14 October 2020

Secretariat
COAG Energy Council

Sent via email

Dear Secretariat,

Submission to Regulatory Sandboxing Legislative Amendments

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon people who are marginalised and facing disadvantage. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training. The Energy + Water Consumers' Advocacy Program represents the interests of low-income and other residential consumers, developing policy and advocating in energy and water markets.

PIAC welcomes the opportunity to respond to the draft legislation and consultation paper.

PIAC supports the toolkit as a whole

To be successful, regulatory sandboxes must be used to develop shared solutions to new and emerging challenges. PIAC supports the introduction of a set of regulatory sandbox tools (the advice service, trial waivers and trial rule change) that allow changes to the regulatory framework to be trialled in a manner that balances and manages the potential benefits of transformation against the potential risks.

In this submission, PIAC comments on the proposed legislation. But we note there are a number of important implementation questions to be addressed, but these are better settled in more detailed design stages such as developing AER guidelines to implement sandboxes. PIAC looks forward to continuing to engage in their development.

Innovation Trial Principles

PIAC is generally supportive of the innovative trial principles proposed in the draft legislation. They provide clear and transparent guidance for the AEMC, AER, trial proponents and stakeholders whilst allowing necessary discretion and flexibility in how individual trial proposals are treated.

In particular, PIAC strongly supports 7B(d) which requires considering "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." In interpreting this clause, PIAC considers the AEMC and AER must take into account the potential harms from the trial to both consumers who are participants within the trial and those who are not. Considering risks to other parties (e.g.: retailers or network businesses) should only be considered to the extent that it may have material implications to outcomes for consumers.

PIAC also supports clause 7B(d) explicitly taking into account how any risks to consumers from the trial may be mitigated. Innovative trials, by their nature, may introduce some consumer risks as existing protection frameworks were not designed with the trial's business models or technologies in mind. Therefore it is reasonable and prudent for such trials to still be allowed to proceed if appropriate additional protections are put in place.

For the same reason, PIAC considers clause 7B(h) should also include consideration of whether appropriate protections or safeguards are introduced to address potential risks to system and market operation. For instance, the clause could be amended to (new text underlined):

> (h) whether the trial project may negatively impact AEMO's operation of the national electricity system and national electricity market and (if so), how such impacts might be mitigated;

Duration of trial waivers

PIAC notes that the draft legislation would cap the duration of trial waivers at five years (section 18ZP) and cap an extension to a trial waiver to one year (section 18ZQ).

PIAC does not consider it appropriate to define such caps in the NEL. Doing so may unnecessarily restrict the AER's ability to manage regulatory sandbox trials and may hamper delivering innovative energy services to consumers.

While it may be rare that trials would require waivers beyond five or six years, some trial projects may warrant longer duration waivers. For instance, some projects may require investing in assets with 10-15 year lives either by the trial proponent or participating customers. Proponents and customers will be unwilling to commit to such trials if the AER is unable to grant a waiver for the full asset life (or a significant portion of it), regardless of how prudent such a waiver may be and whether conducting the trial would be in the long-term interests of consumers.

Setting a cap on waiver durations is not the best way to address the risk of trial applicants misusing waivers to avoid long-term compliance with the Rules. It is better managed through the AER's power and responsibility to decide whether or not to grant a waiver, its duration, what reporting and compliance obligations are included retained or added, and whether to revoke or revise the waiver if it becomes apparent that consumer harm is occurring (either deliberately or inadvertently).

Therefore, PIAC recommends that the AER be allowed discretion to determine the length of any waiver or extension (and the need for defining any caps on these).

Post implementation review

To ensure the continued success of the regulatory sandbox toolkit, PIAC recommends that the market bodies require a post-implementation review including formal consultation with stakeholders. This should consider whether the types of tools available in the toolkit and its operation have been well-used to date (in terms of uptake by potential innovators and translating to better outcomes for consumers) and whether any further modifications are warranted to improve its functioning and to meet future challenges.

Continued engagement

PIAC would welcome the opportunity to meet with the Secretariat and other stakeholders to discuss these issues in more depth.

Yours sincerely,

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