL and NGL to include trial waiver functions.

The Draft Bill defines the new AER trial waiver functions by inserting Part 3 Division 1D in the NEL, Part 5A in the NERL and Chapter 2 Part 1 Division 1B in the NGL.

For the purposes of a trial waiver the Draft Bill confers the AER with broader exemption functions than its existing functions so that it may exempt persons from one or more provisions of the National Electricity Rules, the National Energy Retailer Rules and the National Gas Rules.

There is some crossover between Chapter 2 of the National Electricity Rules and section 12 of the NEL. Hence, to avoid conflict between exemptions provided under a trial waiver and registration requirements in the NEL, the Draft Bill also provides the AER with a limited ability to waive the provisions of section 12 of the NEL using a trial waiver.

The policy framework also requires that the AER monitor trial projects that are undertaken under a trial waiver, including the proponent's adherence to any conditions placed on the trial waiver.

The Draft Bill also confers on the AER a new function of monitoring and investigating trial projects carried out under a trial waiver.

Section 28 of the NEL currently provides the AER with power to obtain information and documents in relation to the performance and exercise of their functions and powers. If the AER has reason to believe that a person is capable of providing information that the AER requires for the performance

or exercise of a function or power conferred on it under the national energy laws or the rules, the AER may serve on that person a notice to provide that information.

The Draft Bill amends the functions and powers of the AER to confer on the AER new functions of monitoring and investigating trial projects carried out under a trial waiver. This ensures the AER's new monitoring and investigation functions can be undertaken by using its information gathering powers provided by section 28.

### *Trial waivers*

Under the proposed regulatory sandboxing framework, the AER may exempt a trial project from complying with certain registration requirements under the rules for a limited time.

The Draft Bill provides for the AER to, on application by a proponent of a trial project, grant the proponent a trial waiver from the rules or provision of the rules.

As mentioned, a waiver could provide exemption from any provision of the rules, and apart from this there is currently no proposed ability to waive provisions of the laws, with the exception of section 12 of the NEL relating to registration. This is consistent with the AEMC's recommendations.

### ***Issue for Stakeholder consideration***

Stakeholders are requested to consider and provide feedback on any particular law provisions across the NEL, NERL or NGL that the AER may need the ability to waive for the purposes of a trial.

Officials are keen to ensure that the regulatory sandbox arrangements do not create any unintended barriers to trials, but at the same time are of the view that it would be inappropriate to provide the AER with a broad power to waive law provisions.

The Draft Bill also requires that before making a determination to grant a trial waiver the AER must take into account the innovative trial principles. It also provides that a trial waiver must be made in accordance with the rules.

It is not the policy intent that a trial project simultaneously be the subject of a trial waiver and a trial rule. As such the Draft Bill requires that the AER not make a trial waiver for a trial project which is materially similar to a trial project for which a trial rule has been made or that is the subject of a request for the making of a trial rule.

The Draft Bill also provides that the AER must not make a trial waiver if it reasonably considers it is unlikely to be carried out.

It is not the policy intention that the AER be able to exempt itself from compliance with provisions of the national energy laws or the rules.

The Draft Bill includes a provision that prohibits the AER from exempting itself by granting itself a trial waiver and therefore its compliance with any provision of the national energy laws or rules under its extended exemption powers.

### Conditions on trial waivers

It is the intention that the AER can impose conditions on a trial waiver and revoke the trial waiver if these conditions are not met.

The Draft Bill includes provisions for the AER to grant a trial waiver subject to any conditions required by the rules and any conditions it considers appropriate.

The Draft Bill also provides for the AER to revoke or vary conditions of a trial waiver in accordance with the rules.

### Duration of trial waivers

The policy intention is that for innovative trials to access regulatory relief through waivers, they would need to be time-limited and meet appropriate eligibility criteria, and appropriate consumer safeguards under the NERL must remain in place during the trial.

The Draft Bill limits the duration of the trial waiver to a period not exceeding five years.

A duration of up to five years is considered to provide a sufficient time to undertake a trial project while still limiting the time a proponent may remain exempt from complying with provisions of the rules.

Further, a duration of five years is considered sufficient to undertake a trial project that may require more significant investments or infrastructure. However, it is expected that the AER would grant a trial waiver for a duration that is sufficient for the relevant project and that this duration would be for less than five years for smaller trial projects.

### *Issue for Stakeholder consideration*

Officials are interested in stakeholders' views on whether the proposed duration of five years is sufficient or whether a lesser or greater duration is appropriate for a trial waiver.

### Power to extend a trial waiver

The policy recognises that there may be limited circumstances where it may be necessary for a trial waiver to be extended beyond five years. For the AER to appropriately manage trial waivers, the national energy laws will provide for the AER to extend a trial waiver it has granted in accordance with the rules.

The Draft Bill provides for the AER, in accordance with the rules, to extend a trial waiver for a specified period (not exceeding one year). Extensions must be published on the AER's website.

### Compliance with trial waivers

It is the policy intent that the AER should be able to monitor and enforce compliance with the trial waiver including any conditions imposed.

To ensure that proponents granted a trial waiver have an incentive to comply with the trial waiver and any conditions to which it is subject, the Draft Bill provides for the AER to revoke the trial waiver or vary or revoke a condition of, or impose further conditions on, the trial waiver.

### Relation to other provisions of the laws or the rules

It is intended that the AER's ability to specify waivers for innovative trials is a new power and is in addition to, and should not impact, its existing powers under the national energy laws and rules to grant waivers.

The Draft Bill therefore provides amendments to the NEL, NERL and NGL to clarify that the AER's power to grant a trial waiver is in addition to, and does not limit its powers to grant a waiver or exemption under any other provision of the laws or the rules.

## **5. Trial rules**

The policy intention is for the AEMC to be able to make a trial rule at the request of any other person or the MCE<sup>1</sup> and for trial rules to follow a similar process to the current provisions. This section outlines amendments made by the Draft Bill in relation to the AEMC's consideration and making of trial rules.

### Request to make a Trial Rule

The Draft Bill amends the NEL, NERL and NGL such that the AEMC is empowered to make a trial rule for the purpose of enabling a trial project to be carried out. This is achieved by amending the AEMC's rule making powers under the NEL, and the subject matters of rules under the NERL and NGL, to include any matter or thing related to the purposes of a trial project.

It is intended that a person wanting to propose a trial rule should be required to apply in accordance with existing requirements for the initiation of making of a rule, subject to some additional relevant requirements.

The Draft Bill therefore amends the definition of *market initiated proposed rule* in the NEL, NERL and NGL to include a trial rule. The Draft Bill also inserts a definition for trial rule, to mean a rule for the purposes of a trial project, into the laws.

### Contents of requests for Rules

The NEL, NERL and NGL prescribe the contents that a request for the making of a rule must contain. Currently a request must contain information prescribed by the Regulations.

It is the policy intent that a request for making of a rule, including a trial rule, must also include any information that is prescribed by the rules. This will provide for the AEMC to require detailed information to successfully conduct a trial rule change process.

The Draft Bill amends the national energy laws to require that a request for the making of a rule, or trial rule, contains any other information prescribed by the rules. This is in addition to information prescribed by the Regulations.

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<sup>1</sup> The NEL, NERL, NGL associated Regulations reference Energy Ministers as the Ministerial Council on Energy (MCE), the original name of the Ministerial forum. The Statutes Amendment (National Energy Laws) (Omnibus) Bill 2020 (Bill) defines MCE as the group of Ministers responsible for energy matters at a national level comprising of nine Ministers (one from every jurisdiction) that act in accordance with its own procedures.

### Trial rule request assessment

The national energy laws prescribe the subject matter the AEMC must consider as soon as practicable after receiving a request for the making of a rule. It is the policy intention that where a trial rule change request is lodged, the AEMC must undertake a similar assessment.

It is the policy intent however that the AEMC should not progress a request for a trial rule if the related trial project is unlikely to be carried out or offers no reasonable prospect of leading to better services and outcomes for consumers.

It is also not the intent that the AEMC progress a request for a trial rule if it is unnecessary to enable the trial project to be undertaken, including for example because the trial project could be undertaken with a trial waiver, is unlikely to enable the trial project to be undertaken or it should be the subject of a request for a rule other than a trial rule.

The Draft Bill amends the national energy laws to provide for the AEMC to consider these matters and make a decision to not take any further action in regards to the trial rule request.

The Draft Bill also includes a provision that the AEMC is required to consult with the Australian Energy Market Operator when considering the making of a trial rule.

### Requirements on Trial Rules

It is the intention that the AEMC can impose requirements on a trial rule and revoke the trial rule if requirements are not met. The AEMC would be able to revoke a trial rule after receiving a recommendation from the AER.

The Draft Bill includes a provision for the AEMC to impose such requirements as it considers appropriate by notice, in addition to any requirements required by or under the rules.

To ensure a trial project is meeting any requirements imposed on it by the trial rule, the Draft Bill provides for the AEMC to impose an obligation on the proponent of the trial project to submit one or more reports in relation to the trial project to the AER.

The Draft Bill provides for the AER to monitor and enforce compliance with the trial rule including any requirements imposed.

### Trial rule extension and revocation

The policy intention is that a trial rule should only operate for a limited period of time sufficient to undertake and assess a trial of a genuinely innovative project. A trial rule will expire on a specified date, or upon the expiry of a specified length of time after its commencement. Similar to trial waivers above, the trial rule will not operate for a period of time greater than five years.

The Draft Bill includes amendments such that a trial rule must not be made for a duration exceeding five years from the date that the trial rule was granted.

Similar to a trial waiver, a duration of five years is considered sufficient to undertake a trial project that may require more significant investments or infrastructure. However, it is expected that the AEMC would grant a trial rule for a duration that is sufficient for the relevant project and that this duration would be for less than five years for smaller trial projects.

*Issue for Stakeholder consideration*

Officials are interested in stakeholders' views on whether the proposed duration of five years is sufficient or whether a lesser or greater duration is appropriate for a trial rule.

The policy recognises that there may be limited circumstances where it may be necessary for a trial rule to be extended beyond five years.

The Draft Bill also amends the national energy laws to include a provision empowering the AEMC to extend the operation of a trial rule for a specified length of time (not exceeding one year) if:

- a request to extend the operation of the trial rule is made to the AEMC at least 60 days before the scheduled expiry of the trial rule; and
- the request specifies the length of the extension required.

Amendments to the national energy laws include that upon receiving a request to extend the operation of a trial rule, the AEMC must consult with the AER and may consult with AEMO, if the AEMC considers it appropriate to do so.

If the AEMC determines to extend the operation of a trial rule, it must publish notice of the extension (specifying the revised expiry date of the trial rule), in the South Australian Government Gazette and on the AEMC's website. These obligations replicate the publication requirements following the making of a rule, including a trial rule.

The Draft Bill includes a provision so that the AEMC may repeal a trial rule prior to its expiry. Where the AER makes a recommendation to the AEMC to revoke a trial rule, for example where the proponent fails to meet requirements placed on it, the AEMC must give consideration to revoking the trial rule.

*Trial Rule Determinations*

While the process for making of trial rule determinations should be consistent with the standard rule-making process, it is intended that the AEMC will not be required to make a draft determination in respect of a trial rule request and that the rule change process for a trial rule change should be less than 10 weeks long and involve one round of stakeholder consultation.

The Draft Bill includes amendments such that the requirements in the national energy laws related to draft rule determinations do not apply to rule change requests related to trial rules.

The Draft Bill also makes amendments such that the period of time within which the final rule determination in respect of the trial rule must be published is 10 weeks from the date of publication of the notice of the proposed trial rule.

*AER functions in relation to trial rules*

It is the policy intent that while any trial rule is in force, the AER must monitor the associated trial project in accordance with the rules and in accordance with any applicable guideline made under the rules.

The Draft Bill amends the functions and powers of the AER to confer on the AER new functions of monitoring and investigating trial projects carried out under a trial rule. As noted earlier, this ensures the AER's new monitoring and investigation functions can be undertaken by using its information gathering powers provided by the national energy laws.

## 6. Power to make Initial Sets of Rules

The Draft Bill makes provision for the South Australian Minister to make an initial set of National Electricity Rules, National Energy Retail Rules and National Gas Rules associated with these amendments on the Regulatory Sandbox framework.

## 7. Draft Initial Set of Rules

In March 2020 the AEMC published advice for the former COAG Energy Council on rules to implement regulatory sandbox arrangements in the national electricity and gas markets.

As the Draft Bill has now been developed the AEMC's recommended rule drafting has been updated to reflect the proposed law changes.

The Draft Initial rules contain relatively minor amendments to the versions published by the AEMC.

The AEMC's final advice to the former COAG Energy Council, including its recommended rules package can be found on the AEMC's website.

### **Issue for Stakeholder consideration**

Stakeholders are requested to consider and provide feedback on the draft Initial Set of rules and their interaction with the Draft Bill.

## 8. Issues for consultation

In providing the draft Bill for comment, feedback is sought on the provisions as they are drafted. In addition to the specific issues highlighted above for stakeholder consideration, comments are sought from stakeholders on whether the amendments will raise any practical implementation concerns.