

Guidance Note: flexibility in ring-fencing and sandboxing waiver pathways

Background

Ring-fencing and regulatory sandboxing are two regulatory tools that the AER can use to allow for exceptions to be made from regulatory requirements where good reason exists to grant them. Both ring-fencing and sandboxing frameworks offer waivers, but these waivers have different functions and considerations.

There are circumstances in which distribution network service providers (DNSPs) may be unclear on which waiver function to apply for to facilitate delivery of a project or service. The AER's advice to stakeholders to date has been based on section 1.2 of the [Explanatory Statement to the Trial Projects Guideline](#) (for sandboxing), which states that where the AER can already grant a waiver or an exemption from certain National Energy Laws or Rules (including waivers under the ring-fencing guideline), applicants will need to apply under the existing arrangements rather than via a sandboxing trial waiver.

The AER is now open to receiving applications under either of these two regulatory waiver pathways, as is set out in this guidance note.

Ring-fencing

Ring-fencing refers to the separation of regulated services provided by a distribution network service provider (DNSP) from the provision of contestable services by a DNSP or an affiliated entity. Ring-fencing seeks to prevent DNSPs from using their position as monopoly providers of prescribed distribution services in ways that undermine or damage competition, efficiency and innovation in contestable markets.

The AER is able to grant waivers from some ringfencing requirements under chapter 5 of the [Ring-fencing Guideline](#) (electricity distribution) and clause 6.17.2 of the NER. In assessing waiver applications, we must have regard to the National Electricity Objective, the potential for cross-subsidisation and risks of discrimination in the market, whether the benefits to consumers from denying the waiver are likely to outweigh the costs to the DNSP of complying with the guideline, and any other relevant matters.

Regulatory sandboxing

Regulatory sandboxing is a policy tool designed to support innovation and help frameworks adapt to rapid change. The [Energy Innovation Toolkit](#) is the public branding for the AER's regulatory sandboxing function, delivered in conjunction with project partners the AEMC, AEMO, ARENA and ESC in Victoria.

The AER can grant a regulatory sandboxing waiver to enable trials to operate under relaxed regulatory settings, so that innovative business models and technologies can be tested in a real-world environment. The AER's proposed approach to delivering trial waivers and assessing applications is set out in the [Trial Project Guidelines](#). The objective and intent of the regulatory sandboxing framework is fundamentally about structured experimentation to test new or novel ideas or solutions, that may deliver system value.

Regulatory sandboxing is open to all energy innovators, including DNSPs and other regulated entities. It has a broader application than ring-fencing as waivers can be granted from a greater range of provisions within the National Electricity Laws and Rules, and the corresponding Gas and Energy Retail Laws and Rules.

Revised approach

In the current regulatory and commercial context of increased interest in regulatory sandboxing waivers and the advent of [Policy-led Sandboxing](#), we wish to clarify that we are **open to considering ring-fencing waiver applications through the regulatory sandbox, even where the waiver relates only to ring-fencing requirements**. DNSPs can elect to submit applications for waivers via either the regulatory sandboxing or ring-fencing frameworks.

Once an application is made to either framework, the process and decision-making considerations of the respective ring-fencing or regulatory sandboxing framework will be applied in accordance with the applicable guideline. That is, ring-fencing waivers will be assessed in line with the ring-fencing guideline and sandboxing waivers will be assessed in line with the trial projects guideline.

DNSPs are encouraged to carefully consider whether a ring-fencing or a sandboxing waiver is more appropriate to the needs of their business and project, and should obtain independent legal advice if necessary. AER staff can provide general information only about the two respective frameworks and are not able to provide indications of relative likelihood for success under each pathway.

Key framework differences

The following comparison table is provided to highlight some of the key distinctions and similarities between the ring-fencing and sandboxing frameworks. This is not an exhaustive list and should be used as an initial guide only.

Table 1: Comparison of waiver assessment under ring-fencing and sandboxing

	Ring-fencing waiver	Regulatory sandboxing waiver
Assessment criteria	<p>In considering whether to grant or deny a ring-fencing waiver, the AER must have regard to:</p> <ul style="list-style-type: none"> the NEO potential cross-subsidisation and discrimination risk of the waiver, and whether the benefits to consumers of granting this waiver outweigh the potential costs to the DNSP of complying with the guideline. 	<p>In considering whether to grant a trial project waiver, the AER must be satisfied that the project meets specific eligibility criteria, including that it is innovative, cannot proceed under existing regulatory arrangements, is likely to contribute to the achievement of the energy objectives (NEO, NERO, NGO), includes adequate consumer protections, and is capable of delivering regulatory or industry insights.</p> <p>The AER does not need to be satisfied that all requirements and principles are met to grant a waiver. The AER has indicated it will take a holistic approach</p>

	Ring-fencing waiver	Regulatory sandboxing waiver
	The AER may also have regard to any other matters it considers relevant.	to the consideration of the eligibility requirements and innovative trial principles when assessing each application. The AER may also have regard to any other matter it considers relevant.
Length and conditions of waivers	The AER may grant a waiver for any term that the AER considers appropriate. The AER has full discretion over the maximum term of a waiver and will expect robust evidence in a waiver application to support a longer term. The AER can impose any waiver conditions that we consider appropriate.	Trial waivers are granted for no more than 5 years with a possible extension of up to 1 year at the AER's discretion. In addition to consumer protection measures set that are set out in the trial project guidelines; in granting a trial waiver the AER may impose any other conditions the AER considers appropriate. Trial project waivers must include an exit strategy that includes a process for how the trial project proponent could exit the trial and return to BAU. The innovative trial principles also include an assessment of whether there is potential for the trial project to be successfully expanded.
Stakeholder consultation	The AER may invite public submissions and may conduct any consultation it considers appropriate in conducting its assessment of a waiver application. However, the AER is not obligated to consult on a waiver application under the ringfencing guideline.	The AER must carry out public consultation in relation to a proposed trial waiver, unless it is satisfied that the proposed trial waiver: <ul style="list-style-type: none"> • is unlikely to have an impact on other Registered Participants; and • is unlikely to have a direct impact on retail customers other than those who provide explicit informed consent to participate in the trial project. Under the trial project guidelines, the AER has committed to publishing a notice of consultation and running a consultation period of at least 20 business days.
Timing for a waiver application decision	The AER will endeavour to make a final decision on each waiver application within 90 days of the application being validly lodged.	The trial project guidelines explanatory statement sets out that the AER will aim to finalise trial waiver applications within 3 months, but that the guidelines indicate a six-month timeframe to

	Ring-fencing waiver	Regulatory sandboxing waiver
		account for any highly complex applications or those that require extensive consultation.

Contact us

To find out more about regulatory sandboxing and trial waivers, please visit <https://energyinnovationtoolkit.gov.au/>.

To discuss lodging a sandboxing trial waiver, please contact regulatorysandbox@aer.gov.au.

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