

13 May 2022

Essential Services Commission
Level 8, 570 Bourke Street
Melbourne VIC 3000

By portal: <https://engage.vic.gov.au/>

Dear Ms Symons,

Re: Implementing a regulatory sandbox framework for the energy sector – Draft Decision

Thank you for the opportunity to comment on the Essential Services Commission's (ESC) *Implementing a Regulatory Sandbox Framework for the Energy Sector – Draft Decision (Draft Decision)*.

The Energy and Water Ombudsman (Victoria) (EWOV) is an industry-based external dispute resolution scheme that helps Victorian energy or water customers by receiving, investigating and resolving complaints about their company. Under EWOV's Charter, we resolve complaints on a 'fair and reasonable' basis and aim to reduce the occurrence of complaints¹. We are guided by the principles in the Commonwealth Government's Benchmarks for Industry-based Customer Dispute Resolution². It is in this context that our comments are made.

Overview

The Draft Decision succinctly outlines the background and rationale for the proposed sandboxing guidelines that are due to commence 1 June 2022.

EWOV is a supporter of energy innovation. As previously acknowledged in our 'Charging Ahead Report', in the midst of change and upheaval in the industry 'energy will remain just as essential to the health, safety and social participation of every individual as it has always been'³. However, significant change requires equally significant protections for consumers, and 'the over-riding social contract for

¹ See Clause 5.1 of EWOV's Charter: <https://www.ewov.com.au/files/ewov-charter.pdf>

² See EWOV's website: <https://www.ewov.com.au/about/who-we-are/our-principles>

³ Energy and Water Ombudsman, *Charging Ahead Report*, March 2020, p. 6 available at: https://www.ewov.com.au/uploads/main/Reports/charging_ahead_report_release_june_2020.pdf

government to ensure a safe and reliable supply will remain'⁴. At this initial stage of sandboxing, it is fundamental for ESC to implement mechanisms that will pre-emptively work to protect consumers.

The draft guidelines do not explicitly mention EWOV in our dispute resolution capacity as an option for customers engaging in a sandboxing arrangement. To provide assurances to customers in these circumstances, and to support an approach that provides consumer protections for those customers of new and emerging technology products and services, EWOV considers it important that the guidelines are revised. These amendments should work to ensure mandatory reporting, explicit inclusion of becoming a member of EWOV and enabling a positive obligation for trial waiver holders to access our services. Our further comments are set out below.

Mandatory reporting

Upon reviewing the reporting functions under guideline 5.2 it is clear that reporting obligations lie predominately with the trial waiver holder⁵. The ESC will have discretion to request additional progress reports and outcomes pursuant to the nature of the project and any new risks during the trial project⁶. Under guideline 5.2.6 it will be the responsibility of the trial waiver holder to report on their compliance with the trial waiver conditions⁷ and any breaches of the code of practice or guidelines⁸.

Collectively, these guidelines demonstrate that in practice these trials will rely heavily on self-regulation. There is concern that if ESC relies on a self-monitoring model and only exercises reporting on a case by case basis, there will inevitably be instances where trial waiver holders do not approach ESC when required. Additionally, it would be unlikely that the ESC would be aware of such conduct due to the nature of the self-monitoring expectations.

EWOV queries the reasoning behind these self-monitoring expectations. As acknowledged in Draft Decision 9 of the Trial Project Guidelines, monitoring and reporting will be determined on a case-by-case basis which differs from the mandatory approach under the AER⁹. Throughout the implementation of sandboxing it is likely that many of the innovative ideas established under the initiative will be carried out across different states. Therefore, in the interests of consistency, it would be preferable for the reporting and monitoring functions to be consistent across Victoria and the nation alike.

⁴ Energy and Water Ombudsman, *Charging Ahead Report*, March 2020, p. 6 available at:

https://www.ewov.com.au/uploads/main/Reports/charging_ahead_report_release_june_2020.pdf

⁵ See clause 5.2 of ESC's Regulatory sandboxing Trial Draft Guidelines:

<https://www.esc.vic.gov.au/sites/default/files/documents/regulatory-sandboxing-draft-trial-project-guideline-20220419.pdf>

⁶ Above, see clause 5.2.5(d).

⁷ Above, see clause 5.2.6(a).

⁸ Above, see clause 5.2.6(b).

⁹ See Draft Decision 9 of ESC's Trial Project Guidelines: <https://www.esc.vic.gov.au/sites/default/files/documents/regulatory-sandboxing-trial-project-guideline-draft-decision-20220419.pdf>

Sandboxing initiatives that have been established outside of Australia incorporate somewhat of a hybrid self-regulating scheme. For example, the Ofgem sandboxing scheme in the UK notes additional monitoring and reporting requirements may be necessary depending on what they innovator is undertaking. However there are consistent, formal core reporting and monitoring requirements for all innovators on statistical performance data, customer views/complaints and progress and completion reports¹⁰.

Similarly with the consumer protection provisions, that responsibility predominately lies with the trial waiver holder to ensure they are driving consumer protection. Under guideline 7.2, it will be the trial waiver holder's responsibility to provide project participants with access to dispute resolution within the trial project¹¹. The onus will also lie with the trial participants to 'opt-out' of the project in accordance with the trial's exit process. Additionally, under the Draft Decision it is noted that 'applicants are also encouraged to consult with AEMO, Energy Safe Victoria, the Energy and water Ombudsman (Victoria) or any other relevant bodies regarding the trial project and their proposed risk management plan for the project prior to submitting their application'¹².

Jurisdiction & membership

Upon reviewing the draft guidelines and decisions, EWOV is concerned that the consumer protection mechanisms lie too heavily with the trial waiver holder and the consumers themselves. There is concern that in practice the ESC will not have the resources to properly monitor these projects. EWOV will be instrumental in reporting potential breaches and issues more broadly to the ESC when customers approach us with a complaint, particularly due to the broad scope of disputes that may arise within these trials.

While it is likely that customers will approach EWOV with complaints, unless EWOV membership is mandated as part of the sandboxing trials, many cases will fall outside our jurisdiction. As discussed below, the scope of our jurisdiction, should membership be mandated through the trial guidelines, will ensure that we are able to provide dispute resolution services for consumers engaging in sandboxing as well as key insights into the trends and issues that they are experiencing. In turn, this will serve to inform development of protections and feed into the national response which will aid in determining the balance of consumer protections and innovation.

¹⁰ See clause 5.2 Ofgem's Sandbox Guidance:

https://www.ofgem.gov.uk/sites/default/files/docs/2020/07/sandbox_guidance_notes.pdf

¹¹ See clause 7.2 of ESC's Regulatory sandboxing Trial Draft Guidelines:

<https://www.esc.vic.gov.au/sites/default/files/documents/regulatory-sandboxing-draft-trial-project-guideline-20220419.pdf>

¹² See Draft Decision 3 of ESC's Trial Project Guidelines:

<https://www.esc.vic.gov.au/sites/default/files/documents/regulatory-sandboxing-trial-project-guideline-draft-decision-20220419.pdf>

EWOV has the capability to adapt our model to handle complaints about participants within our scheme. Trial waiver applicants can be retail, supply, generation or transmission and can be licensed, exempt entities or entities that are neither licensed nor exempt. Under the current guidelines however, a trial waiver could be granted without the requirement to be a member of EWOV to an unlicensed or non-exempt entity. If this was to occur, customers of that business would not be able to access EWOV as an external dispute resolution service, if that business did not already hold a licence or an exemption (and be an existing member of EWOV). This will create an uneven playing field for customers.

As outlined, the activities conducted via the sandboxing trial will fall under selling, supplying, transmitting and generating electricity and gas. We understand that the AER is seeking to apply external dispute resolution requirements to selling activities. The ESC has taken a different approach, where pursuant to the current draft guidelines, EWOV would not have the jurisdiction to deal with most of the trial disputes and in these instances, would have to ask consumers to take their complaints to Consumer Affairs Victoria or to Victorian Complaints Administration Tribunal.

While customers in Victoria would naturally assume that complaints arising from these trials should be handled by EWOV, the power to regulate and resolve disputes under these bodies is also limited. Additionally, there is concern that ESC's approach to consider trial waiver membership to EWOV on a case by case basis, and as determined by the trial participants themselves, will result in a patchwork membership with varying protections and outcomes for consumers participating in the trials.

Mandating EWOV membership for trial waiver holders would grant EWOV jurisdiction to investigate complaints within our scope and serve to inform the development of consumer interests for the future of sandboxing. It would also serve to progress the development of protections toward consumers as well as work in parallel with the national response from the AER.

Without a mechanism that requires businesses to be a member of EWOV, our experience is they do not join on a voluntary basis. On this basis, without a positive obligation, it is likely that trial waiver participants will not consider external dispute resolution relevant to their trial. In practice, this will mean that, as above, customer protections across sandboxing arrangements will be inconsistent. Further, for complaints that do arise from these trials, where EWOV does not have jurisdiction, those disputes will likely need to transfer to Consumer Affairs, who as we note, have a different focus on dispute resolution.

This is already the case for example, where there is no requirement for solar business to be members of EWOV (outside those who already hold a licence). The resulting outcome is that there are consumer protection gaps within the industry and from January 2019 to date, 26% of solar complaints raised by consumers with EWOV were out of our jurisdiction.

Based on the discretion in the current proposal by the ESC it is likely disparity would exist for consumers of sandboxing trial waiver applicants. In the interests of fairness, it is integral that the guidelines create consistency across trial participants and protection for the consumers engaging in the trial. EWOV

suggests that the ESC make it a positive obligation (in line with AER) and require trial waiver participants to be members of EWOV for retail, distribution, transmission and generation (sales and supply) and only remove the obligation where the trial participant identifies clearly why it is not relevant.

Consumer confidence is integral for the program's future and success. If consumer protection is not prioritised at this early stage, conflicts and complaints will not be addressed efficiently and will inevitably stall innovation. Further, if consumer trust toward the initiative waivers, there will be hesitation to engage altogether.

There is undeniable value that will come from mandating EWOV membership. This would enable us to resolve disputes whilst also working to prepare trial waiver holders for consumer complaints – enhancing the opportunity for positive, successful innovation. Scheme participant members would have access to EWOV's internal dispute resolution training, therefore should a sandboxing trial be successful, the trial waiver holder will be better informed about actual failure points (that have led to complaints), and better prepared to deal with consumer conflict internally. Trial participant holders would also receive assistance from EWOV in dealing with more complex consumer issues that, particularly for start-ups and the like, they often do not have the experience to deal with (this has consistently been our experience with new entrants to the energy market). Finally, trial waiver holders, as well as regulators and policy makers, would have access to EWOV's diverse complaints data and be able anticipate problems as well as gain an understanding of potential systemic issues within the trial itself.

Amending the guidelines to mandate reporting and EWOV membership would serve to progress the development of protections toward consumers as well as work in parallel with the national response from the AER.

EWOV has previously been vocal about the need for industry and regulators to be more proactive within the emerging energy technologies space. The sandboxing initiative is an important step in this process, however its intended purpose will not be fully realised if it is not conducted with consumer interests in mind. In practice, that will mean ensuring that both ESC and EWOV have the ability to assist and support consumers and the industry alike during the roll out of these initiatives.

Going forward, it would be useful for EWOV to have access to examples of prospective case studies to more accurately identify the scope of this initiative. Although we anticipate that an absence of mandatory membership will narrow EWOV's power to assist consumers, it is difficult to envisage other potential issues that may arise beyond this. EWOV requests that ESC supply case studies, ideas and examples on their website soon so further informed comment and guidance on the framework can be made if necessary.

We trust these comments are useful. Should you like any further information or have any queries, please contact Claudia Lavery, Senior Policy and Stakeholder Engagement Officer on (03) 8672 4400.

Yours sincerely



James Lawson
Acting Energy and Water Ombudsman (Victoria)