

Electricity transmission Ring-fencing Guideline Explanatory Statement – Version 4

March 2023

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Shortened forms

Shortened Form	Extended Form
ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AEC	Australian Energy Council
AEO	Australian Energy Operations
AER	Australian Energy Regulator
AusNet	AusNet Transmission Group Pty Ltd
CAM	cost allocation methodology
CitiPower	CitiPower, Powercor and United Energy (joint submissions)
DNSP	Distribution Network Service Provider
draft guideline	Ring-fencing guideline – Electricity Transmission (Version 4, Draft), November 2022
ENA	Energy Networks Australia
NECA	National Electricity Contractors Association
NEL	National Electricity Law
NEM	National Electricity Market
NEO	National Electricity Objective
NER or the rules	National Electricity Rules
NSW DNSPs	Ausgrid, Endeavour Energy, Essential Energy (joint submissions)
previous guideline	Ring-fencing guideline – Electricity Transmission (Version 3), July 2022
RAB	Regulatory Asset Base
RESP	related electricity service provider
REZ	Renewable Energy Zone(s)
TNSP	Transmission Network Service Provider

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Executive Summary

Australia's electricity market is undergoing a fundamental transformation, transitioning from a reliance on coal- and gas-fired power plants to renewable sources of energy (mainly wind and solar) to meet State and Federal renewable energy targets. This transformation presents significant challenges and opportunities for Australia's electricity transmission system (the interconnected networks of high voltage lines and infrastructure that carry electricity from generators to distributors and ultimately to consumers). The role of transmission network service providers (TNSPs) is expanding to connect this large investment in new generation, while supporting AEMO in its management of system as our reliance on variable renewable energy increases.

At the same time, new contestable markets are being developed and technology is being deployed in new ways that increase the potential scope of TNSP operations outside of traditional transmission network services. New markets are being considered for essential system services (such as inertia). Technologies such as batteries and synchronous condensers are being deployed that can provide both transmission and contestable market services. These developments are opening new market opportunities, including for TNSPs.

There is also increasing appetite to explore or promote contestability in areas that have traditionally been provided by monopoly TNSPs. Amendments to the rules governing transmission connections arrangements have already expanded opportunities for third parties to provide elements of transmission connection services. Some jurisdictions have also adopted contestability in relation to the delivery and operation of major transmission projects within renewable energy zones.

It is in this context that we have reviewed the transmission ring-fencing guideline. Given TNSPs' monopoly role in planning, operating, and maintaining the transmission network¹ – the backbone of the electricity market – as well as in providing connections to their networks, it is timely to consider whether appropriate controls are in place to support competitive outcomes in markets within which TNSPs may operate.

Ring-fencing seeks to prevent TNSPs from using their position as monopoly providers of prescribed transmission services² to distort outcomes in contestable markets. There are two types of harmful conduct by TNSPs that ring-fencing can address:

- **Cross-subsidisation**, where a TNSP uses revenues it earns in providing prescribed transmission services to subsidise its activities in other, contestable markets. Cross-subsidisation can have the effect of undermining or damaging competition and innovation in related contestable markets. In addition, it can result in consumers paying more than they should for regulated transmission services.
- **Discrimination**, where a TNSP is able use its monopoly position in regulated markets, or information obtained through the provision of those services, to favour itself (or an affiliated entity) or to discriminate against a competitor in contestable

¹ With the exception of Victoria, where AEMO performs some of these roles.

² Prescribed transmission services are shared services provided via the transmission network that are paid for by all end users. They do not include negotiated transmission services or connection services, which are paid for by individual connecting parties.

markets. This harms consumers by distorting outcomes in competitive markets, reducing competition and so increasing prices and reducing innovation.

The AER's transmission ring-fencing guideline seeks to prevent these harms from occurring by requiring a TNSP to separate the provision of prescribed transmission services from contestable services that may be provided either by the TNSP (or its affiliates) or third parties. Ring-fencing obligations should evolve to remain a targeted, proportionate, and effective regulatory response to the potential harm consumers may face as the market context within which TNSPs operate changes.

The AER's previous transmission ring-fencing guideline was first published in August 2002. While there have been minor amendments to the guideline over the years, the guideline has not changed substantively over the past 20 years, despite significant changes in the regulatory landscape and electricity market. By contrast, the ring-fencing guideline for distribution network service providers (DNSPs), which came into effect in November 2016, has been amended twice to respond to these changing market conditions. The distribution guideline differs in many respects from the previous transmission ring-fencing guideline, and we are mindful of the National Electricity Rules' (NER) direction that we try to make the two sets of guidelines consistent where practicable.³

With these matters in mind, we initiated a full review of the guideline in 2019. We have consulted with stakeholders throughout the process, including:

- issuing an initial Discussion paper on 15 November 2019, to which we received 9 submissions;
- issuing an Issues paper on 31 May 2022, to which we received 18 submissions;
- holding a stakeholder forum on 15 June 2022 to discuss our review of the guideline to that point;
- issuing a draft guideline and Explanatory statement on 4 November 2022, to which we received 23 submissions;⁴ and
- holding a public forum regarding the draft guideline on 17 November 2022.

Based on our consideration and analysis of these submissions and our powers and obligations under the National Electricity Law and the NER, the AER has formed the view that changes to the previous transmission ring-fencing guideline are required to ensure that it remains fit for purpose. Table 1, at the end of this executive summary, compares the provisions in the previous and final guidelines and provides an overview of the changes we have made.

Addressing the potential for cross-subsidisation

Opportunities for TNSPs to cross-subsidise contestable services using regulated revenues have expanded since the guideline was introduced in 2002. At that time, the distinction

³ NER 6A.21.2(c)(2).

⁴ The following stakeholders made submissions in response to our draft guideline: AEC, AEO, AGL, AusNet, CEFC, CEIG, CitiPower, ECA, ENA, ETU, Flow Power, Iberdrola Australia, Jemena, Marinus Link, Network REZolution, NSW DNSPs, PIAC, Powerlink, Snowy Hydro, Squadron Energy, TasNetworks, Tilt Renewables, and Transgrid.

between generation, transmission, distribution and retail was clearer. Under the previous guideline, TNSPs were prohibited from operating in those other parts of the electricity supply chain except where revenue from those activities was no more than 5% of a TNSP's total annual revenue.

Since 2002, the boundaries between these activities have blurred, and the scope of services that a TNSP can provide that do not clearly fall into generation, transmission, distribution or retail has expanded. With the expected increase in transmission investment, the absolute value of the 5% revenue cap permitted under the previous guideline would have increased significantly, expanding TNSPs' opportunities to operate in other, generally prohibited, markets. Furthermore, deployment of technologies that can provide both transmission services and contestable services, such as grid-scale batteries, makes it harder to monitor and control the potential for cross-subsidisation.

To address these concerns, we have strengthened TNSPs' legal separation obligations in three main areas in the final guideline. The final guideline, as amended:

- Allows TNSPs to provide all transmission services (regulated and non-regulated) and regulated distribution services but generally prohibits them providing other services without a waiver. In effect, this expands TNSPs' previous legal separation obligations to capture all non-transmission contestable electricity services and non-electricity services (with some exceptions), rather than just generation, distribution, and retail services. This approach will provide greater assurance to the AER and market participants that TNSPs are not cross-subsidising contestable services with regulated revenues. For clarity, TNSPs who do not provide any regulated distribution services cannot provide contestable distribution services unless they obtain a waiver.
- Removes the 5% revenue cap exception to the previous guideline's legal separation obligation but introduces the ability for TNSPs to apply for a waiver from this obligation. A waiver may be granted where there are consumer benefits from the TNSP providing a service that would otherwise be prohibited. We consider a revenue cap is no longer appropriate given the lack of regulatory oversight and the expected increase in TNSPs' revenue from significantly increased investment in the transmission system. A waiver provides greater transparency and oversight over TNSP activities that could potentially impact contestable markets.
- Prevents TNSPs from leasing excess capacity from batteries without a waiver from the AER. This brings the transmission ring-fencing guideline into alignment with the distribution guideline. It also provides important protection for competition in the grid-scale battery market, which is in an early stage of development.⁵ Allowing TNSPs to operate without appropriate checks and balances could stifle smaller and less well-equipped participants in the battery services market. Our decision also reflects our concern about TNSPs' abilities to influence operational outcomes in contestable markets within which batteries may operate.

We have also made amendments to accounting separation and cost allocation requirements. Unlike the legal separation obligations, these requirements cannot be waived.

⁵ There are presently only about 15 grid-scale batteries operating around Australia. See AusNet, *Response to Questions from the Ring-fencing Guideline Electricity Transmission Issues Paper* submission, 22 July 2022, pp 5-6. Another 157 grid-scale batteries are proposed, however, according to AEMO's January 2023 generation report. See AEMO, NEM Generation Information, January 2023.

Addressing the potential for discrimination

As new, contestable electricity markets have developed, the potential for TNSPs to favour themselves or an affiliate operating in those markets has also increased. Discrimination against competitors could potentially occur wherever a TNSP holds sensitive information obtained from providing regulated services or, in connection with the provision of regulated services, the TNSP has the ability to discriminate in favour of itself or an affiliate.

Stakeholders identified two areas of potential harm that they considered were not adequately addressed by the previous guideline:

- TNSPs favouring themselves or an affiliate in providing the contestable component of transmission connection services, and
- TNSPs favouring themselves or an affiliate in relation to batteries, particularly favourable terms and conditions for connecting their own batteries to the transmission network.

In respect of contestable connections, stakeholder concerns largely related to potential discrimination in the market as a result of a TNSP being the monopoly provider of negotiated transmission services – in this case services provided by the TNSP to facilitate connections to the transmission network. The AER's transmission ring-fencing powers are limited to requiring accounting and functional separation of prescribed transmission services from other services. Our powers do not extend to requiring separation between negotiated transmission services and non-regulated (contestable) transmission services.

To the extent that stakeholders have concerns in respect of TNSPs' conduct in the provision of connection services, we encourage stakeholders to raise these matters with the AER. If evidence is presented to us that TNSPs are not complying with their obligations under Chapter 5 or Chapter 8, Part C of the NER, we may consider taking enforcement action where appropriate.

In respect of connecting batteries, where TNSPs are connecting batteries for the purposes of providing prescribed transmission services and can discriminate in favour of themselves or an affiliate to the detriment of a competitor, this would fall within the scope of the ring-fencing framework.

To address this concern, and wider concerns we have about TNSPs being able to favour themselves or their affiliates participating in other contestable electricity markets, we have strengthened the previous guideline's functional separation obligations. The final guideline we adopt:

- introduces the concept of a 'related electricity service provider,' which includes not only a TNSP's affiliates but parts of a TNSP that provide contestable (i.e., non-regulated) transmission services;
- clarifies and strengthens obligations around information access and disclosure, including the establishment of an information sharing protocol; and
- requires TNSPs to establish, maintain and keep an information register about information that has been shared.

These obligations are intended to mitigate discrimination by the TNSPs in relation to the provision of prescribed transmission services, in favour of themselves or affiliates. Consistent with our distribution guideline, these obligations cannot be waived.

We expect this approach will increase transparency, confidence and predictability for stakeholders and improve compliance with the guideline. This approach also better aligns the transmission and distribution ring-fencing guideline, while recognising differences between the distribution and transmission markets.

Next, we have introduced a new obligation on TNSPs to require any agreements with third party service providers who provide services to the TNSP to contain provisions mirroring the guideline's non-discrimination and information access and disclosure provisions. This approach recognises that third parties who assist with a TNSP's provision of prescribed transmission services can also engage in discriminatory behaviour. This provision will apply to new agreements and variations to existing third party service agreements executed after the amended guideline's publication. As such, the costs of compliance are, in our view, likely to be minimal.

We have not added new obligations in relation to staff and office separation or restrictions on cross-branding and promotions. We do not have sufficient evidence at this time that the benefits of these functional separation obligations would outweigh the costs. This is due to the relatively small size of TNSPs and the nature of their customers, which are typically large, sophisticated corporate entities. However, we have retained the previous guideline's provisions requiring the marketing staffs of TNSPs and affiliates to be separate. We have amended the wording of this provision to apply to 'related electricity service providers,' which expands the provision's reach to capture contestable electricity services.

We provide only limited opportunities for TNSPs to seek waivers from the obligations that seek to prevent discrimination against competitors. TNSPs may only seek a waiver from the marketing staff separation requirement and the requirement for TNSPs to ensure that new or varied agreements with service providers require those providers to comply with our non-discrimination and information access and disclosure obligations.

Other amendments

We have made several other amendments to the previous transmission ring-fencing guideline in relation to compliance reporting, specified procedures relating to waivers, and transitional arrangements. We make it clear that waivers will be granted on a case-by-case basis where the applicant has demonstrated a compelling case for a waiver including that the benefit to consumers of the TNSP complying with the waiver would be outweighed by the cost to the TNSP of complying with the obligation. In addition, we include a power to grant class waivers.

All amendments from the previous guideline are summarised in the table below.

Finally, we note our intention to consult with stakeholders on a potential rule change that would expand the ring-fencing framework to include negotiated transmission services. We also intend to seek changes to the national electricity regulations to attach civil penalties to non-compliance with our transmission guideline. These are important to ensure we have the necessary powers and tools to limit the risk of the abuse of monopoly power in a way that

Developing a transmission ring-fencing guideline that remains fit for purpose in a rapidly transforming energy market is an iterative process. New regulatory or market arrangements, new information, or new evidence may justify further amendments to the transmission ring-fencing guideline's obligations in the future. As with our distribution ring-fencing guideline, we

intend to continue to review market conditions and to update the guideline when warranted while balancing the need for regulatory certainty.

Table 1: Summary of amendments

Potential harm	Previous guideline	Final guideline changes from previous guideline
Cross-subsidisation	<p>Legal separation</p> <p>TNSP may not engage in related business (electricity generation, distribution or retail), except if total related business revenues \leq 5% of total TNSP revenue</p>	<p>Legal Separation</p> <p>Expand to prohibit TNSP from providing contestable electricity and non-electricity services</p> <p>Remove 5% revenue cap exception and replace with waiver</p> <p>Allow TNSPs to provide regulated distribution services without a waiver</p> <p>Prevent TNSPs from entering into any new agreements or agreeing to material variations to agreements which lease excess capacity from batteries without a waiver</p>
	<p>Accounting and transactional separation</p> <p>TNSPs must: maintain separate accounts for ring-fenced services and separate amalgamated accounts for entire business and comply with any AER accounting guideline</p> <p>TNSPs must allocate costs between ring-fenced services and other activities per any AER approved TNSP guidelines</p>	<p>Accounting and transactional separation</p> <p>Extend accounting separation and cost allocation requirements to include allocating costs between transmission services and non-transmission services per TNSP's cost allocation methodology and cost allocation principles</p> <p>Explicitly prevent TNSPs from allocating or attributing costs to transmission services that properly relate to other services and require allocation attribution to be consistent with NER 6A.19.2</p>
Discrimination	<p>Obligation not to discriminate</p> <p>Has less definition around 'discrimination' than the distribution guideline</p>	<p>Obligation not to discriminate</p> <p>Include a more comprehensive non-discrimination obligation which will address TNSP's misusing their monopoly position to discriminate unfairly in respect of the provision of prescribed transmission services</p>
	<p>Functional separation – offices</p> <p>No obligation</p>	<p>Functional separation – offices</p> <p>No change</p>
	<p>Functional separation – staff</p> <p>TNSP must ensure its marketing staff do not work for an 'associate' taking part in a related business and that none of its staff are marketing staff of an associate taking part in a related business</p>	<p>Functional separation – staff</p> <p>Retain general approach in previous guideline which focusses on separation of marketing staff but updated to include the broader concept of RESP resulting in a potential impact on some additional staff</p>
	<p>Functional separation – service branding, promotions</p> <p>No obligation</p>	<p>Functional separation – service branding, promotions</p> <p>No change</p>
	<p>Information access and disclosure</p> <p>TNSPs must ensure information regarding prescribed transmission services given to an affiliate taking part in a related business is available to others</p>	<p>Information access and disclosure</p> <p>Require TNSPs to keep information acquired in connection with provision of prescribed transmission services confidential, where it is not already publicly available</p> <p>Require TNSPs to only use such information for the purpose for which it was acquired or generated</p>

		Require TNSPs to establish an information sharing protocol and maintain an information register about information shared with a related electricity services provider
	Third-party service providers	Third-party service providers
	No obligation on third parties providing prescribed services on behalf of a TNSP	Require TNSPs to ensure that any new or varied agreements with third party service providers who provide services contain provisions that mirror non-discrimination and information access and disclosure provisions applicable to TNSPs
	Compliance reporting	Compliance reporting
	TNSPs must report measures taken to ensure compliance; could include independent audit	Require annual compliance reporting, subject to independent audit
	TNSPs must report any breaches immediately	Extend breach reporting to 15 days from breach
	Waivers	Waivers
	After consultation, AER may waive any TNSP obligation if satisfied benefit to the public is outweighed by cost to TNSP of complying with the guideline	Maintain waiver process but expand to include a power for AER to issue class waivers
		Restrict the provisions for which waivers may be granted
Other matters	Transitional arrangements	Transitional arrangements
	N/A	TNSPs will have 12 months to comply with Version 4 of the guideline. However immediate compliance with the current guideline is required for: <ul style="list-style-type: none"> breach reporting (i.e., 15-day breach reporting) entering into any new or materially varied agreements relating to the leasing of excess battery capacity and new or varied service provider arrangements annual compliance reporting for the period of commencement date to 31 December 2023. Reports should be submitted by 30 April 2024 <p>The waiver process in section 5 of the final guideline is available if a TNSP requires relief from obligations under the amended Guideline, including any immediately applicable obligation such as the battery leasing prohibition in clause 3.1(c).</p>
	Additional obligations	Additional obligations
	After consultation, AER may impose additional obligations on TNSP if satisfied cost to TNSP and its affiliate of complying is outweighed by benefit to the public	By implementing more comprehensive and robust ring-fencing requirements the ability for the AER to impose additional ring-fencing obligations will no longer be required. Therefore, we have removed this obligation

1 Background

Under the National Electricity Rules (NER), the Australian Energy Regulator (AER) is required to develop, and may amend from time to time, a transmission ring-fencing guideline (guideline).⁶ The guideline provides for the accounting and functional separation of the provision of prescribed transmission services by transmission network service providers (TNSPs) from the provision of other services by TNSPs. Ring-fencing supports the development of competitive markets by placing restrictions around TNSP behaviour to prevent them from taking advantage of their status as a monopoly service provider.

Ring-fencing benefits consumers in two ways:

- by addressing the risk that consumers pay more than they should for regulated services because a TNSP uses regulated revenue to cross-subsidise unregulated services offered in competitive markets; and
- by supporting competitive markets, meaning that electricity consumers can benefit from lower long-term costs and greater consumer choice associated with strong competition.

The guideline was first published by the Australian Competition and Consumer Commission (ACCC) in August 2002. While there have been minor amendments to the guideline over the years,⁷ the guideline has not substantively changed since that time, despite significant changes in the regulatory landscape and electricity market.

For this reason, we commenced a full review of our transmission ring-fencing arrangements with the release of a discussion paper on 15 November 2019.⁸ Following a pause due to disruptions associated with the COVID-19 pandemic, we recommenced the review with the release of an issues paper on 31 May 2022.⁹ We received 18 submissions in response to the issue paper (and 9 submissions in response to the earlier discussion paper).¹⁰ We held a public forum on 15 June 2022 attended by 17 stakeholders¹¹ and also consulted individually with various stakeholders. These earlier efforts culminated in our publication of a draft transmission ring-fencing guideline proposing numerous amendments to the guideline on 4

⁶ NER, 6A.21.2.

⁷ The previous version of the transmission ring-fencing guideline (Version 3) was recently published on 6 July 2022. Prior to that, the transmission ring-fencing guideline was republished by the AER in 2005 (Version 2). Version 2 of the guideline was substantially the same as Version 1.

⁸ See AER, *Electricity transmission ring-fencing – a review of current arrangements, Discussion paper*, November 2019.

⁹ See AER, *Ring-fencing guideline electricity transmission, Issues paper*, May 2022.

¹⁰ We received 18 submissions on the Issues Paper from: AEC; AEO; AGL; the NSW DNSPs; CitiPower; CEIG; ENA; Iberdrola; Jemena; NECA; Network REZolution; Northern Beaches Council; Powerlink; Snowy Hydro; TasNetworks, Tilt Renewables; and Transgrid. In addition, we received 9 submissions in response to our 15 November 2019 Discussion Paper from the following: ENA, Australian Energy Operations, AusNet Services, CitiPower/Powercor/United Energy, Evoenergy, TasNetworks, Transgrid, Spark Infrastructure, and the Public Interest Advocacy Centre.

¹¹ The following sent one or more representatives to the 15 June 2022 public forum: AEMC, APA, AusNet Services, Clean Energy Council, Department for Energy and Mining, ElectraNet, Elliott Green Power, Electrical Trades Union of Australia (ETU), Incenta Economic Consulting, Marinus Link, NECA, Neoen, Nexa Advisory, Northern Beaches Council, Powerlink, TasNetworks, and Transgrid.

November 2022. We invited submissions in response to that draft, held a public forum on 17 November 2022 to discuss the amendments, and met with several stakeholders in the weeks before submissions were due. We received 23 submissions from stakeholders in response to our draft guideline.¹² We thank all stakeholders for their constructive engagement over the course of the review.

This explanatory statement and accompanying guideline set out our final amendments to the transmission ring-fencing guideline to ensure it remains fit for purpose and continues to support outcomes that are in the long-term interests of electricity consumers. We consider the changes strike an appropriate balance, having considered the views of all stakeholders.

1.1 Australia's rapidly transforming electricity market

Australia's electricity market is undergoing a fundamental transformation. Historically, the nation's electricity market depended on electricity generated from coal and gas fired power stations. The transmission system we have today was constructed based on the location of coal and gas resources used to fuel electricity generation.

The move to renewable generation sources, including wind and solar, represents a significant transformation that reinforces the role of transmission as the backbone of the national electricity market. This system consists of interconnected networks of high voltage lines and infrastructure that carry electricity from generators to distributors and ultimately to consumers. The shift from fossil fuels to renewables highlights the importance of the transmission network, and its role in connecting these new renewable generation sources into the electricity market.

As the industry transitions, new generators will need to be connected to the transmission network to replace retiring fossil fuel generation.

The location of these new generators will drive significant investment in the transmission network. The best sources of wind and solar are not always located close to the existing electricity network. This means new transmission infrastructure needs to be built, and existing assets strengthened and expanded, to enable new renewable generators to connect.

The investment needed to expand and strengthen the transmission system is significant. The Australian Energy Market Operator (AEMO) predicts that at least 10,000 kilometres of new transmission lines will be required to accommodate the anticipated growth in renewable generation over the next 30 years, at an estimated cost of around \$12.7 billion.¹³ For context, the combined value of the regulatory asset bases of the 7 TNSPs is approximately \$22.8 billion.¹⁴ This will significantly increase TNSPs' revenue and geographic reach.

¹² The following stakeholders made submissions in response to our draft guideline: AEC, AEO, AGL, AusNet, CEFC, CEIG, CitiPower, ECA, ENA, ETU, Flow Power, Iberdrola Australia, Jemena, Marinus Link, Network REZolution, NSW DNSPs, PIAC, Powerlink, Snowy Hydro, Squadron Energy, TasNetworks, Tilt Renewables, and Transgrid.

¹³ AEMO, *2022 Integrated system plan*, June 2022, p. 15.

¹⁴ AER, *State of the energy market 2022*, p. 59.

Building on the introduction of contestable transmission connection services, there is an increasing appetite for allowing third party delivery of transmission services, with the overarching objective of lowering costs for consumers through competitive tensions. For example, some jurisdictions such as NSW are implementing the competitive provision of transmission services through renewable energy zones (REZs). Australia's transition to renewables also increases the importance of essential system services such as system strength, inertia¹⁵ and fast frequency response. In the past, these physical properties were created as a by-product of synchronous fossil fuel and hydro generators and considered essentially 'free' services. In contrast, inverter-based generators – such as wind and solar – generally are not able to readily provide these services.

TNSPs currently have a role to play in planning to provide, and maintaining, a secure and reliable network. This role includes procuring inertia when directed by AEMO¹⁶ and, from 1 December 2022, procuring system strength services.¹⁷ However, a range of reform initiatives are currently under way that may change the regulatory framework for how essential system services are provided, including who is responsible for procuring them (where they are not mandated). In addition, the AEMC has received a rule change request proposing the development of a competitive spot market for inertia. The continued role of TNSPs in this space, and the role of ring-fencing to support newly competitive markets, will need to be carefully considered.

Finally, some TNSPs have deployed assets such as batteries and synchronous condensers that can provide both contestable and network services. The opportunities for using such assets for multiple purposes are expanding, with new markets being implemented for fast frequency response and being considered for other essential system services. While 'value stacking' these services may provide benefits to consumers, the opportunities for cross-subsidisation and discrimination are also increased where TNSPs own, operate and/or lease such assets.

We note the critical role batteries can play in supporting the shift to a generation mix that is dominated by variable renewable generators. AEMO anticipates that by 2050, approximately 46 GW/640 GWh of dispatchable storage capacity will be required.¹⁸ TNSPs will have an important role in connecting utility-scale storage to the transmission network. TNSPs can also support the deployment of storage by purchasing network services from third party providers. However, it is important that TNSPs are not able to distort the development of the utility scale battery market or contestable markets in which the battery may be operated, particularly at a time when many of these new markets (including, for essential system services) are developing and where innovation from new service providers is occurring.

¹⁵ Inertia is a physical resistance that slows the impact of a sudden disturbance to the system. The large rotating mass of a plant's turbine and alternator create this inertia as they rotate in synch with system frequency. A system with low inertia has a higher risk that frequency deviations will cause generators to disconnect from the power system. AER, AER, *State of the energy market 2021*, p. 43.

¹⁶ Under NER 5.20B.4, a TNSP that is an Inertia Service Provider must make inertia network services available if AEMO assesses that there is or is likely to be an inertia shortfall in a particular area.

¹⁷ AEMC, *Efficient management of system strength on the power system*, Rule determination, 21 October 2021.

¹⁸ AEMO, *2022 Integrated system plan*, June 2022, p 50.

Ring-fencing goes hand-in-hand with these regulatory, market and technology developments to support both competitive market outcomes and innovation, and to ensure consumers receive the benefits of these. Ring-fencing is an essential tool for levelling the playing field between TNSPs and third-party providers, helping them compete on an equal footing. The ring-fencing arrangements must therefore evolve to complement, and not obstruct, policy and market developments.

1.2 What is Ring-fencing?

Ring-fencing involves the separation of business activities, costs, revenues, and decision-making for delivering regulated (monopoly) network services, from the delivery of other, unregulated services that are subject to competition. In the context of electricity transmission, ring-fencing refers to the separation of prescribed transmission services provided by a TNSP (e.g., the installation, operation and maintenance of high voltage towers, poles, conductors and associated switching and protective equipment), from the provision of contestable services (such as electricity generation or retail services). The objective of ring-fencing is to provide a regulatory framework that promotes competitive markets, generally by seeking to ensure a level playing field for providers in markets for contestable services while promoting the long-term interests of consumers.

There are two key harms that ring-fencing seeks to prevent:

- **Cross-subsidisation.** This can occur where a TNSP uses revenue that it earns from providing prescribed transmission services to subsidise its activities in other, contestable markets.
- **Discrimination.** This can occur where a TNSP is able to favour itself or an affiliated entity, or discriminates against a competitor, as a result of providing a monopoly service.

Both cross-subsidisation and discrimination can have the effect of undermining or damaging competition and innovation in related contestable markets. In addition, cross-subsidisation can result in consumers paying more than they should for regulated transmission services.

TNSPs are subject to ring-fencing requirements under Chapter 6A of the NER. These rules require the AER to develop ring-fencing guidelines for the accounting and functional separation of TNSPs' prescribed transmission services from other services provided by the TNSP. The rules also provide that the AER's transmission ring-fencing guidelines may include other matters, such as:

- legal separation of the entity through which a TNSP provides network services from any other entity through which it conducts business;
- limitations on the flow of information between the TNSP and any other any other person; and
- limitations on the flow of information between those parts of the TNSP that provide "prescribed" transmission services and parts of its business that provide any other services where there is the potential for a competitive disadvantage.

Finally, the rules allow the AER to add to, or waive, a TNSP's obligations under the ring-fencing guidelines.

1.3 Challenges in assessing the transmission ring-fencing requirements

Each TNSP, and the market within which it operates, is very different from one another. There is considerable disparity among TNSPs, for example in terms of their regulated revenues and the extent of infrastructure they operate and manage.¹⁹

Similarly, while all TNSPs' operations are focused primarily on providing transmission services, some TNSPs provide other electricity and non-electricity services, either themselves or through an affiliated entity. For example, TasNetworks provides both transmission and distribution services in Tasmania from within the same business entity²⁰ while AusNet's affiliate provides distribution services for the eastern half of Victoria. Other TNSPs have separate legal entities that provide contestable services. For example, Transgrid provides contestable connection services through a separate legal entity, Lumea.

In Victoria, where AusNet operates, AEMO is responsible for planning the transmission network and procuring contestable network and non-network services where augmentations are required. AEMO also has a role in facilitating connections to the shared transmission network. This means that AusNet's role and the context within which it operates is different to other jurisdictions.

Jurisdictions are transitioning to renewable energy at different paces and in different ways, impacting on factors such as the expected level of connections that will need to occur.

These differences mean it is challenging to balance the costs and benefits of ring-fencing tools across all TNSPs. For example, while a stronger approach may be justified for one TNSP, the same approach may be less appropriate for another TNSP due to differences in scale, scope or market context. We have approached this issue by adopting positions that are appropriate for the majority of TNSPs, noting that TNSPs will be able to apply for a waiver from several of the obligations where appropriate.

1.4 Alignment with distribution ring-fencing requirements

In reviewing the guideline, the NER require us to consider consistency with the distribution ring-fencing guideline.²¹ However, we are mindful of the differences between distribution and transmission markets. For example:

- In aggregate, DNSPs are considerably larger than TNSPs, both in terms of revenues, operating expenditures and infrastructure. For example, average operating expenditures allowed for DNSPs over the five years ending 30 June 2026 are \$3.2

¹⁹ In terms of gross, regulated revenues in 2020-21, TNSPs ranged from large providers Transgrid, Powerlink, Transgrid and AusNet (\$783, \$781, and \$622 million, respectively), to mid-sized ElectraNet (\$320 million), to quite small TNSPs TasNetworks (\$143 million) and smaller Murraylink and Directlink (about \$15 million each). See *AER, Electricity Networks Performance Reporting*. The transmission networks operated by TNSPs also vary widely, from 63 km (Directlink), the smallest, to 14,534 km (Powerlink), the largest (with the average being about 6,200 km). AER, *State of the Energy Market 2022*, p. 61 Figure 3.2.

²⁰ TasNetworks currently has a waiver from the transmission ring-fencing guideline to enable this to occur.

²¹ NER, 6A.21.2(c)(2).

billion. Over the same period, operating expenditures for TNSPs averaged \$812 million – or a little less than one-quarter of the DNSPs' expenditures.²²

- DNSPs serve nearly 11 million connections via 755,429 km of lines, most of which are residential and small business customers. In contrast, TNSPs directly serve a few hundred customers, most of whom are large and well-resourced, over 43,411 km of high voltage lines.²³

Despite these differences, there are areas where we consider alignment between the two guidelines to be appropriate, particularly where divergence in policy could distort market outcomes.

We also note that the distinction between distribution and transmission is less sharp today than it was previously. Some DNSPs – such as Ausgrid – provide services via 'dual function assets.' Dual function assets operate at distribution level voltages (between 66 kilovolts (kV) and 220 kV), meaning services provided by these assets might be prescribed transmission services but for the fact that the NER deems them to be distribution services.²⁴ Similarly, in Victoria, AusNet provides transmission services at voltages typically associated with distribution system voltages (33 kV and possibly lower). As such, we consider aligning the guidelines where appropriate is less likely to result in loopholes or distortions.

1.5 Ring-fencing in Renewable Energy Zones

Renewable Energy Zones (REZs) are being developed in New South Wales, Victoria and Queensland, with the NSW framework most progressed.²⁵ The purpose of REZs is to cluster new wind and solar projects in renewable hubs so that transmission investment can be made efficiently – in terms of time and cost. Clustering renewable generation in REZs reduces the amount of transmission investment that would otherwise be needed if new renewable power sources are widely dispersed.

The role of ring-fencing within REZs will likely be determined by individual state governments and will depend on the framework they adopt. In NSW, the Government has appointed the AER as a regulator to oversee development of the state's REZs and conferred a number of functions on us under the *Electricity Infrastructure Investment Act 2020* (NSW). These functions include making five-year revenue determinations for authorised network operators, determinations for contributions from the state's DNSPs, and developing a risk management framework.²⁶ In addition, the AER will be developing ring-fencing guidelines that are specific to network operators who operate in NSW's REZs. Our transmission and distribution ring-fencing guidelines will likely inform development of similar guidelines for NSW REZs.

1.6 Structure of this explanatory statement

The remainder of this explanatory statement is structured as follows:

²² See AER, *State of the energy market 2022*, p 86 Figure 3.5.

²³ See AER, *State of the energy market 2022*, p 61 Figures 3.2 and 3.3.

²⁴ NER, 6.24.

²⁵ For a discussion of REZs, see AER, *State of the Energy Market Report*, 2021, p 58.

²⁶ See AER, *NSW Renewable energy zones* and NSW Government, *Electricity-infrastructure-roadmap*.

- Chapter 2 sets out how we have amended the ring-fencing obligations to address issues in relation to cross-subsidisation.
- Chapter 3 explains the amended mix of tools we have adopted to address discriminatory behaviour.
- Chapter 4 sets out the obligations in relation to compliance and reporting that we have refined.
- Chapter 5 addresses our amendments relating to the detailed processes related to waivers in the final guideline.
- Chapter 6 explains the transitional arrangements we have adopted.
- Chapter 7 addresses issues related to changes to the NER and national electricity regulations with respect to our transmission ring-fencing head of power and attaching civil penalties to non-compliance with the guideline.

Our final guideline (Version 4) should be read in conjunction with this explanatory statement. To assist stakeholders, a list of guideline clauses that we have amended or deleted, together with new clauses, is provided in Appendix A.

2 Preventing cross-subsidies

This Chapter explains the content and rationale for our amendments to the previous guideline that further reduce the risk of cross-subsidisation by a TNSP. Cross-subsidisation occurs where TNSPs use revenue earned through providing prescribed transmission services to subsidise its activities in other markets. This can cause harms in two ways. First, consumers pay more than they should for regulated services. Second, TNSPs can gain an unfair advantage in a contestable market by recovering some of their costs from consumers of regulated services, allowing them to undercut their competitors in the contestable market for reasons other than cost efficiencies.

There are two tools we can use to address the risk of cross-subsidisation:

- legal separation; and
- account separation and cost allocation.

The revised guideline strengthens the application of both of these tools, consistent with the draft guideline, for the reasons discussed below.

2.1 Legal separation

Legal separation provides transparency in the way costs are allocated between different services. Legal separation goes further than separate accounting and cost allocation measures which, alone, are not sufficient to prevent cross-subsidisation. Legal separation gives an added layer of transparency and assurance about separation arrangements, including the ways costs are allocated, increasing the robustness of ring-fencing arrangements.²⁷ For example, each legal entity is required to comply with the *Corporations Act 2001* (Cth) and the relevant requirements for the preparation of financial statements and company accounts.

Legal separation also supports ring-fencing provisions that aim to prevent TNSPs from discriminating against competitors, discussed in Chapter 3, by reinforcing the requirements for the TNSP and its affiliates to deal with each other at arms-length. For example, the TNSP must enter into separate transactions with its affiliates and we may request details of those transactions.

The previous guideline prohibited TNSPs from carrying on a related business, being the activities of generation, distribution, and retail electricity supply. However, TNSPs were permitted to carry on these activities if the total revenue from them did not exceed 5% of their total annual revenue. There was no restriction on TNSPs providing other types of services from the same legal entity.

²⁷ The NER allows a ring-fencing guideline to include provisions defining the need for and extent of "legal separation of the entity through which a TNSP provides network services from any other entity through which it conducts its business". See NER 6A.21.2(b)(1)(i).

The draft guideline proposed:

- extending TNSPs' legal separation obligations to capture all non-transmission contestable electricity services and non-electricity services (with some exceptions), rather than just generation, distribution and retail services;
- prohibiting TNSPs from leasing excess capacity from batteries without a waiver from the AER; and
- removing the 5% revenue cap exception to the current guideline's legal separation obligation but giving TNSPs the opportunity to apply for a waiver from this obligation.

2.1.1 Expanded scope of legal separation

2.1.1.1 Submissions

Market participants other than TNSPs generally supported extending the scope of legal separation to capture additional, non-transmission services. The NSW DNSPs, AGL and CitiPower stated their support.²⁸

AGL noted that while the costs of expanded legal separation will be passed to consumers, it considers that those costs 'will be minor compared to the efficiency benefits obtained by ensuring that investment in contestable electricity services and non-electricity services will be market driven'.²⁹ CitiPower considered that legal separation is an effective tool to ensure "greater accounting cost allocation clarity".³⁰

The NSW DNSPs specifically supported the exclusion of contestable distribution services, and CitiPower noted that TNSPs should not be permitted to offer contestable distribution services without functional separation.

Several other stakeholders, while not specifically supporting the proposed amendments to the legal separation requirements, generally supported strengthening the previous guideline. This included Powerlink, AEO, CEIG, Flow Power, Iberdrola and Snowy Hydro.³¹

AusNet did not specifically object to the proposed legal separation requirements, but noted the obligation is not without significant cost or time implications.³²

²⁸ See NSW DNSPs, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 7; AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 1; CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

²⁹ AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 1

³⁰ CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

³¹ See Powerlink, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 20 December 2022, p. 1; AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1; CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 1; Flow Power, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 13 December 2022, p. 2; Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; and Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1.

³² AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 7.

ENA considered there is limited basis for additional legal separation due to the costs of implementation and limited benefits to the proposed amendments, beyond cost allocation and accounting separation requirements.³³ However, ENA specifically recommended that legal separation requirements not be implemented for:

- Non-electricity services. ENA submitted that: (1) there is no role for the ring-fencing guideline with respect to competitive market outcomes for non-electricity services; and (2) there is no ability for TNSPs to discriminate in the provision of services in these unrelated markets.
- Distribution services. ENA considered that there is no justification for the transmission arrangements and distribution arrangements to differ, and that competition is reduced if TNSPs cannot also offer contestable distribution services. ENA also noted that cost allocation requirements will ensure there is no cross-subsidy between regulated and unregulated services.

Marinus Link Pty Ltd (Marinus) supported ENA's submission, noting it does not consider the case for legal separation has been made.³⁴ The Electrical Trades Union (ETU) opposed not only expanded legal separation obligations, but the ring-fencing framework in general and stated it should be abolished.³⁵

Transgrid considered there are two services that would benefit from further clarity and that these services should be permitted to be provided within the same legal entity as the TNSP.³⁶

- Consulting services, which TNSPs are increasingly being asked to provide by Governments and market participants such as DNSPs due to their unique expertise
- Network support services, where an asset or service is required to be provided for network support or to meet a reliability obligation. This includes, for example, Transgrid's Broken Hill generators. Transgrid further noted that, in the event the guideline requires a waiver for such services, reassurance in the Explanatory Statement that a waiver would be granted in these circumstances would be helpful to provide certainty.

Transgrid also requested clarification on TNSPs' ability to provide telecommunications services, which go beyond the leasing of poles and wires for this purpose.³⁷ Transgrid considered that TNSPs should be able to continue to provide telecommunications services

³³ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 14.

³⁴ Marinus, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1.

³⁵ ETU, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1. ETU noted that its submission represented its longstanding position that energy ring-fencing guidelines (both transmission and distribution) are a costly imposition that have failed to deliver any real benefit to Consumers and have served to both hinder workers' ability to negotiate fair pay and conditions, but also to carry out their role in maintaining the safety and operability of Australia's energy networks.

³⁶ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2.

³⁷ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 6-7.

within the same legal entity on the basis that these services provide benefits to communities and businesses, including in regional NSW and in the event of extreme weather events. In addition, Transgrid suggested that, if the guideline requires expanded legal separation, then existing arrangements should be grandfathered.

Finally, Transgrid also indicated that there are TNSPs such as its affiliated entity, Lumea, who are registered as a TNSP only for contestable services, and do not provide prescribed transmission services. Transgrid considered that the legal separation obligation under clause 3.1(b) of the draft guideline could apply to these entities and prevent them from providing other services, inconsistent with the AER's policy intent which is to prevent cross-subsidisation of "other services" by prescribed services.³⁸

2.1.1.2 Final position

Our final position is the same as proposed in our draft guideline. That is, the guideline permits TNSPs to provide transmission services and regulated distribution services but does not permit them to provide other services within the same legal entity.³⁹ The guideline does not prevent an affiliated entity of a TNSP from providing other services, subject to certain constraints.⁴⁰ This is broadly consistent with the approach taken for distribution.

As noted in the explanatory statement accompanying the draft guideline:

- TNSPs will continue to be able to provide all transmission services from within the same legal entity, including non-regulated transmission connections.
- Our intention is that network services being provided in respect of a REZ will fall within the definition of a transmission service and therefore can be provided within the same legal entity. In respect of NSW, TNSPs will also need to comply with the bespoke ring-fencing guidelines being developed for network services provided within a NSW REZ.
- The strengthened legal separation requirements will not impact any TNSP that only provides transmission services.⁴¹

ENA also requested clarification that the obligation for legal separation would not prevent resources being shared between the TNSP and related entities, such as staff sharing (where this is consistent with the functional separation obligations of the guideline), financial guarantees, and finance being raised at the group level.⁴² In response, we note that the legal separation requirements of the guideline do not restrict reasonable resource-sharing occurring within the corporate group of a TNSP such as staff sharing, provision of security and debt-raising activities, so long as staff separation and cost allocation obligations are met.

³⁸ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

³⁹ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.1(b).

⁴⁰ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.1(d)(i).

⁴¹ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory statement*, November 2022, p. 13.

⁴² ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 14.

We consider that the expanded legal separation obligations represent a targeted and proportionate approach to address concerns about the potential for cross-subsidisation between revenue obtained from providing prescribed transmission services and the provision of other services.

In response to comments that there is insufficient evidence to justify expanding the existing legal separation requirements, we note that the primary purpose of ring-fencing is to encourage effective competition by curbing the potential for a monopoly business to take advantage of its market power in contestable markets. Even the potential for cross-subsidisation may deter competitors' market entry, and consequently the development of competitive markets, unless potential competitors are confident that appropriate safeguards are in place to ensure a level playing field supporting their investment. For this reason, we consider even the potential use of market power to be sufficient justification to impose ring-fencing requirements, where we consider the benefits of doing so outweigh the costs.

As highlighted by the NEM post-2025 reforms considered by the Energy Security Board and AEMC, and being implemented by AEMO, significant changes are required to electricity market frameworks to prepare for a system that is dominated by variable renewable energy. In Chapter 1 of this explanatory statement, we discussed many of the changes and challenges posed by Australia's transition to this system, and the role ring-fencing measures play in helping to deliver this transition, including, the development of new contestable markets and the expanding role of TNSPs.

We also note that services are no longer tied as closely to specific assets as they were in the past, meaning a single asset can be used to provide multiple services. Where TNSPs are investing in such assets to provide prescribed transmission services, this increases the importance of regulatory instruments, including ring-fencing, to ensure that cross-subsidisation is not distorting competitive market outcomes and that customers benefit from any potential efficiencies that can be gained from offering multiple services.

We consider that legal separation of non-transmission services represents an appropriate control to mitigate against the risk of cross-subsidisation. Accounting separation and cost allocation methodologies assist in providing transparency about how TNSPs are assigning costs. This goes some way to preventing cross-subsidisation. However, we consider these accounting measures are not sufficient in themselves to address concerns about cross-subsidies. Legal separation provides additional rigour by improving transparency into how costs are allocated to the TNSP, before the cost allocation methodology is applied to allocate costs between transmission services.

Improving the transparency of cost allocation through legal separation will provide greater certainty and confidence for other market participants that they are competing with TNSPs on a level playing field. As noted above, while the main purpose of legal separation is to address concerns about cross-subsidisation, it also has the added benefit of reinforcing non-discrimination requirements for the TNSP and affiliates to operate at arms-length. Addressing cross-subsidisation also removes any unfair advantage to the TNSP in contestable markets due to cross-subsidies.

We do not agree with ETU's view that ring-fencing guidelines generally should be abolished. Ring-fencing provides an important mechanism for facilitating greater competition in new and existing markets for contestable services, to give consumers access to more services at

efficient prices, delivering better consumer outcomes. As discussed above, this is particularly important during the current energy transition, where there is extensive innovation underway.

In the explanatory statement accompanying the draft guideline we asked TNSPs whether they are currently providing any electricity services that do not fit the definition of a transmission service, but which could not practically be provided by any other party. Our query was made in response to concerns raised that TNSPs may no longer operate in such markets if legal separation is required.⁴³ The only response we received to this question was from Transgrid in relation to consultancy services,⁴⁴ which is discussed further below.

The remainder of this section addresses specific issues raised by stakeholders.

Non-electricity services

We agree there is limited scope for TNSPs to discriminate in favour of itself or an affiliate in providing non-electricity services, including telecommunications services. However, we remain concerned about the ability of TNSPs to use revenue received from providing prescribed transmission services to cross-subsidise the provision of other services. While ring-fencing does not have a role in respect of these other markets, the potential use of revenue from prescribed transmission services for purposes other than the provision of prescribed transmission services is not in the long-term interests of consumers of electricity. Further, this approach is consistent with our approach to distribution, and we have not been presented with compelling evidence to suggest this approach is not also appropriate in transmission.

In respect of telecommunications services, we note that leasing poles and wires to mount telecommunications cables may benefit consumers where it is in accordance with the shared asset rules and guideline, by reducing the cost of providing prescribed transmission services. However, these shared asset activities are different to the provision of telecommunications services generally, particularly where such services are not provided using transmission network infrastructure. As for other non-electricity services, we remain concerned about the potential use of revenue from prescribed transmission services being used to fund other services, which we do not consider is consistent with the national electricity objective. For this reason, we do not consider telecommunications services should generally be exempt from the legal separation requirements.

However, we note that in some instances there may be wider benefits from permitting a TNSP to provide telecommunications services, or where the costs to electricity customers from divesting these services may outweigh the benefits. These must be assessed on a case-by-case basis and, as such, we consider the waiver process to be the appropriate mechanism for considering whether a TNSP should be able to provide these services.

⁴³ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, p. 15.

⁴⁴ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 9.

Distribution services

We noted in the explanatory statement that accompanied the draft guideline that the ability for TNSPs to provide contestable distribution services is a nuanced issue, and that we welcomed further feedback from stakeholders on whether the draft guideline appropriately balances the various potential costs and benefits of allowing TNSPs to provide distribution services, as well as any additional evidence that would help inform our assessment.

Overall, we are not persuaded that TNSPs should be able to offer contestable distribution services. Contrary to the ENA's view, we consider there is justification to treat distribution and transmission services differently at this time for two reasons:

- as discussed in Chapter 3, we are not imposing the same degree of functional separation on TNSPs as for DNSPs, meaning they would not be competing on a level playing field; and
- while the distribution ring-fencing guideline permits DNSPs to provide transmission services within the same legal entity, the associated explanatory statement indicates this was primarily done to recognise that some DNSPs own both distribution and transmission assets to provide regulated network services, rather than enabling DNSPs to provide contestable transmission services.

In addition:

- we hold concerns about TNSPs generally being able to provide unregulated, non-transmission services due to the risk of cross-subsidisation; and
- we have not been provided with any evidence supporting a need for TNSPs to be able to provide distribution services, other than for TasNetworks.

For these reasons, the guideline permits TNSPs to provide regulated distribution services (that is, direct control services) within the same legal entity, but not contestable distribution services on their own. Where a TNSP is also a regulated DNSP providing direct control services, the TNSP/DNSP is also able to provide any other distribution services, so long as they are complying with the distribution ring-fencing guideline.⁴⁵ If a TNSP is not a regulated DNSP under Chapter 6 of the NER (that is, it does not provide direct control services), but wishes to provide contestable distribution services, then it will need to seek a waiver from the legal separation requirements, to ensure that the risks of cross-subsidisation are appropriately mitigated.

In practice, this approach means that TasNetworks no longer requires a waiver from the transmission ring-fencing guideline to continue to provide distribution services within the same legal entity as it is a DNSP who provides direct control services, and therefore, is required to comply with the distribution ring-fencing guideline with respect to any distribution services it provides.

We consider this approach is in keeping with the original policy intent of the distribution ring-fencing guideline. It strikes an appropriate balance between reducing administrative burden

⁴⁵ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.1(d)(ii).

for those TNSPs that are already subject to appropriate regulatory oversight and preventing potential harms associated with cross-subsidisation.

Consulting services

Under the guideline, consultancy services are permitted where they fall within the definition of a transmission services – either prescribed, negotiated or non-regulated. Consultancy services that do not meet the definition of a transmission service would not be permitted within the same legal entity as the TNSP, such as consultancy services for the provision of a private microgrid. Therefore, the ability of a TNSP to provide consultancy services within the same legal entity will need to be considered by TNSPs on a case-by-case basis to ascertain whether the service falls within the definition of transmission service.

While there may be instances where it would be in the long-term interests of electricity consumers for a TNSP to provide consultancy services that are not transmission services, this will not always be the case. As such, we consider a waiver approach is appropriate to enable specific scenarios to be evaluated on a case-by-case basis.

Network support services

In the explanatory statement accompanying the draft guideline we noted that one implication of removing the materiality threshold and replacing it with a waiver framework (as discussed further below) is that Transgrid would need to apply for a waiver for its Broken Hill generators. This is because, when the generators are running, electricity is delivered to the wholesale electricity market and thus they are providing a generation service rather than a network service, although the generators only operate in the event of a transmission outage.

We went on to note that we consider it is unlikely to be in consumers' best interests to require Transgrid to legally separate these services given the role they play in providing back-up supply to Broken Hill, and encouraged Transgrid to apply for a waiver from the final guideline. We also noted, for clarity, that stakeholders should not consider this position as a precedent for our treatment of future waiver requests.

We continue to consider this approach is appropriate. Requiring a waiver provides the AER and other market participants with confidence that the provision of services other than transmission services by a TNSP will not adversely impact the competitiveness of those markets. It also provides for appropriate regulatory oversight and reporting requirements. We do not consider that generally permitting TNSPs to provide such services – even when in connection with a transmission service – is in the long-term interests of electricity consumers for the same reasons why ring-fencing is required, particularly in the case of generation.

However, we reiterate that while we cannot pre-empt the outcome of a waiver request, we consider it unlikely that requiring Transgrid to legally separate the generation services provided by its existing Broken Hill generators would be in the interests of consumers. As a general observation, material issues that should be outlined in a waiver application could include whether:

- the service is required to meet a regulatory or legislative obligation, including to meet reliability standards;
- providing the service is the most efficient option for meeting the obligation; and
- the related market will not be adversely impacted as a result of either actual or potential discriminatory behaviour.

TNSPs who do not provide prescribed transmission services

In response to Transgrid's concern that non-regulated TNSPs (i.e., those that do not provide prescribed transmission services) may have been caught by the draft guideline's legal separation requirements, we note that this is not the AER's policy intent. It is also not an outcome that would be consistent with the clause 6A.21.2(a) of the NER – which specifically focusses on the ring-fencing of prescribed transmission services from other services. For the avoidance of doubt, we have included in the Background section to the final guideline (clause 1.1.1) a clarification that the guideline only binds TNSPs who provide prescribed transmission services. We consider this is sufficient to remove any ambiguity around the guideline's application to TNSPs who are not regulated under Chapter 6A.

2.1.2 Batteries and synchronous condensers**2.1.2.1 Submissions**

AEC, AGL, CEIG, Snowy Hydro, and Tilt Renewables all supported our proposed approach to prohibit the leasing of excess battery capacity by TNSPs (unless it is for the sole purpose of providing network support services to the TNSP) without a waiver.⁴⁶ Squadron Energy also supported the 'prohibit and waive' approach, but noted that the AER should closely monitor the market and potentially strengthen the restrictions to ensure that arrangements governing the installation and operation of TNSP-owned batteries, and battery services procured by TNSPs from a third party, are open and transparent.⁴⁷

Consumer groups considered that a waiver approach is an appropriate short-term solution, but that further evidence and information is required to understand the appropriate role of TNSPs in the ownership and operation of batteries. For example, ECA supported our proposed approach on the basis that a number of aspects of the use of batteries are still unclear, including whether network service providers are best placed in the long-term to develop, own, and operate batteries and other storage devices.⁴⁸ ECA recommended:

- the AER should take into account information and demonstrated evidence that batteries will be located and sized in a way that adds value to customers when considering whether to grant a TNSP a waiver; and
- as a waiver condition, TNSPs must update this information annually.

PIAC raised concerns about the efficiency and practicalities of artificially separating ownership and control of batteries.⁴⁹

⁴⁶ See AEC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 2; CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 3; Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; and Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

⁴⁷ Squadron Energy, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2.

⁴⁸ ECA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 1.

⁴⁹ PIAC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 19 December 2022, pp. 1-2.

ENA considered the waiver requirement for leasing batteries is overly onerous, does not align with the practicalities of negotiating and investing in storage, and will create unnecessary barriers to TNSPs efficiently deploying batteries. ENA instead recommended a 'report and comply' approach, which it considered would enhance regulatory certainty. As discussed below, Marinus and Network REZolution had concerns with the waiver process more generally.

AGL considered that TNSP operation and leasing of synchronous condensers should be treated the same way as batteries. It raised concerns that TNSPs will be using synchronous condensers to provide similar services to batteries and generators that could impact contestable markets for these services.⁵⁰

2.1.2.2 Final position

For reasons discussed in Chapter 5, we consider the approach proposed in the draft guideline strikes the right balance. As such, the guideline prohibits TNSPs from leasing spare capacity on batteries without obtaining a waiver.⁵¹ We consider this approach provides an appropriate balance between encouraging competition in the battery services market, while allowing TNSPs to apply for a waiver and have their proposals considered on a case-by-case basis.

We continue to hold the view that while there is a possibility of TNSPs leasing spare capacity on synchronous condensers to provide contestable electricity services, in practice the likelihood of this occurring is small. Synchronous condensers are more limited in the services that they can provide compared to batteries, and as such there is likely to be less value to be extracted by TNSPs in leasing them to third parties. Further, some of the services that could be offered via synchronous condensers are locational-specific, limiting the potential opportunities to provide these services. Finally, there is still significant uncertainty as to how the markets for this more limited range of services will develop. The combination of these factors suggests there is limited need to restrict TNSPs' ability to lease synchronous condensers at this current time.

As such, the final guideline does not place any restrictions on leasing synchronous condensers. However, if contestable markets are to develop for which synchronous condensers could be used, we may revisit this decision (noting the AEMC is currently looking to introduce such a market)⁵². We also note that if this decision was reviewed in future, grandfathering existing services may be appropriate where TNSPs have already invested in synchronous condensers in good faith to meet existing regulatory obligations.

2.1.3 Defining categories of transmission services

2.1.3.1 Submissions

AEO and CitiPower considered that greater guidance is required with respect to which services are prescribed, negotiated or non-regulated transmission services. They considered

⁵⁰ AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 2.

⁵¹ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.1(c).

⁵² See AEMC, *Operational security mechanism, Draft rule determination*, 21 September 2022.

this could take the form of a service classification guideline, and that additional transparency about service classification is required for users of transmission services.⁵³

2.1.3.2 Final position

Developing a service classification guideline is out of scope for this review. We also note that, unlike for distribution, we do not have a role in classifying services for transmission.

2.1.4 Replacement of materiality threshold with a waiver framework

2.1.4.1 Submissions

AEC, AGL and Snowy Hydro explicitly supported a waiver approach to replace the previous guideline's exemption from its legal separation obligations, which allowed TNSPs to engage in generation, distribution, and retail electricity supply activities, so long as the revenue from such activities did not exceed a cap of 5% of their total annual revenue.⁵⁴

PIAC supported waivers as an interim measure while the industry better understands the benefits for consumers and the role of transmission in an increasingly complex energy system.⁵⁵ PIAC considered that the distinction between regulated and contestable services is outdated and is resulting in increasingly complex regulatory solutions. PIAC suggested there are likely to be inefficiencies in separating ownership and operation between multiple parties, particularly for batteries, which is unlikely to result in optimal outcomes for consumers.

Marinus considered the approach of the previous guideline, which permits contestable activities to be undertaken by a TNSP up to a 5% revenue cap, to be a more proportionate and balanced approach than requiring waivers.⁵⁶ Network REZolution similarly noted that a waiver process increases regulatory and investment uncertainty.⁵⁷

2.1.4.2 Final position

We consider permitting TNSPs to offer non-transmission services up to a cap based on a percentage of revenue is no longer fit for purpose and that a waiver approach is a more appropriate tool. In summary, this is because:

- TNSPs' annual revenue, and so the value of the cap, is expected to increase significantly over coming years.
- There is a risk that TNSPs could breach their cap since revenues change over time.

⁵³ See AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3; and CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

⁵⁴ See AEC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1; AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 1; and Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2.

⁵⁵ PIAC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 19 December 2022, pp. 1-2.

⁵⁶ Marinus, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

⁵⁷ Network REZolution, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

- There is no oversight of TNSP activities within the revenue cap, or process to monitor whether the cap is being complied with.
- Waivers provide greater transparency over the services being provided and allow conditions, such as reporting, to be attached.
- Other than Transgrid, it appears that no TNSP is currently using the cap.
- This approach is consistent with distribution and we have not been presented with any compelling evidence to suggest transmission should be treated differently.

We agree with PIAC's comments that the industry needs to gain a better understanding of the benefits for consumers and the role of transmission in an increasingly complex energy system. We consider that a waiver approach will provide important information in this respect, due to the reporting requirements that will likely be imposed on TNSPs when a waiver is granted. As such, the guideline permits TNSPs to seek a waiver from legal separation requirements.⁵⁸ Further discussion on this point was set out in the explanatory statement accompanying the draft guideline last year.

2.1.5 Other exceptions to the legal separation requirements

In addition to the ability for TNSPs to seek a waiver from having to comply with the legal separation requirements, the guideline carves out a number of exceptions from the obligation to legally separate transmission and non-transmission services, consistent with distribution. These carve-outs include:⁵⁹

- Leasing assets to a third party, with the exception of batteries;
- providing corporate services (such as general administration, accounting, payroll, human resources, legal or regulatory, or information technology support services) to a related electricity service provider or other legal entity;⁶⁰
- providing staff to a related electricity service provider or other legal entity where doing so is not prohibited under the guideline;
- providing electricity information to another legal entity where doing so is not prohibited under the guideline;
- providing assistance to the extent necessary to respond to an event (such as an emergency) that is beyond a Network Service Provider's reasonable control; and
- providing any other services authorised in accordance with the waiver process set out in the guideline.

No submissions were received on these exceptions and so the final guideline is consistent with the draft guideline.

⁵⁸ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.1(f).

⁵⁹ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.1(e).

⁶⁰ We discuss 'related electricity service provider' and our proposal to adopt a definition of that term in more detail in Chapter 3 of this explanatory statement.

2.2 Accounting separation and cost allocation

Accounting separation and cost allocation help provide transparency in the way in which TNSPs are allocating costs between different services. Combined with a requirement for an independent audit, these tools help provide confidence that TNSPs are appropriately allocating costs according to the services for which they are incurred, including between a TNSP and its affiliates.

There is currently a gap in the cost allocation requirements, whereby TNSPs are only required to allocate transmission costs according to their cost allocation methodologies. There is no existing reporting mechanism or enforceable obligation that requires correct cost allocation between transmission and non-transmission services.

The draft guideline proposed strengthening both the separate accounting obligations and the cost allocation guidelines.

2.2.1 Submissions

No stakeholder opposed the proposed amendments. AEC, AGL and Snowy Hydro explicitly stated their support.⁶¹ AEO and CitiPower also stated their support for strengthened accounting separation and cost allocation, but noted concern that there is still the risk of contestable transmission services being cross-subsidised by regulated transmission services where they are provided from the same entity.⁶²

AusNet did not raise any issues with the proposed approach, but noted consideration could be given to aligning reporting with the end of March annual RIN reporting requirements.⁶³

ENA supported the proposed approach, noting the requirements are consistent with how they currently operate.⁶⁴

2.2.2 Final position

Our final position is the same as our draft position. That is, the guideline:

- requires TNSPs to establish and maintain appropriate accounting procedures to ensure they can show the extent and nature of transactions between themselves and their affiliated entities.⁶⁵ This approach strengthens the previous guideline, which simply required a separate set of accounts for the provision of prescribed transmission services and a separate amalgamated set of accounts for the entire business.

⁶¹ See AEC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 2; and Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

⁶² AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

⁶³ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 8.

⁶⁴ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

⁶⁵ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.2.1(a).

- explicitly prevents TNSPs from allocating or attributing costs to transmission services that properly relate to other services. The allocation attribution must be consistent with the cost allocation principles in the national electricity rules (cl. 6A.19.2).⁶⁶

The final guideline does not provide for a waiver from these obligations, providing certainty and confidence for stakeholders operating in competitive markets and ensuring that consumers do not pay for the provision of contestable services.⁶⁷

In response to AEO and CitiPower's concerns, we note that the existing TNSP cost allocation methodologies (CAM) are already required to detail the principles and policies for attributing costs directly to, or allocating costs between or within, categories of transmission services. The CAMs must comply with the AER's Cost Allocation Guidelines⁶⁸ and are approved by the AER. As such, we consider the risk of cross-subsidisation between prescribed transmission services and contestable (non-regulated) transmission services is already sufficiently addressed under the NER.

⁶⁶ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, March 2023, cl. 3.2.2(a)-(c).

⁶⁷ AER, *Ring-fencing Electricity Transmission Guideline (Version 4)*, cl. 3.2.1(b) and 3.2.2(d).

⁶⁸ AER, *Electricity transmission network service providers, Cost allocation guidelines*, September 2007. See, in particular, clause 2.2.

3 Preventing discrimination

This Chapter explains the content and rationale for our amendments to the guideline that further reduce the risk of discrimination by a TNSP. Discrimination can occur where a TNSP is able to favour itself or an affiliate to the detriment of a competitor to gain an advantage in a contestable market. For example, this could be through the provision of favourable (or unfavourable) terms and conditions or taking advantage of the use of confidential information gained in providing regulated services. Where such behaviour reduces competition in a market, consumers will be harmed through higher costs and less innovation.

There are four tools we can use to reduce the risk of a TNSP discriminating in favour of its own, or an affiliate's, business, to the disadvantage of competitors:

- a general obligation not to discriminate;
- functional separation of offices, staff, branding and cross promotions;
- restrictions on sharing of confidential information and information sharing obligations to reduce information asymmetries; and
- application of non-discrimination measures to third party service providers.

The final guideline utilises some of these tools, consistent with the draft guideline, for the reasons discussed below.

3.1 Strengthening the obligation not to discriminate

In our explanatory statement to the draft guideline, we noted that the definition of discrimination in the current transmission guideline provided less guidance compared to the distribution guideline.

Accordingly, we proposed to add clause 4.1 to the guideline, which was intended to replicate the same form of non-discrimination obligations that apply to DNSPs under the distribution ring-fencing guideline. Consistent with the distribution ring-fencing guideline, we proposed in clause 4.1 to:

- Extend the non-discrimination obligation to mitigate the risk of discriminatory conduct by a TNSP in respect of any 'related electricity service provider' (RESP) or any customer of a RESP.
- Define RESP to include not only a TNSP's affiliate but also that part of a TNSP that provide contestable electricity services, including non-regulated transmission services. We considered that this would provide a clearer, more targeted approach to achieving our regulatory objectives.
- Include a non-exhaustive list of instances where the general obligation not to discriminate applies in order to provide more clarity about the obligation's application.
- Provided guidance regarding our expectations with respect to what dealing at arms-length with a RESP entails and clarified that a TNSP must avoid providing information it has obtained from a competitor of its RESP to that RESP.

3.1.1 Submissions

Many submissions supported the proposed obligation not to discriminate. AGL agreed that competition law alone is not adequate, and therefore that the guideline should address discriminatory behaviour.⁶⁹ AEO supported the broadened obligation but questioned how it would be enforced in practice without functional separation.⁷⁰ CEIG supported the introduction of the concept of the RESP.⁷¹ Tilt Renewables supported replicating the requirements for distribution.⁷² For its part, CEFC supported our taking measures to enable transparency and competition, including enhancing the guideline's non-discrimination provisions.⁷³ CitiPower indicated it supported amending the guideline to replicate the non-discrimination provisions in the distribution ring-fencing guideline.⁷⁴

We received submissions from ENA and AusNet expressing concerns with several aspects of clause 4.1 of the draft guideline.

While ENA 'supports the intention of provisions associated with non-discrimination,' it submitted that the guideline's provisions – drawn from our distribution ring-fencing guideline – are complex and lack clarity. ENA considered this makes it difficult for TNSPs to get a practical understanding of the full range of behaviours that could breach the guideline.⁷⁵ ENA recommended that, at a minimum, the explanatory statement to the final guideline should set out the intent behind the drafting of all the clauses relating to non-discrimination, including a detailed description of the types of actions that would constitute discrimination and those that would not.⁷⁶

ENA also indicated that it has 'particular concerns with clause 4.1(b)(ii)' of the draft guideline and suggested that this clause appears to extend non-discrimination obligations beyond what is appropriate, or permitted, under the NER.⁷⁷

AusNet agreed with ENA's views, and also raised concerns about the inclusion of non-regulated transmission services in the obligation not to discriminate. AusNet's concern stems from the contestability framework that applies to transmission connection arrangements in Victoria. According to AusNet, many of the transmission services that are regulated in other NEM jurisdictions (i.e., they are either prescribed or negotiated transmission services) are non-regulated transmission services in Victoria. Such non-regulated transmission services

⁶⁹ AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 2.

⁷⁰ AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

⁷¹ CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 1.

⁷² Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 4.

⁷³ CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, p. 2.

⁷⁴ CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

⁷⁵ ENA *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 11.

⁷⁶ ENA *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 12.

⁷⁷ ENA *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 12.

are subject to the contestability regime under Chapter 8 of the NER and AEMO's declared functions. AusNet suggested that non-regulated transmission services should not be included within the scope of clause 4.1(b)ii of the draft guideline.⁷⁸

3.1.2 Final position

Our final position retains the amendments that clarify the definition of discrimination in the context of prescribed transmission services. However, we have removed the obligation included in clause 4.1(b)ii of the draft guideline, which had proposed to extend non-discrimination obligations to 'contestable services provided by any other legal entity'.

We acknowledge the concerns raised by the ENA and AusNet that this clause of the draft guideline was unclear and was capable of being read in a manner which exceeded the limits of our transmission ring-fencing powers under the NER.

If the ring-fencing framework were to be expanded to extend to negotiated transmission services, as discussed in Chapter 7, we may re-visit this provision in order to reconsider the nature of this obligation, as well as re-consider the approach to other provisions.

Having regard to the concerns referred to above, the AER considers that it is appropriate to remove subclause (b)ii. In particular, the AER considers that the remaining subclause (b)i is sufficiently broad to capture any kind of discriminatory conduct which arises in connection with prescribed transmission services. This prohibition not only prevents discriminatory conduct of the TNSP in providing prescribed transmission services to the market, but any other discriminatory conduct favouring a RESP which is related to prescribed transmission services generally.

For example, and without limitation, clause 4.1(b) is targeted at preventing a TNSP engaging in conduct in connection with providing prescribed transmission services that would:

- give its RESP a financial benefit that is not available to its competitors;
- give customers of its RESP a financial or non-financial benefit that would not be available to them if they were customers of a competitor of the RESP; or
- give an advantage to the TNSP's RESP in competing to provide contestable electricity services.

The final guideline also includes a non-exhaustive list of instances where the general obligations not to discriminate may apply. These include that a TNSP be required to:

- deal with a RESP as if it were not a RESP;
- deal with a RESP and its competitors in the same way;
- provide the same quality, reliability and timeliness of service to a RESP and its competitors; and

⁷⁸ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 6-7. This amendment, AusNet suggested, would also address the 'anomaly' in clause 4.3 with respect to functional separation of marketing staff (discussed below). AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 7.

- avoid providing information to a RESP that the TNSP has obtained through its dealings with a competitor of that provider that may advantage the provider.

We expect TNSPs to deal with their RESPs on an arm’s length basis. We expect a TNSP to contract with its RESPs on a commercially efficient basis, as if it were dealing with a non-related third party. The requirement to deal at arm’s length does not restrict efficient purchasing policies. The final guideline does not prevent a TNSP from purchasing goods and services from a RESP so long as there is no cross-subsidy or discrimination in favour of a RESP. It also does not prevent TNSPs from undertaking bulk procurement and passing on those savings or lower prices to RESPs. However, the TNSP should be prepared to deal on similar terms with competitors, including offering the benefits of these economies of scale, where possible.

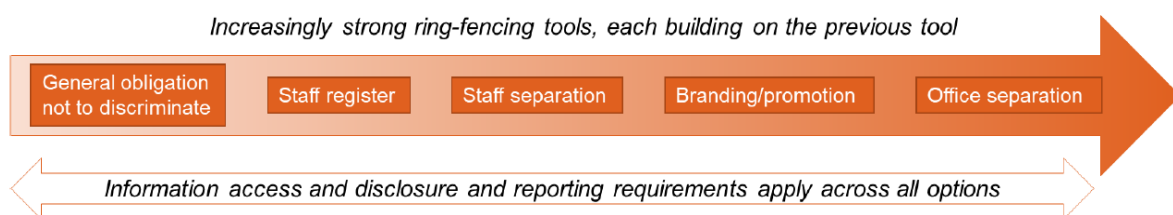
Finally, a TNSP must avoid providing to its RESP information that it has obtained from a RESP’s competitor. This is intended to avoid a RESP receiving an advantage in contestable markets in which it competes by reason of its relationship with the TNSP, and the access the TNSP has to information from many parties by virtue of its monopoly control of the transmission network.

As with other obligations in section 4 of our final guideline, TNSPs will not be able to apply for a waiver from the obligation not to discriminate.

3.2 Functional separation

Functional separation is a step beyond a general non-discrimination requirement that reinforces the general obligation not to discriminate. Functional separation provides tighter controls on potentially discriminatory information flows by requiring physical and branding separation between the part of a business providing regulated services and the parts of the business or its affiliate providing contestable services. Figure 1 provides a summary of tools that may be adopted to implement functional separation.

Figure 1: Functional separation tools



3.2.1 Marketing staff

In our explanatory statement to the draft guideline, we noted that the previous transmission ring-fencing guideline provided – in clause 7.7 – for limited functional separation of TNSP staff. Specifically, the previous guideline required TNSPs to ensure their marketing staff do not work for an ‘associate’ taking part in a ‘related business’ and also required TNSPs to ensure that their staff are not marketing staff of such an associate.

We proposed to retain this provision, noting that we intended to ‘updat[e] the language to reflect other amendments to the draft guideline, such as replacing “associate” with “related

electricity service provider”⁷⁹. The marketing staff separation provision was contained in clause 4.3 of the draft guideline.

3.2.1.1 Submissions

ENA and 3 TNSPs (AusNet, TasNetworks and Transgrid) raised concerns regarding our proposed amendments to the previous guideline’s marketing staff separation obligation.

ENA noted that the previous guideline only requires a separation of marketing staff between prescribed transmission and generation and retail services, but that clause 4.3, as drafted, creates a much broader obligation that ENA ‘assume[d] to be an unintended consequence’.⁸⁰ The clause, ENA submitted, would effectively impose both legal and functional separation between prescribed transmission services and contestable connection activities.⁸¹ This represented a substantial shift from current practice as all TNSPs provide contestable connection services and would be materially impacted by the expanded clause.

ENA also noted that the proposed amendment was stricter than its counterpart in the distribution ring-fencing guideline. This was because ‘the transmission provision refers to who can employ the marketing staff, while the distribution provision [clause 4.2.2(a)] instead refers only to the tasks that may be performed by staff of the distributor’.⁸² ENA recommended that clause 4.3, as proposed, be amended to retain the current guideline’s approach to functional separation, and thus not extend to contestable transmission connection services, and to focus only on the tasks performed by staff rather than which entity employs them.⁸³

Transgrid, AusNet and TasNetworks broadly agreed with ENA’s submission and offered some additional points. Transgrid noted that clause 4.3(a)ii of the draft guideline is problematic as some of its employees are deployed to RESPs (such as Lumea) through arms-length arrangements and undertake marketing activities for the RESP, but not for Transgrid.⁸⁴ Transgrid also considered that the definition of ‘marketing staff’ in the draft guideline is absolute – meaning any participation in sales, sales provision or advertising (whether they are also involved in other functions) – renders the employee ‘marketing staff,’ even if staff only allocated a small percentage of time to marketing.⁸⁵

⁷⁹ AER, *Draft Ring-fencing Electricity Transmission Guideline Explanatory Statement*, November 2022, p. 34.

⁸⁰ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 13.

⁸¹ This is presumably because a RESP, as defined in the draft guideline, includes a part of a TNSP providing ‘contestable electricity services’, which in turn are defined to expressly include ‘non-regulated’ (i.e., contestable) transmission services. See AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, November 2022, cl. 1.4.

⁸² ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 13.

⁸³ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 13.

⁸⁴ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

⁸⁵ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

AusNet submitted that it would be counter-intuitive to allow TNSPs to provide non-regulated (contestable) transmission services within the same entity that provides prescribed transmission services, as we propose, but then require TNSP staff who market such services to be functionally separate.⁸⁶ TasNetworks suggested that the broad definition of ‘marketing staff’ made it unclear whether TNSP staff who provide information to support a tender application would be involved in ‘sales,’ which presented problems for it because there would be insufficient work for staff working exclusively on contestable connections and TasNetworks could not afford to lose their expertise. The result would be TasNetworks exiting this market.⁸⁷

3.2.1.2 Final position

Our final position is consistent with our draft position. However, we have made some small amendments to the guideline to better reflect our policy position. We have also provided below an additional explanation of our policy position to provide greater clarity on its intent.

The final guideline maintains the previous approach to staff separation by focussing on the separation of marketing staff but updates this requirement in line with the new RESP concept. As a consequence, the marketing staff separation adopted is broader than the previous guideline, which is limited to electricity generation, distribution and retail categories. Our intent, reflected in incorporating the RESP concept, is to extend marketing staff separation to the other services brought within the broader scope of legal separation established in the revisions to the guideline. In other words, the obligation to separate marketing staff is likewise expanded if the TNSP or its affiliates participate in ‘contestable electricity services’.⁸⁸

Our intent is to ensure that a TNSP cannot allow marketing staff who are involved in providing prescribed transmission services to also be involved in the RESP’s provision of contestable electricity services. And, vice versa, we want to ensure that any staff involved in the provision of prescribed transmission services are also not involved as marketing staff for contestable electricity services. This means that there is a restriction on staff sharing between that part of the TNSP’s business involved in prescribed transmission services and that part of the TNSP’s business involved in non-regulated transmission services (albeit a relatively limited constraint has been imposed because of the focus on “marketing staff”).

However, we have maintained the definition of “marketing staff” which existed in the previous version of the Guideline. We consider this definition captures a relatively narrow category of staff – noting that sales, sale provision and advertising activities are generally customer-facing functions. If staff are not directly involved in those activities, they will not be caught by the definition of “marketing staff”. In addition, we have maintained the exceptions related to corporate services staff and “officers”, which includes directors, company secretary and some senior management staff.

⁸⁶ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 7.

⁸⁷ TasNetworks, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

⁸⁸ But not regulated distribution services (i.e., direct control services).

We agree with concerns raised by ENA and TNSPs that the staff separation clause, as proposed in the draft guideline, was too broad because it was capable of being interpreted as a restraint on a TNSP's employment of staff, rather than the tasks that may be performed by staff. In response, we have amended clause 4.3 in the final guideline to focus on the tasks performed by staff rather than which entity the staff belongs to, consistent with our approach in the distribution guideline.

We do not believe any further amendment to the final guideline is required to address Transgrid's concern that the functional separation obligation for marketing staff is 'absolute' (meaning any participation by staff in sales, sales provision or advertising renders the employee 'marketing staff'). Transgrid's interpretation is accurate – and so it is up to TNSPs to organise their resourcing arrangements in a manner which conforms to the objectives of the final guideline. With respect to TasNetworks' concern, we do not consider that all staff who provide information to support a tender (for example, network engineers providing technical information as part of the proposal documentation being prepared by the business development team) would be caught – since they are not directly involved in the commercial sales activity. However, whether certain staff are caught by the restrictions will depend on the particular circumstances of the TNSP's resourcing arrangements.

3.2.2 Additional functional separation

In the previous transmission guideline, the only functional separation requirement applying to TNSPs related to separation of marketing staff. While we indicated in our May 2022 Issues paper that we would consider strengthening functional separation obligations as part of a suite of amendments to the current transmission guideline, we recognised that differences in operating environments between TNSPs and DNSPs meant that the arrangements for distribution may not be appropriate.

Most of the harms identified by stakeholders in submissions responding to our Issues paper related to misuse of a TNSP's monopoly position in providing negotiated transmission services, as part of its delivery of transmission connections. However, in the explanatory statement to our draft guideline, we noted that our transmission ring-fencing powers are limited to requiring functional separation between prescribed transmission services and other services; they do not currently extend to requiring separation between negotiated transmission services and other services. This issue is discussed further in Chapter 7 of this explanatory statement.

Noting we lack the power to require functional separation of negotiated transmission services and thus cannot address these issues, we considered the benefits of strengthening staff, office and brand separation with respect to prescribed transmission services (where we do have power) did not outweigh the costs and accordingly did not propose such measures in our draft guideline.

3.2.2.1 Submissions

TNSPs (and some non-TNSPs) generally supported our position that additional functional separation measures were not justified at this time, given the limits on our transmission ring-fencing powers under the NER and the evidence before us.⁸⁹

Other stakeholders expressed disappointment or concern with our position that additional functional separation was not justified at this point, based largely on the ring-fencing framework being limited to prescribed transmission services.⁹⁰

Two stakeholders, CitiPower and the NSW DNSPs, questioned our reading of our head of power under the NER. CitiPower indicated that it did not believe that it was 'necessarily the case' that our transmission ring-fencing powers were so limited.⁹¹ The NSW DNSPs considered that the NER do not seem to expressly prohibit our transmission ring-fencing guideline from dealing with negotiated transmission services, and that NER 6A.21.2(e) appears to contemplate that a guideline may address these services.⁹²

3.2.2.2 Final position

The final guideline does not include any functional separation obligations beyond those already in the previous guideline for marketing staff (as discussed above, which has been further clarified in the final guideline). To be clear, this means no office separation obligations will be adopted at this time, nor will we adopt any provisions requiring separate branding of services or prohibiting the cross-promotion of services by TNSPs.

As noted in the explanatory statement to our draft guideline, given that this is the first full review of the transmission guideline in twenty years, and that many of the measures will assist both in leveling the playing field for competitors and improving reporting requirements from TNSPs, our revisions to the final guideline are part of an iterative regulatory approach. We expect our knowledge from increased compliance reporting and monitoring of TNSPs' provision of regulated and non-regulated services, particularly in association with network connections, will grow and may justify revisiting the transmission ring-fencing guideline sooner in the future. We will also continue to monitor changes adopted by the AEMC and other regulatory bodies, which might affect both the evolving energy market and the considerations underlying our approach, including any rule changes amending the ring-fencing framework.

⁸⁹ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 7; ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 3, 5; Network REZolution, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 3-4, 6; NSW DNSPs, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 4, 8; Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1, 7.

⁹⁰ See, e.g., AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1; Squadron Energy, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

⁹¹ CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1.

⁹² NSW DNSPs, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

Our head of power is discussed in chapter 7 of this explanatory statement.

3.3 Information access and disclosure

In the draft guideline we proposed to strengthen obligations around information access and disclosure by including provisions that mirrored the obligations in the distribution guideline. Consequently, TNSPs would be required to:

- keep information that is acquired by a TNSP in connection with its provision of prescribed transmission services confidential, where it is not already publicly available; and
- only use such information for the purpose for which it was acquired or generated.

Our proposed provisions also clarified the circumstances under which such information must be disclosed, as well as the circumstances under which information must be shared with other legal entities on an equal basis. These provisions are contained in clause 4.2 of our draft transmission ring-fencing guideline.

To facilitate compliance with the obligations in clause 4.2 of the draft guideline, we also proposed to require TNSPs to establish an information sharing protocol and to establish, maintain and keep an information register to provide transparency about information that has been shared. These obligations are contained in clause 4.3 of our draft guideline.

3.3.1 Submissions

We received several submissions regarding our proposed information access and disclosure amendments to the transmission ring-fencing guideline, nearly all of them supportive.⁹³ While not entirely supportive, AusNet advised that it had not identified any significant concerns with the information access and disclosure provisions proposed by us, noting that they are arrangements with which AusNet is ‘already familiar’.⁹⁴

While ENA indicated that it supports ‘ensuring robust arrangements to protect confidential information’,⁹⁵ it questioned the application of several of the provisions in clause 4.2 of the draft guideline, specifically:

- Compliance with clause 4.2.3 (a) may in some cases be impractical. For example, how is a TNSP to know if ring-fenced information that a TNSP has disclosed is “then disclosed by any person” to a RESP? If the TNSP and its RESP are ring-fenced this may not always be apparent to the TNSP.
- The exceptions in clause 4.2.2 of the draft guideline ‘appear to be too narrow’, particularly when clause 4.2.3 is considered. ENA noted that there is no express ability to disclose information to lawyers, insurers, auditors or financiers or AEMO and

⁹³ CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, pp. 1-2; CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1; AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, p. 2.

⁹⁴ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 8.

⁹⁵ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

the lack of clarity on this issue 'becomes particularly important' when considered in conjunction with clause 4.2.3(e), which only permits the other legal entity to disclose information as permitted by 4.2.2(a) to (d). ENA sought to highlight its concerns by providing an example, namely if the other legal entity is seeking finance for a project, how it can make any disclosure to its prospective financiers or any independent engineer engaged by the financiers?

- Clause 4.2.4(b) does not seem to contemplate that some of the information on the register may be confidential, noting that the register is publicly available and there is no ability to claim confidentiality. ENA suggested that this may not just be an issue for the TNSP but it may also be an issue for the other legal entity. For example, if another legal entity is asking for information because it is seeking to develop a currently confidential project, it may not want this fact publicised.⁹⁶

3.3.2 Final position

Our final position is to adopt the draft guideline as proposed. As we explained in the explanatory statement accompanying our draft guideline, we intended that the amendments to the guideline would complement, not duplicate, information sharing requirements relating to contestable connections in Chapter 5 of the NER. The NER's requirements provide a reasonably robust set of information access and sharing obligations for negotiated transmission services (although somewhat limited), while our amendments provided information access and disclosure requirements for prescribed transmission services.

The increased transparency of information flows between a TNSP and its RESP associated with our amendments are expected to reduce any competitive advantage TNSPs or their affiliates derive from their possession, or acquisition, of such information. For example, in the absence of the obligations in clauses 4.2 and 4.3, a RESP could use information about planned transmission investments or future transmission constraints, known to the TNSP but that are not yet public, to advise its affiliated entities or customers on investment decisions, or use short-term or real-time information on network congestion to inform operational decisions. However, we noted that our amendments may not address all the harms stakeholders had identified during our review of the transmission guideline, especially those related to negotiated transmission services.

We acknowledge ENA's questions with regard to application of clause 4.2 of the draft guideline in particular scenarios. In response to these queries, we note that:

- we consider a TNSP is reasonably capable of becoming aware of any disclosure to a RESP arising under clause 4.2.2(f) or (h) (and therefore it is not impractical to comply with clause 4.2.3) – for example, by including notification requirements in its terms of disclosure with the other legal entity, such that any such disclosure to a RESP is to be reported to the TNSP. Such obligations are not uncommon in agreements governing information disclosure;
- we do not consider that the exceptions in clause 4.2.2 are too narrow – noting that disclosure of information to lawyers, insurers, auditors, financiers or AEMO may be

⁹⁶ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 12.

permitted under a number of the exceptions (for example, under clauses 4.2.2(a)-(d), and (h), but noting that the availability of such exceptions will of course depend on the circumstances); and

- clause 4.2.4(b) does not require the confidential information itself to be published, or the identity of the requesting RESP or legal entity to be disclosed, but rather a general description of the information (which is of a sufficient detail to enable other legal entities to make an informed decision to also request that kind of information from the TNSP) is sufficient to comply with clause 4.2.4(b).

3.4 Requirement for service providers to comply with the guideline

In order to strengthen the transmission ring-fencing guideline and align it with its distribution counterpart, we proposed to introduce a new provision in the draft guideline, requiring any TNSP agreements with third parties who provide services to the TNSP to contain provisions that mirror the non-discrimination, staff sharing and confidentiality provisions of the guideline. We noted that our intent was that this provision would apply to new or varied third party service agreements only – once the amended guideline took effect – and would not require TNSPs to vary existing agreements prior to or on the commencement of the revised guideline to comply with the new requirement. The new requirements were contained in clause 4.4 of the draft guideline.

3.4.1 Submissions

Only three stakeholders, ENA, CitiPower and CEIG, offered submissions regarding our proposal to add clause 4.4 to the transmission ring-fencing guideline. CEIG and CitiPower supported the new clause.⁹⁷ ENA, on the one hand, expressed support for TNSP agreements with third party service providers mirroring the obligations imposed on TNSPs,⁹⁸ but on the other suggested that clause 4.4.1(a) ‘seems very broad’ and questioned ‘why a service provider has to be subject to the same restrictions as are in clauses 4.1 and 4.3’.⁹⁹

3.4.2 Final position

The final guideline is consistent with our draft guideline in requiring new or varied third party service provider contracts to mirror the guideline’s non-discrimination obligations. We do not consider further amendments are required, or that the obligations are too broad, particularly in light of the amendments we have decided to make to clauses 4.1(b)ii and 4.3(a) in the final guideline compared to the draft guideline.

We also retained the language, that *any* variation to an existing third-party service provider contract (however minor), will trigger the obligation under clause 4.4.1(a). We consider it reasonably low cost for service providers when reopening its contractual arrangements with service providers for whatever reason to include these requirements.

⁹⁷ CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 2; CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 4.

⁹⁸ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

⁹⁹ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 12.

In response to ENA's submission regarding clause 4.4.1(a), we consider that the clause does not apply to any service provider engaged by a TNSP but rather applies to a limited class of third party service providers, namely those service providers who a TNSP engages to 'enable or assist the TNSP to provide prescribed transmission services'. The extent of a TNSP's outsourcing arrangements with a particular service provider will inform how onerous compliance with these provisions will be for that service provider.

For example, if a TNSP elects to engage another entity to schedule and deliver on all its maintenance activities across its network (and therefore, that contractor will decide when to program certain works), then clause 4.4.1(a) is particularly important so that TNSPs cannot use outsourcing to circumvent the non-discrimination obligations. In particular, the practical effect of clause 4.4.1(a) in this example, would be to prevent the TNSP's contractor from unfairly prioritising the maintenance works delivered to a RESP of the TNSP (for example, enabling a RESP's generator facilities to be connected to the transmission network ahead of its competitors). We would expect a heightened degree of compliance activity for such a service provider who has been outsourced significant functions of the TNSP in providing prescribed services, as compared to a service provider who undertakes a more limited or prescribed function (for example, front-end engineering design of a network augmentation or ad hoc vegetation management activities under the direction of the TNSP).

4 Compliance and reporting

This Chapter explains the content and rationale for our amendments to the guideline that strengthen the previous guideline's compliance monitoring and reporting arrangements. In our 2016 explanatory statement to the distribution ring-fencing guideline, we stated:

We consider a robust ring-fencing regime requires rigorous monitoring and reporting arrangements. In the absence of these measures the development of contestable markets may be undermined by lack of confidence and predictability.¹⁰⁰

That statement remains relevant, both today and in the context of electricity transmission.

Under the previous transmission ring-fencing guideline, we had limited oversight of TNSP compliance. We could require TNSPs to report on compliance, including an independent audit, but we had not exercised this power in recent years. In our explanatory statement to the draft guideline, we noted that an effective reporting framework should encourage compliance, readily detect any areas of non-compliance, and be consistent with our Compliance and Enforcement Policy.

Accordingly, our draft guideline proposed to expand the scope of reporting to provide both the AER and the market with greater transparency and confidence that a TNSP is complying with its ring-fencing obligations. We did this by proposing several new provisions in the draft guideline:

- First, requiring a TNSP's compliance with its ring-fencing obligations to be independently verified by a suitably qualified auditor then reported to the AER annually (clause 6.2). We may then publish reports about TNSP compliance with our guideline based on TNSPs' annual compliance reports.
- Second, aligning TNSPs' breach reporting obligations with the breach reporting obligations applicable to DNSPs under our distribution guideline. This meant removing the 'immediately' reporting obligation in the current transmission guideline and replacing it with an obligation for TNSPs to self-report potential breaches within 15 business days of becoming aware of the breach (clause 6.3).
- Third, requiring TNSPs to establish and maintain internal procedures to ensure it complies with the new transmission ring-fencing guideline, including the new reporting and auditing framework (clause 6.1).
- Finally, expressly providing that the AER may, at any time, require a TNSP to provide a written response to a complaint or concern we raise about its compliance (clause 6.4).

4.1 Submissions

We received submissions from 6 stakeholders regarding the compliance reporting and auditing framework proposed in the draft guideline. Two stakeholders (CEFC and Snowy

¹⁰⁰ AER, *Ring-fencing Electricity Distribution Guideline (Version 1) Explanatory Statement*, November 2016, p. 39.

Hydro) generally supported the proposed framework.¹⁰¹ The other 4 stakeholders expressed some concerns about the new framework's implementation but did not actually oppose any of our proposed requirements.

For example, ENA suggested we should reconsider the new requirements' application during the transition period, noting that it 'seems inappropriate' to require breach reporting for provisions that have yet to take effect and that the value of a first annual compliance report was unclear.¹⁰² Transgrid likewise suggested that we provide clarity whether breach reporting is required during the 12-month transitional period before the new version of the guideline becomes fully effective and that we need to provide evidence of harm before imposing additional obligations.¹⁰³ Similarly, AusNet suggested both that 15 business days does not provide much time within which a TNSP must report potential breaches of the guideline and that the new framework will impose costs that will be passed on to consumers.¹⁰⁴

Finally, Tilt Renewables questioned whether the new framework would allow us to actually learn whether a TNSP has leased excess capacity on its battery on more favourable terms to RESPs than to its, or its RESP's, competitors.¹⁰⁵

4.2 Final position

Given the general support for the new compliance reporting and auditing framework proposed in our draft guideline, we have determined to adopt the provisions proposed without further amendment. Our detailed reasons for the amendments are set out in the explanatory statement accompanying the draft guideline.¹⁰⁶

Regarding Transgrid's submission, as discussed in Chapter 5, TNSPs must continue reporting potential breaches, either of those provisions of version 4 of the guideline that take effect immediately¹⁰⁷ or of the previous guideline requirements that remain in effect during the transitional period.

With respect to AusNet's submission, we note that 15 business days provides more time to report potential breaches than the 'immediately' requirement in the previous guideline. We also understand that new obligations impose costs and those costs will be passed to consumers. However, we consider that the benefits to customers from providing strengthened ring-fencing guidelines and greater transparency where TNSPs operate in

¹⁰¹ CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, p. 2; Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

¹⁰² ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 15.

¹⁰³ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 8.

¹⁰⁴ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 7.

¹⁰⁵ Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

¹⁰⁶ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, pp. 40-41.

¹⁰⁷ Such as the obligation to mirror the TNSP's non-discrimination obligations in new or varied service provider agreements.

contestable markets will outweigh the costs. We also note that we will review TNSPs' proposed recovery of those costs in their periodic revenue determinations.

Finally, we acknowledge the concerns raised by Tilt Renewables. To some extent, the guideline relies on self-reporting, or concerns being raised by other parties about a potential breach of the guideline, which the AER will carefully investigate and consider. However, we also note that our amended guideline has strengthened the reporting and auditing obligations for TNSPs. We will closely analyse the information we obtain via the new compliance reporting and auditing framework. Further, amending the guideline is an ongoing, iterative process. New information or market developments may justify new or varied obligations in the future.

5 Waivers

The previous guideline (clause 11) allowed the AER to waive any TNSP ring-fencing obligations but provided limited guidance about the processes or considerations that would govern the AER's decision. In this Chapter we discuss the detailed provisions establishing the procedures and considerations that underlie the 'prohibit and waiver' approach we are adopting in this revised guideline. We also explain the ways in which the waiver processes we adopt differ somewhat, depending on whether a waiver is sought from the prohibition against TNSPs leasing excess battery capacity to third parties, or whether a waiver is sought from other obligations in the final guideline.

Waivers provide the AER with flexibility to respond to circumstances as they arise, including those which we are currently unable to foresee. Where certain activities or services are broadly prohibited, waivers provide a mechanism to exempt a network service provider from having to comply where the costs of compliance outweigh the benefits to consumers. Our Issues paper noted the following issues with the waiver provisions in clause 11 of the previous guideline:

- while waivers are permitted, the process for applying for waivers and the way in which we assess waiver applications is not well specified; and
- waivers can be granted for any transmission ring-fencing obligation.

In our draft guideline, we proposed to mirror the waiver framework in the distribution ring-fencing guideline, including having some key clauses that are not able to be waived. As proposed, TNSPs would be able to apply for a waiver from the following clauses:

- clause 3.1 – legal separation obligations with respect to the provision of 'other services' – that is, services other than transmission services;
- clause 4.3 – staff separation relating to sharing of marketing staff between the TNSP and related electricity service providers; and
- clause 4.4.1(a) – requirements relating to new or varied agreements with service providers.

As noted in our explanatory statement to the draft guideline, core ring-fencing obligations relating to cost allocation and accounting separation, the obligation not to discriminate, and information access and sharing could not be waived. In our view, this approach strikes an appropriate balance between providing regulatory certainty and providing flexibility to grant relief from regulatory burdens where warranted. We also advised that we may publish updated guidance on the information required in a waiver application from time to time, allowing the application process to remain fit for purpose and responsive to changing market conditions and emerging services.

By including a waiver option in the final guideline, it is our intent that this process will only be used where appropriate, and a waiver ordinarily will only be granted in limited circumstances, on a case-by-case basis where a compelling case for a waiver is demonstrated.

5.1 What obligations should be eligible for waivers

5.1.1 Submissions

We received relatively few submissions from stakeholders regarding our position to maintain and expand on the existing waiver process in the current guideline, consistent with our approach under the distribution guideline. Several non-TNSPs –AGL, AEC Tilt Renewables, Snowy Hydro, and PIAC – expressed broad support for our proposal to adopt a waiver framework like that provided in our distribution guideline.¹⁰⁸

Iberdrola, however, expressed disappointment that, TNSPs can apply for waivers to retain the same staff. In Iberdrola's view, the proposed amendments, including the lack of office and branding separation, were unlikely to prevent discrimination or the passing of information between regulated and unregulated parties.¹⁰⁹

ENA submitted that there were several 'material flaws' in our waiver model for the transmission market, mostly going to administrative and procedural matters.¹¹⁰ Most of ENA's submissions on those matters are discussed below. However, ENA more broadly submitted that the matters for which a TNSP may apply for a waiver are 'unnecessarily limited'. On this point, ENA suggested that 'there is no benefit from the guideline restricting the provisions that can be subject to a waiver' and such restrictions only reduce our flexibility to respond to unforeseen circumstances in a timely manner. In particular, ENA suggested that decisions TNSPs make about matters like access to essential plant that may have a legitimate basis, including for reasons of national security, could be interpreted as discriminatory, and a waiver should be available to allow such decisions.

5.1.2 Final position

Our position remains that we should limit the ring-fencing obligations for which waivers may be sought. As such, TNSPs will only be able to apply for a waiver from a limited range of obligations under the transmission guideline. This not only aligns the transmission guideline with its distribution counterpart, it also promotes a strict approach to compliance with respect to those obligations which are fundamental to the achievement of the national electricity objective.

The obligation not to discriminate is a core obligation that is needed to provide both certainty and confidence that contestable markets are not distorted by TNSPs' using their monopoly position in the transmission market to unfairly favour either themselves or other related electricity service providers. This obligation protects against not only actual conduct that discriminates against competitors but also the potential for such conduct. Allowing TNSPs to

¹⁰⁸ AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, pp. 1-2; AEC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2; Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3; Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2; PIAC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 19 December 2022, p. 2. PIAC made it clear it separated this approach as an interim measure.

¹⁰⁹ Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

¹¹⁰ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 9-11.

apply for a waiver from these clauses introduces uncertainty for other market participants that compete with TNSPs which could harm competitive markets.

With respect to ENA's concern about TNSPs' actions to dealing with national security or system reliability issues, we note that providing assistance needed to respond to an event (such as an emergency or national security matter) that is beyond its reasonable control would not be considered 'discrimination' in contravention of the guideline, so long as the TNSP is treating the RESP as if it was not a related entity, dealing with it on arm's length terms.

5.2 Specific provisions of our waiver framework

5.2.1 Assessment criteria for consideration of waiver applications

We proposed to carry across from our distribution guideline the 8 criteria that we require DNSPs applying for a waiver to provide in support of their application. These criteria were set out in clause 5.2 of our draft guideline. In our explanatory statement to the draft guideline, we noted that these criteria have been developed based on the national electricity objective and from lessons learned from our development of the distribution ring-fencing guideline from 2016 to 2021.¹¹¹

No stakeholders commented on the proposed general criteria that the AER will take into account in considering waiver applications. While some stakeholders suggested additional factors that we should take into account, these submissions were specifically in respect of TNSPs leasing batteries and are addressed in section 5.2.7 below. We therefore adopt the same criteria proposed in our draft guideline.

5.2.2 Consultation process

The previous transmission guideline (clause 17) requires us to consult when deciding whether to grant a waiver. In our explanatory statement to the draft guideline, we indicated that we expected some waivers will be inconsequential if granted (such as extensions of time to existing waivers), while others may have significant implications for contestable markets. To give us the necessary flexibility in how we assess a waiver application, we proposed to update the guideline so that minor matters can be approved with limited or no public consultation.¹¹² We also indicated that decisions likely to attract stakeholder interest or which have the potential to impact the provision of contestable services would undergo formal consultation. In our view, this approach strikes the appropriate balance on consultation and aligns to our approach in the distribution guideline.

5.2.2.1 Submissions

We received two submissions regarding this proposed amendment to the transmission ring-fencing guideline. Tilt Renewables suggested that public submissions should be taken for all waiver applications. According to Tilt Renewables, we should consider market participants'

¹¹¹ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, pp. 44-45.

¹¹² See AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, November 2022, cl. 5.3.2(b)iii and (b)iv.

insights rather than just the TNSP's arguments in favour of its waiver application.¹¹³ Iberdrola likewise submitted that all waiver applications, and decisions on them, should be public regardless of whether the matter may be deemed inconsequential, adding that 'even extensions' of a waiver could have serious market implications.¹¹⁴

5.2.2.2 Final position

We acknowledge the value of market participants' views on TNSPs' waiver applications, and we will usually seek out those views, as well as the views of the broader public, to provide appropriate transparency in our decision-making. However, we continue to consider that there are some waiver applications for which the impact, if approved, would be so inconsequential that the benefits of consultation do not outweigh the costs, in terms of time and administrative effort. We certainly do not anticipate that many waiver applications will be decided without public notice or comment, but we are not inclined to adopt an inflexible requirement that all waiver applications must undergo public consultation. As such, the final guideline maintains this flexibility.

5.2.3 Decision-making timeframes

The draft guideline did not include a specific timeframe within which the AER will make a final decision on TNSPs' waiver applications. This is consistent with the distribution ring-fencing guideline, which similarly does not include specific timeframes for waiver decisions.

However, in our explanatory statement to the draft guideline, we noted we will endeavour to decide each waiver application within 90 days of its lodgement. We also advised that if the application, as lodged, is considered not fully compliant with the guideline's requirements (for example, it does not provide sufficient information for the AER to assess the application), we would notify the TNSP within 10 business days of receiving the application, giving it an opportunity to resubmit or withdraw its application.¹¹⁵ Finally, where a TNSP would be non-compliant with the guideline if we are unable to make a decision within 90 days, we indicated that we may grant an interim waiver (discussed further below).

5.2.3.1 Submissions

ENA considered that this and other aspects of our proposed waiver framework lacked 'the minimum [procedural] safeguards needed to limit regulatory risk'.¹¹⁶ While acknowledging our commitments in the explanatory statement, ENA submitted that our reasonable endeavours timeframe for making a decision should be reflected in the guideline itself and suggested that 'a timeframe similar to the decisions on cost pass throughs could be adopted,' noting that this is 40 business days with a 'stop the clock provision' if further information is needed, coupled with an expectation that all decisions are made within 90 days.¹¹⁷

¹¹³ Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 4.

¹¹⁴ Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

¹¹⁵ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, p. 45.

¹¹⁶ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 9-10.

¹¹⁷ ENA submission, p. 10.

AusNet also advocated for the guideline to stipulate a firm and binding time limit by which we must decide a waiver application. Like ENA, AusNet suggested that 90 days for decision is reasonable (but could be shorter) and further, that if the AER does not make a decision within a firm time limit, the waiver application should automatically be deemed approved.¹¹⁸

5.2.3.2 Final position

The final guideline is consistent with the position set out in the draft guideline. That is, we have not committed to specific timeframes for deciding on a waiver within the guideline itself, nor will applications be automatically deemed to be approved. Our final amendments are consistent with our distribution ring-fencing guideline. More importantly, we consider that transmission waiver applications may present more complex, technical, impactful network issues than distribution waiver applications. It is vital that the AER and its staff have sufficient time to consider all aspects of a waiver application, and to take into account any submissions invited on applications, in order to reach an appropriate decision.

As noted above, the AER has an option to provide an interim waiver, which it may consider doing, if we are unable to make a timely decision on a waiver application and a TNSP has demonstrated that there is genuine time sensitivity. We encourage TNSPs to provide relevant information in their application so we can make such arrangements where appropriate. Given this flexibility to provide interim decisions, we do not consider it is necessary to fix timeframes for our decision-making to be completed.

5.2.4 Publication of waiver decisions and related materials

Consistent with the waiver framework in our distribution guideline, we indicated that we intend to publish the terms, conditions and reasons for any waiver we grant (other than an interim waiver).¹¹⁹ However, clause 5.5 of our draft guideline – like its distribution counterpart – provides that we “may” publish our reasons for granting or refusing to grant a waiver or interim waiver.

5.2.4.1 Submissions

ENA stated that it is essential the AER be required to publish its decision regarding a waiver application and for this to include reasons for that decision as part of good regulatory governance. According to ENA, publishing a decision with reasons is a minimum requirement for delivering accountability and transparency in a regulatory regime, and would help set clear expectations across TNSPs and reduce regulatory risk over time.¹²⁰

AusNet similarly suggested all AER waiver decisions, including interim waiver decisions, should be published on our website. Publishing our decision, AusNet maintained, provides critical transparency and accountability but also serves to educate TNSPs and other market participants about our approach to applying our guideline. With respect to interim waivers,

¹¹⁸ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

¹¹⁹ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, p. 45.

¹²⁰ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 10.

AusNet added that our decisions should also indicate when we expect to make a final decision and why that timeframe is considered appropriate.¹²¹

5.2.4.2 Final position

We accept the submissions put forward by ENA and AusNet about the benefits of publishing our waiver decisions, including reasons, and agree that this is appropriate for good regulatory governance. This is our practice under the distribution guideline and it will remain our practice under the new transmission guideline.

However, while we have made it clear that we intend to publish our waiver decisions, in some form, setting out our reasons and the terms and conditions of any waiver granted, we have retained the language of clause 5.5 of the draft guideline for two reasons. First, we prefer to align our distribution and transmission guidelines to be consistent where it makes sense to do so and there are no compelling reasons for the guidelines to diverge. Second, and more importantly, publishing waiver decisions is not without administrative costs and burdens. Minor and procedural matters, for example, should not require a written decision, complete with reasons, that must be published. Flexibility to make decisions without publishing reasons is appropriate for these instances.

5.2.5 Duration of waivers

In our explanatory statement to the draft guideline, we indicated that we consider it appropriate to retain discretion to determine the duration of a waiver. Accordingly, clause 5.3.4 of our draft guideline proposed that the AER decide the terms for waivers as follows:

- For waivers other than for the leasing of excess battery capacity, a term that coincides with part or all of the TNSP's current regulatory control period, next regulatory control period, or both periods (clause 5.3.4(b)).
- For waivers allowing TNSPs to lease excess battery capacity in accordance with clause 3.1(c) of the guideline, a different term or terms (clause 5.3.4(c)).

Both provisions mirror clauses in the distribution ring-fencing guideline.

5.2.5.1 Submissions

We received two submissions related to the issue of a waiver's duration, both related to the question of 'evergreen' waivers (waivers without an expiry date).

ENA noted that there is 'no provision [in the draft guideline] for the AER to create an evergreen waiver'.¹²² Notwithstanding the intention expressed in our explanatory statement, ENA maintained that, under the draft guideline as proposed, we are 'required to limit the term of a waiver to either or both of a TNSP's current or next regulatory control period'.¹²³ In addition, ENA noted that one area where an evergreen waiver (or waiver beyond the next regulatory control period) may be necessary is in relation to the AER's expanded legal

¹²¹ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

¹²² ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 9.

¹²³ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 11. ENA also suggested the same requirement limited the term of waivers that we might grant for battery leasing, making it impossible for us to grant a waiver for the operational life of the battery in most cases.

separation obligations. ENA advised that this obligation may require a TNSP to change the counter-party to an existing contract. In the event changing the party to an agreement cannot be effected, an evergreen waiver might be required so that the contract can remain with the TNSP.¹²⁴

TasNetworks similarly sought clarification from us whether we intend to allow evergreen waivers or waivers that last for the economic life of assets as was expected to be the case for batteries.¹²⁵

5.2.5.2 Final position

The final guideline adopts the same provisions as the draft guideline. However, below we provide further clarity about the intention behind the duration of waivers that are potentially available for different obligations under the guideline.

For the first category of waivers (i.e., non-battery waivers), we indicated in our explanatory statement to the draft guideline that the waiver term will be linked to a TNSP's regulatory control period(s) on the basis that, if the waiver expires, it enables the TNSP to consider the treatment of any cost implications in its revenue proposal. We also noted that the regulatory determination process provides a sensible trigger to review any waivers.

Whilst we acknowledged that there may be a demonstrable benefit to granting a TNSP an evergreen waiver, we also advised that it is more likely waivers will be granted with sunset dates or a condition to review the appropriateness of the waiver after a reasonable period.¹²⁶ We confirm and clarify our position that evergreen waivers from complying with ring-fencing obligations – that is, waivers with no end date – are not available under clause 5.3.4(b). Clause 5.3.4(b) of the guideline allows the AER to grant waivers for up to two regulatory control periods (except in respect of batteries). This provision is identical to its counterpart in the distribution guideline. We consider this term for non-battery waivers is appropriate given the speed at which the environment within which TNSPs are operating is changing. It is appropriate to have what is essentially a review mechanism to ensure that the ongoing waiver from having to comply with a ring-fencing obligation remains appropriate.

For waivers to lease a battery's excess capacity, we advised in the draft guideline's explanatory statement that an end date for such waivers will likely be linked to the expected operational life of the relevant asset. However, where there is evidence that a shorter term is warranted (e.g., where the battery is not expected to be required after a shorter time), we may grant a waiver for a term shorter than the asset's operational life. It is possible that, under clause 5.2.4(c), the AER could provide a waiver duration which is automatically renewing (amounting to an "evergreen" waiver). That said, TNSPs did not provide any practical examples where such a waiver term would be required. Accordingly, we do not believe that any amendment is necessary for waiver terms associated with leasing batteries.

¹²⁴ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 11.

¹²⁵ TasNetworks, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1.

¹²⁶ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, p. 46.

As noted above, the clause gives us the discretion to make the term align with the asset life, or such shorter periods, where appropriate.

5.2.6 Reviewing and revoking a waiver

Our draft guideline contained provisions (in clause 5.6) giving us the ability to review and revoke a waiver under reasonable circumstances. In our explanatory statement to the draft guideline, we stated that, notwithstanding concerns about regulatory uncertainty, we need to be able to review a waiver at any time to assess its continued appropriateness, such as where new information has come to light, or where circumstances have changed that would likely have changed our views on the original need for the waiver. We noted that the draft guideline's provisions include appropriate procedural safeguards to protect a waiver holder's interests and give the TNSP a reasonable opportunity to be heard before we make any decision regarding varying or revoking a waiver. We also indicated that we would usually publish our reasons for revoking or varying a waiver and publish any varied conditions.¹²⁷

5.2.6.1 Submissions

ENA and AusNet raised similar concerns on this issue, including:

- That our power to unilaterally vary or revoke a waiver must be clearly delineated, transparent and limited and that our proposed approach creates significant uncertainty and risks. ENA urged that our final guideline stipulate the limited circumstances in which we can vary or revoke a waiver.
- The period we allow for a TNSP to implement changes to comply with the guideline if its waiver is varied or revoked is disproportionately short and the draft guideline makes no provision for consulting with the affected TNSP about the repercussions of revocation or variation.
- The AER must provide for consultation with TNSPs whose waivers it is considering revoking or varying and also for the provisions of reasons for such action.¹²⁸

5.2.6.2 Final position

We acknowledge the concerns regarding procedural safeguards associated with our review and possible revocation or variation of a TNSP's waiver. However, we consider that the procedural safeguards provided in the guideline – coupled with our expressed intent reflected in the explanatory statement accompanying our draft guideline – are adequate to protect TNSPs' interests.

With respect to the period of time allowed for TNSPs to implement changes, we note that clause 5.5(a) of the draft guideline provides for 'at least 40 days' notice' to be given to the TNSP that the AER is considering varying or revoking its waiver. We may give the TNSP more than 40 days' notice, and we can extend a notice period as need be to allow a TNSP sufficient time to attain compliance with the guideline after its waiver is revoked or varied. We

¹²⁷ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, pp. 46-47.

¹²⁸ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 10; see AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

also note that clause 5.5(b) of the draft guideline provides for us to grant an interim waiver as a transitional measure, which also provides a TNSP with time to attain compliance.

With regard to ENA's concern around the publication of decisions, and supporting reasons, for revoking or varying a waiver, we note that clause 5.5 of the draft guideline does not specify such decisions, with reasons, will be published. However, we are fully aware of the need for us to provide procedural fairness to TNSPs with respect to our waiver decisions and we would ordinarily do so by publishing our decision, with reasons, to revoke or vary a waiver. We also note that clause 5.6(b)ii of the draft guideline picks up the procedural safeguards provided for in clause 5.3.2(b), which include requesting further information from a TNSP, inviting public submissions, or otherwise conducting such consultation as we consider appropriate. In view of these safeguards, we conclude that no further amendments to clause 5.6 are necessary and we adopt it as proposed.

5.2.7 Waivers for batteries

The draft guideline proposed to prohibit TNSPs from leasing batteries to third parties unless they have first obtained a waiver. In the explanatory statement to our draft guideline, we observed that a 'prohibit and waive' approach addresses not only the potential harm of cross-subsidisation but also the potential for discrimination against entities in competition with the TNSP or its RESP. In our view, while TNSPs have a role in connecting batteries, we do not consider they have a role in owning or operating them for purposes other than as an input into providing prescribed transmission services. We indicated that our proposed approach provides an appropriate balance between allowing batteries to be fully utilised and providing appropriate regulatory oversight.¹²⁹

We did not propose to include in the draft guideline a streamlined waiver process for transmission level (grid-scale) batteries, such as that in place for distribution batteries. However, we left that option open in the explanatory statement to our draft guideline, seeking stakeholder feedback whether such a process should be available for grid scale batteries. We also requested stakeholders who supported such a process identifying what criteria we should use to determine which waiver applications qualify for a streamlined assessment.

5.2.7.1 Submissions

Our proposed approach to TNSPs leasing excess capacity of their batteries drew substantial comment from stakeholders.

CEFC, AGL, ECA, PIAC, CEIG, Iberdrola, Tilt Renewables and Squadron Energy all supported our proposed approach toward TNSPs leasing their batteries.¹³⁰ These

¹²⁹ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, pp. 47-49.

¹³⁰ CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, p. 2; AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 2; ECA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 1; PIAC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 19 December 2022, p. 2; CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 3; Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2; Squadron Energy, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2.

stakeholders offered the following views beyond their general support for our proposal in their submissions:

- CEFC suggested that TNSPs should be able to assess the investment case for efficiently scaled-up batteries that optimise their excess capacity, with the value of the investment passed to consumers or shared with end-users to offset the incremental cost of scaling-up batteries.¹³¹
- AGL submitted that TNSPs should only be able to use a battery to provide contestable services through third parties via a waiver and opined that, if TNSP investment is only viable by using a battery to provide contestable services, then a TNSP should be required to contract with a generator to provide needed network services.¹³²
- Both ECA and PIAC suggested that allowing TNSPs to lease excess battery capacity via a waiver process is a useful, short-term or interim measure, with ECA adding that waiver conditions should require TNSPs to provide evidence of adequate site locations for batteries throughout their service areas to add value for all consumers and potentially defer or avoid other network expenditure. This information, ECA suggested, should be submitted with a TNSP's waiver application and should be required, as a condition of the waiver, to be updated annually in the TNSP's annual planning report over the course of the battery's operational life.¹³³
- CEIG, Iberdrola, Tilt Renewables and Squadron Energy proposed requiring TNSPs to demonstrate that they have gone to the market to solicit interest from third parties in leasing the battery prior to submitting a waiver application. In addition, they suggested we include waiver conditions ensuring that batteries owned by TNSPs or affiliates cannot get more favourable treatment during the process to connect such batteries to the transmission system and to provide for more transparency overall.¹³⁴
- Iberdrola and Squadron Energy also considered we should only allow such waivers in 'limited' circumstances.¹³⁵

Other stakeholders opposed or expressed significant concerns with our 'prohibit and waive' approach to TNSPs leasing excess capacity of grid scale batteries to third parties. ENA and Network REZolution did not support our proposed approach, with ENA suggesting that we should instead adopt a 'report and comply' framework containing all of the relevant

¹³¹ CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, p. 3.

¹³² AGL, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 21 December 2022, p. 2.

¹³³ ECA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 1; PIAC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 19 December 2022, p. 2.

¹³⁴ CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 3; Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3; Squadron Energy, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 1.

¹³⁵ Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Squadron Energy, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

requirements TNSPs must meet instead.¹³⁶ In support of its ‘report and comply’ approach, ENA cited:

- a lack of evidence that current arrangements are leading to market harms, suggesting that there is no evidence TNSPs are ‘crowding-out’ competitors for grid-scale batteries (and noting that non-TNSPs account for 92% of batteries in service, and 97% of those projected);
- concern the waiver process may take months to decide and this is incompatible with the practical realities of negotiating and investing in an energy storage device that leases some capacity to a third party; and
- our proposed approach is inconsistent with the intended operation of the incentive regulation framework, which includes financial incentives for capital and operating expenditure and service performance, annual planning and reporting obligations, and an economic test (RIT-T) to demonstrate that proposed investments deliver a net benefit.¹³⁷

If we did decide to maintain our proposed ‘prohibit and waive’ approach to batteries, ENA suggested we make several changes to our proposed waiver framework. This included stipulating criteria or clarifying ‘what conditions need to be met’ to grant a waiver. ENA also sought more clarity around what sorts of changes to an existing, grandfathered battery leasing arrangement might constitute a ‘variation’ triggering the obligation to seek a waiver.¹³⁸

AusNet supported ENA’s ‘report and comply’ alternative in its submission but also suggested the waiver process should achieve the national electricity objective’s elements and should not be used primarily to collect information (for which our RIN process is more appropriate) or to exert more control through waiver conditions.¹³⁹

On the issue of whether we should provide a streamlined waiver process for grid-scale batteries in the transmission market, stakeholders were divided in their submissions with AusNet and Transgrid supporting a streamlined waiver process for transmission batteries¹⁴⁰ and Iberdrola and Snowy Hydro opposing it.¹⁴¹ Neither side provided much supporting rationale for the AER adopting a streamlined waiver process for grid scale batteries. Network

¹³⁶ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 3, 8; Network REZolution, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 3-5.

¹³⁷ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 7-8.

¹³⁸ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 9.

¹³⁹ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 4-6.

¹⁴⁰ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 6; Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 8.

¹⁴¹ Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

REZolution adopted a middle-ground stance, suggesting that a streamlined waiver process ‘may be appropriate’ if the AER adopted a waiver framework for batteries.¹⁴²

5.2.7.2 Final position

Our final position is essentially the same as proposed in our draft guideline. That is, the guideline adopts a prohibit and waive approach for leasing excess battery capacity. We have also maintained our position that existing leasing arrangements (i.e. agreements in place as at 1 March 2023) do not require a waiver (in that, they are not “new” agreements). However, if such agreements are proposed to be varied on or after 1 March 2023, the TNSP will need to seek a waiver. We understand that only three leasing agreements for DNSP owned batteries are currently in place.

In response to stakeholder feedback, we have made a minor amendment to clarify that we have prohibited **material** variations (rather than all variations) to agreements in place on or after the publication date of the final guideline, and as such, for these variations the TNSPs will need to seek a waiver.

The explanatory statement accompanying the draft guideline sets out our reasons in more detail, but in summary these are:

- Given the types of services a battery can provide, we are concerned about the risk of cross-subsidisation and discrimination. Requiring a waiver, rather than a report and comply framework, provides greater regulatory oversight that we consider commensurate with the potential harms of allowing TNSPs to lease excess battery capacity. This is particularly true for services such as generation, where there has been a long-standing view that TNSPs should not operate in this market due to their ability to manipulate market outcomes in their favour in the way they manage their network.
- The market for services from grid scale batteries is in its early stages. As ECA notes, the role of network service providers in the provision of batteries is not yet clear.¹⁴³ We agree with the points made by ECA and PIAC, that our approach represents an appropriate interim measure while the industry gains a better understanding about battery operations and services.

While non-TNSPs may currently account for the majority of batteries, we are concerned about the chilling effect on the market if it is easier for TNSPs to invest in and lease batteries via a report and comply framework. Requiring additional regulatory oversight via a waiver process provides other market participants with greater confidence that they will be able to compete on a level playing field.

We note the concerns ENA raised with respect to the time taken to determine a waiver. We encourage TNSPs to discuss their plans with us as early as possible in the investment

¹⁴² Network REZolution, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

¹⁴³ ECA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 1.

process, and we commit to working closely with TNSPs to provide as much certainty as possible.

We do not agree with the ENA's view that requiring a waiver to lease excess battery capacity is inconsistent with the intended operation of the incentive regulation framework contained in chapter 6A of the NER. Chapter 6A as a whole is intended to ensure outcomes as they relate to transmission networks delivering regulated services to customers promote the long-term interests of consumers. The elements cited by ENA go to ensuring proposed transmission investments deliver a net benefit. Ring-fencing, which also forms part of chapter 6A, ensures that in delivering on those investments, TNSPs do not use their position as a monopoly to harm outcomes in other markets. Requiring a waiver allows us to weigh up the relative harms and benefits, rather than effectively allowing TNSPs to make this assessment themselves under their 'report and comply' approach.

With respect to stakeholders' other points, we offer the following clarifications and guidance regarding our approach to waivers for grid-scale batteries.

Requiring TNSPs to demonstrate they went to market before applying for a waiver

With respect to stakeholders' submissions on this point, we note that whether a TNSP provided sufficient opportunity for third parties to express interest in leasing excess capacity from the TNSP is a factor that we will consider in determining whether to grant a particular waiver application.

Requiring TNSPs to assess scaling-up batteries to optimise excess capacity

It is outside the scope of the ring-fencing guideline to impose obligations on the appropriate sizing of a battery. For batteries that are providing prescribed transmission services, the appropriate size will be informed by the regulatory investment test for transmission which require all options to be considered on an equal footing - including batteries provided by third parties. If a TNSP seeks a waiver to lease the spare capacity of a battery, the amount of excess capacity will be one of a number of factors that the AER will take into account in deciding whether to grant the waiver. It is also likely that the AER will consult publicly on any requests for waivers from the obligation not to lease excess battery capacity, in which case other stakeholders will have an opportunity to provide comments on this issue on a case-by-case basis.

Granting waivers in only limited circumstances

As discussed below, we have decided not to adopt a streamlined waiver process for grid-scale batteries at this time. To the extent each battery leasing arrangement will be assessed as part of an individual waiver application, in consultation with the public, the circumstances are sufficiently 'limited' in our view.

Clarifying what variations to battery leases require a waiver

We have amended clause 3.1(c) of the final guideline to require that a TNSP must not enter into any *material* variation to an existing agreement, to lease excess battery capacity to third parties. As noted above, this means that for those lease arrangements which existed prior to 1 March 2023, or any new agreements which are entered into on or after that date (having first obtained a waiver), if the parties then wish to make a material variation to any such

arrangements, they must obtain a waiver. We have amended the guideline to make it clear that a ‘material variation’ means any agreement to alter or modify the terms of an existing contract, where such change is not minor in nature.

We have included in that definition, a non-exhaustive list of variations, which are material. These include, without limitation, changes to:

- the contracting parties;
- the term of the contract;
- price terms, including the approach or methodology for calculating or deriving prices;
- the extent of the lessee’s right to utilise the battery or leased capacity;
- the extent of the TNSP’s right to utilise the battery for network support services; and
- a party’s ownership, control or operation of the battery (including the ability to direct or control the other party’s or another legal entity’s operation of the battery). The reference to other legal entity is intended to capture a third party (i.e. not a contracting party) who operates the asset (for example, a service provider).

It is appropriate to have a reasonably broad definition here, given the myriad of terms and conditions that typically exist in complex commercial agreements, which characterise the transmission market. We cannot, and should not, try to provide an exhaustive list of changes that would be considered ‘material’.

Streamlining battery waivers

We consider there was no compelling evidence or policy grounds for changing our position that streamlined waivers are not, at this stage, appropriate for transmission. As we noted in our explanatory statement to our draft guideline, while cross-subsidisation remains a concern for transmission, we also hold greater concerns about a TNSP’s ability to discriminate in favour of itself or an affiliate in relation to batteries than we did for DNSPs.

There has been a long-held acceptance that TNSPs should be prohibited from owning and operating generation because of their ability to influence wholesale market outcomes via the way in which they operate their networks.

Concerns about TNSP entry into contestable generation markets goes back to 1993, when the foundations of Australia’s current electricity regulatory framework were being laid. For example, the 1993 Hilmer Report addressed the need to restrict monopoly providers of essential facilities – namely TNSPs – from ‘also competing in markets that are dependent on access to the facility,’ such as generation. The report noted, ‘a business that owned an electricity transmission grid and was also participating in the electricity generation market could restrict access to the grid to prevent or limit competition in the generation market. The Hilmer committee was concerned that ‘Even the prospect of such behaviour may be sufficient to deter entry to, or limit vigorous competition in, markets that are dependent on access to an essential facility.’¹⁴⁴

¹⁴⁴ See National Competition Policy Review, *National Competition Policy*, Committee report, 25 August 1993 (see Chapter 11, in particular).

Other regulatory concerns arising from TNSPs owning and operating generation assets have been noted. Among these are the potential for TNSPs: giving themselves preferential treatment in short notice and unplanned network outages or altering network ratings of lines and equipment; or providing their generator arm with access to confidential information acquired in its transmission role.¹⁴⁵

Regulators have consistently signalled opposition to TNSP ownership of generation assets.¹⁴⁶

For this reason, we consider a higher threshold to be appropriate for TNSPs, and that applications from TNSPs to provide ‘other services’ using grid scale batteries should be considered through a full waiver process.

5.2.8 Class waivers

Clause 5.4 of our draft guideline includes a power for us, in our absolute discretion, to grant, revoke or vary class waivers on our own initiative regarding obligations imposed under clauses 3.1, 4.3 or 4.4.1(a). In our explanatory statement for the draft guideline we noted that, in our experience administering our distribution guideline, class waivers provide us with additional, necessary flexibility to address in a timely way unforeseen issues arising in a rapidly evolving energy transition that could significantly affect the market.¹⁴⁷

5.2.8.1 Submissions

We received only one submission on this issue, from Flow Power, which suggested that class waivers ordinarily should not be initiated unilaterally by us except as a last resort, and should normally only be granted in response to applications by a proposed beneficiary that substantiates why a class waiver would be in energy consumers’ long-term interest. Flow Power submitted that this limitation would result in a stronger governance framework and increased transparency. Moreover, Flow Power suggested that class waivers directly initiated by us risks giving the perception that the need for a waiver is pre-determined, with consultation then focused on waiver conditions.¹⁴⁸

5.2.8.2 Final position

We will adopt our guideline as proposed. Limiting our power to unilaterally grant class waivers, as Flow Power suggests, would limit our flexibility that, in our experience, we often require to deal with rapidly evolving conditions in the transmission market or, for that matter, government policy decisions or initiatives that impact the sector. Moreover, the same procedures outlined in clause 5.3.4(b) of the guideline, including public submissions and

¹⁴⁵ See Acacia CRE, *The Effectiveness of the Trade Practices Act to Guide Mergers in the Australian Electricity Market*, Report for the Energy Reform Implementation Group, 22 November 2006, p. 11.

¹⁴⁶ See, e.g., Ed Willett, Commissioner, ACCC & Member, AER, *Regulating the National Energy Market: Comments to the 17th Annual Power and Electricity Congress*, 28 November 2006; Richard Owens, AEMC Senior Director, Transmission and Distribution Networks, *Redrawing the boundaries between regulation and competition in new energy services market: Comments to ENA Regulation Seminar 2016*, 3 August 2016.

¹⁴⁷ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, p. 49.

¹⁴⁸ Flow Power, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 13 December 2022, pp. 2-3.

consultation, ordinarily apply to class waivers to the same degree as individual waivers. These procedures should provide the transparency that Flow Power seeks.

5.2.9 Interim waivers

We proposed to incorporate provisions for granting interim waivers in clause 5.3.3 of the draft guideline, which is substantially identical to those in our distribution guideline. In our explanatory statement to the draft guideline, we noted that our experience has demonstrated that it is sometimes reasonable to provide a temporary exemption from ring-fencing obligations, either in anticipation of a final waiver decision or of a business becoming compliant, and interim waivers provide that mechanism. We noted that interim waivers will be granted in exceptional circumstances and outlined the matters that we will consider in deciding whether to grant an interim waiver. In addition, we noted that an interim waiver will include an expiry date and that, if the interim waiver is needed to allow the TNSP a transitional period to become compliant with the guideline, we will also make a final decision on the underlying waiver application at the same time.

5.2.9.1 Submissions

The AER received a single submission from Tilt Renewables on the subject of interim waivers. Tilt Renewables suggested that there is a risk that interim waivers can be used as a way around the waiver process and urged that there should be short expiry dates on interim waivers.¹⁴⁹

5.2.9.2 Final position

We appreciate Tilt Renewables' concerns but do not consider that they require any amendment to our draft guideline, which we adopt as final. The AER will consider all the circumstances before granting – or refusing to grant – an interim waiver and does not intend to grant an interim waiver for a term any longer than necessary.

5.2.10 Existing waivers

Our draft guideline was prepared with the understanding that TasNetworks operates under a waiver, granted in 2014, that enables it to provide both transmission and distribution services and did not include an expiry date. In our explanatory statement to the draft guideline, we noted that the draft guideline would allow TasNetworks to continue providing those activities within the same legal entity without requiring a waiver.¹⁵⁰ We received no submissions regarding this issue that would warrant a departure from our draft guideline.

¹⁴⁹ Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 4.

¹⁵⁰ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, p. 49.

6 Transition to Version 4

This Chapter considers the transitional arrangements for TNSPs to comply with version 4 of the guideline.

While the draft guideline (clause 7(a)) contemplates TNSPs complying with the updated obligations as soon as reasonably practicable, we recognised that immediate implementation of the draft guideline's updated obligations could impose significant costs on TNSPs. We considered that significant costs were most likely to be associated with legal separation, amended accounting requirements and compliance reporting mechanisms. Accordingly, we proposed a 12-month transitional period to achieve compliance with most of the new obligations.

While we allowed for a transitional period of up to 12 months to comply with version 4 of the guideline, we proposed to require immediate compliance with some of the new transmission obligations, namely:

- reporting of all breaches of the guideline within 15 business days of becoming aware of the potential breach;
- complying with the final guideline's provisions regarding agreements relating to the leasing of excess battery capacity and service provider arrangements; and
- submitting an initial, audited annual compliance report, which will cover the period from commencement of Version 4 of the guideline to 31 December 2023 (less than a full calendar year), with the first report submitted by 30 April 2024.

TNSPs are required to comply with these obligations from Version 4's commencement date (i.e., 1 March 2023). Finally, we indicated that interim waivers may be considered on an ad hoc basis where TNSPs are able to demonstrate that they cannot reach compliance within 12 months.¹⁵¹

6.1 Submissions

ENA advised that it considered that 'an appropriate timeframe has been provided for the transition to the new arrangements'.¹⁵²

However, some stakeholders questioned our intent and logic behind our proposal to make annual compliance and breach reporting immediately effective. For example, ENA considered it was unclear what compliance and breach reporting we were requesting during the transition period. ENA suggested it would be inappropriate to require breach reporting for provisions that have yet to take effect and questioning the value in an initial annual compliance report that covers only the limited matters in effect during the transition period. On the other hand, if compliance and breach reporting during the transition period is intended to address compliance with the existing guideline (Version 3), then ENA questioned the merit

¹⁵¹ AER, *Draft Ring-fencing Electricity Transmission Guideline (Version 4) Explanatory Statement*, November 2022, pp. 50-51.

¹⁵² ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

of TNSPs ‘devoting substantial resources to this exercise given that much of [it] would be a one-off’.¹⁵³

AusNet raised concerns with several points related to our proposed transitional arrangements in its submission. Specifically, AusNet:

- Suggested we reconsider our transitional arrangements altogether and to instead provide that the entirety of the new version of the guideline, including the breach and compliance reporting requirements, do not come into effect until 12-months after its commencement date. AusNet suggested that there are no binding obligations to breach during the transition period and therefore no breaches to report during the first 12 months.¹⁵⁴
- Suggested that the initial compliance reporting proposed created several ‘practical and operational problems,’ namely diverting resources that should be focused on a successful transition to meeting new requirements or setting up processes to ensure compliance and those efforts would increase TNSPs’ costs, which in turn would be passed to consumers.¹⁵⁵
- Was concerned that the waiver process under clause 5 of the draft guideline would not be available for 12 months and that it would therefore be unavailable to TNSPs seeking a waiver from the obligation in clause 3.1(c) (battery leasing), which requires immediate compliance.¹⁵⁶

Marinus also questioned how the transitional arrangements in our draft guideline would apply in its case. Specifically, Marinus asked for clarification on how the transmission guideline would apply to prospective TNSPs, like Marinus, or newly formed TNSPs, such as when Marinus starts providing prescribed transmission services. In its submission, Marinus noted that it may be non-compliant if it starts providing prescribed transmission services without having first obtained a waiver from particular ring-fencing obligations. However, it would be unable to apply for a waiver until it becomes a TNSP, as clause 5.1 of the draft guideline only allows TNSPs (not prospective TNSPs) to apply for a waiver. Marinus suggested that we consider amending the transitional provisions or amending the definition of ‘commencement date’ to address this issue.¹⁵⁷

6.2 Final position

6.2.1 Transition period

Based on the lack of stakeholder comment on the 12-month transitional period proposed in the draft guideline, and ENA’s supportive submission, we consider this aspect of our draft guideline to be uncontroversial and adopt it in the revised guideline.

¹⁵³ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 15.

¹⁵⁴ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

¹⁵⁵ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 3-4.

¹⁵⁶ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 4.

¹⁵⁷ Marinus, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

6.2.2 Compliance and breach reporting

With respect to the transitional arrangements we proposed for breach reporting, we consider the concerns raised by ENA and AusNet can be addressed by clarifying our intent in this explanatory statement and that no amendments to the guideline are required. As such, the final guideline is consistent with the proposals in our draft guideline.

TNSPs' obligations to report breaches during the transition period apply to both the obligations that are required to be complied with immediately in Version 4 of our transmission ring-fencing guideline, and the obligations in the previous guideline that remain in effect until the end of the transition period. As required in clause 7(c) of the draft guideline (and retained in the revised guideline), a TNSP must continue to comply with the previous guideline until it becomes fully compliant with the revised guideline, except to the extent that non-compliance with the previous guideline is necessary to comply with version 4. Thus, breaches of the previous guideline that remain in place must be reported.

The main change is that the timeframe within which to report breaches has changed, from the previous guideline's requirement that breaches are reported 'immediately', to an obligation to report within 15 business days of becoming aware of a breach.

With respect to requiring TNSPs to prepare and submit their audited annual compliance report for the transitional period, we do not agree with ENA's or AusNet's submission that this obligation represents an unwarranted diversion of TNSP resources to reporting and away from developing its compliance processes and procedures. First, the final guideline is clear that a TNSP must 'fully comply with version 4 of this guideline as soon as reasonably practicable,' but no later than Version 4's compliance deadline (clause 7(a)). Second, annual compliance reporting, and the independent audit that accompanies such reporting, is a key process that we consider critical to TNSPs coming into compliance with the other obligations in the guideline. Finally, we expect that the initial compliance report submitted by 30 April 2024 will provide us with critical information on a TNSP's progress toward developing and implementing processes and procedures to ensure compliance with the new obligations, and to foreshadow any issues that may require an interim waiver to assist a TNSP to achieve compliance.

6.2.3 Application of the guideline to prospective TNSPs

The transmission ring-fencing guideline only applies to TNSPs that are providing prescribed transmission services. Consequently, the guideline does not apply to entities who, like Marinus, have not yet begun to provide prescribed transmission services. While such entities are not eligible to apply for and be granted a waiver under the guideline until they are actually engaged in the provision of prescribed transmission services, we consider this issue is best addressed through a commitment to work through issues raised by Marinus in the lead-up to becoming a TNSP, rather than through a specific provision in the guideline.

Specifically, we expect this issue can be managed by entities who anticipate becoming subject to our transmission ring-fencing guideline engaging with AER staff early, for example providing us with information such as their expected TNSP registration date, the date when they expect to begin providing prescribed transmission service and aspects of their arrangements which may not comply with the guideline. While Marinus and other prospective TNSPs may not be able to apply for waivers until they are TNSPs subject to our guideline, such early engagement will allow them to apply for necessary waivers at the earliest

opportunity and for staff and the AER to be prepared, if necessary, to grant an interim waiver to facilitate their initial operations until a fuller appraisal of the need for, and appropriate terms and conditions of, a waiver can be more fully developed.

6.2.4 Access to waivers during the transition period

We consider that AusNet's concern that the waiver process in clause 5 of the draft guideline is not available to TNSPs during the transition period can be clarified in this explanatory statement and that no further amendment to the draft guideline is required.

In response to AusNet's concern, we note that Version 4 of the guideline takes effect, in its entirety, from 1 March 2023, and that transitional arrangements are included in clause 7 of the guideline to acknowledge that:

- some provisions are required to be complied with immediately; and
- for all other provisions, TNSPs are expected to comply as soon as reasonably practicable, but compliance with these provisions will not be enforced until the version 4 compliance deadline.

Accordingly, the waiver provisions under clause 5 are available for a TNSP who wishes to seek relief from those provisions that may be waived under the amended guideline and, as such, we confirm that TNSPs will be able to apply for a waiver from 1 March 2023.

7 Seeking changes to the law and rules

7.1 Expanding the scope of the transmission ring-fencing framework

Submissions to our May 2022 Issues paper raised concerns about both information sharing and the potential for TNSPs to favour themselves or an affiliate when providing contestable connections. This is as a result of TNSPs' exclusive ability to provide the non-contestable components of a transmission connection (as a negotiated transmission service), while also participating in the market for the contestable components of such connections.

In the explanatory statement accompanying the draft guideline, we noted that while the NER provide a number of protections in relation to information sharing, it is not clear that the framework is functioning as well as intended given stakeholders' concerns. However, the NER limits our transmission ring-fencing powers to requiring accounting and functional separation of prescribed transmission services provided by TNSPs from other services provided by TNSPs.¹⁵⁸ We do not have the power to require accounting or functional separation of negotiated transmission services (most commonly the non-contestable components of a transmission connection) from non-regulated transmission services (including the contestable components of transmission connections).

We indicated that we would consider, based on stakeholder feedback, whether the NER's current obligations for preventing discrimination go far enough to address harms, particularly in the provision of connection services. If current arrangements are inadequate, we noted we are minded to pursue a rule change request to expand the transmission ring-fencing framework to create the ability to specifically ring-fence negotiated transmission services, in addition to prescribed transmission services.

7.1.1 Submissions

Submissions on this issue from stakeholders other than TNSPs supported the AER pursuing a rule change. These included the AEC, AEO, CEIG, CEFC, CitiPower, Iberdrola, Snowy Hydro, Squadron Energy and Tilt Renewables.¹⁵⁹ The reasons these stakeholders gave for supporting a rule change included:

- the general view that the current arrangements for contestable connections are inadequate;

¹⁵⁸ NER 6A.21.2(a).

¹⁵⁹ See AEC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-2; CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 3; CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, p. 3; CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3; Squadron Energy, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; and Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

- the need for functional separation between those staff involved with specifying the technical requirements of the connection (a negotiated transmission service) and those involved in the provision of non-regulated transmission services; and
- a view that there is a risk of information disclosure without functional separation.

For example, CitiPower stated that:

Given that negotiated transmission services are subject to monopoly provision, there is ample scope for the incumbent TNSPs to abuse their position and act in a discriminatory manner, impacting the cost and viability of connections from the distribution to transmission networks.¹⁶⁰

The CEFC supported the rule change as a means to make it easier for generator proponents to consider alternative providers for contestable connection services.¹⁶¹ The CEFC highlighted that, from its experience, very few renewable generation projects have appointed a competitor to the local TNSP to provide contestable grid services and that grid connection costs have increased in absolute terms in recent years. The CEFC also noted the importance of providing transparency, confidence, and predictability for stakeholders to efficiently connect 33 GW of large-scale wind, solar and storage by 2030.

The NSW DNSPs considered that the NER already permits the AER to ring-fence negotiated transmission services from other services, and considered that '[a]s a general principle, any ring fencing controls should be imposed around the provision of monopoly services,' which include negotiated transmission services.¹⁶² Generally, the NSW DNSPs were concerned about inconsistencies between the treatment of TNSPs and DNSPs and the potential for distortions to arise, as well as implications for the competitiveness of contestable connections due to the risk of a TNSP taking advantage of its monopoly position.

In addition to supporting the proposed rule change, Iberdrola also suggested that we should develop a roadmap of key actions that will set out how contestability for new transmission will be delivered, how and when the rule change will be submitted and delivered, and the development of a civil penalties framework for non-compliance with the ringfencing guideline.¹⁶³

AusNet did not comment specifically on the proposal for a rule change but noted it did not consider functional separation of connection services to be warranted in Victoria due to the effectiveness of Victoria's contestability framework in preventing potential harms associated with discrimination.¹⁶⁴ AusNet also considered that the scope for contestable transmission services in other jurisdictions is 'extremely limited' and that wider market reforms should be

¹⁶⁰ CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2.

¹⁶¹ CEFC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 22 December 2022, pp. 2-3.

¹⁶² NSW DNSPs, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 5.

¹⁶³ Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

¹⁶⁴ AusNet, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 1-3.

considered to improve contestability, rather than being pursued through the ring-fencing guideline.

The ENA did not explicitly express a view on the need for a rule change. However, it engaged Incenta Economic Consulting to prepare a report (attached to ENA's submission), considering the existing measures for supporting contestable connections in the NER and whether additional ring-fencing measures are required to protect competitive outcomes. Incenta concluded that:¹⁶⁵

- The existing framework for contestable connections was designed to prevent TNSPs from using their monopoly power to harm competitive outcomes.
- There are no obvious gaps in the regulatory framework that warrant more onerous measures, such as ring-fencing.
- Submissions provided to the AER raising concerns about the competitiveness of connections lacked evidence and did not highlight gaps in the framework.

The ENA drew on this report to suggest that, even if the AER had the power to impose greater functional separation, it would not be warranted.¹⁶⁶

Similarly, Network REZolution, while not expressing a view on a rule change, noted it did not consider the risk of discriminatory behaviour to be as high for TNSPs as for DNSPs. It also noted that, in considering expansion of the AER's ring-fencing powers, we should consider:¹⁶⁷

- risks of regulatory burden for both TNSPs and the AER;
- impacts on future market innovation, particularly in light of increased compliance costs; and
- whether ring-fencing negotiated services provides a material benefit to industry and consumers.

Transgrid submitted that there is no justification for pursuing a rule change given there is no evidence of harm from the current functional separation arrangements.¹⁶⁸

7.1.2 AER position and further process

A critical purpose of ring-fencing is to address competition concerns where access to a monopoly service is essential to facilitate effective competition in another market. This is the case for transmission connections, where generators and others must engage with a TNSP for the non-contestable elements of a connection, but in theory have access to multiple providers for the contestable elements of a connection. Allowing TNSPs to operate in the contestable market raises concerns about their ability to misuse their market power by tying

¹⁶⁵ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022 (Incenta Economic Consulting, Competition issues for contestable transmission projects, p. 1).

¹⁶⁶ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

¹⁶⁷ Network REZolution, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 6.

¹⁶⁸ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 9.

the provision of non-contestable services to the provision of contestable services. Even if market power is not actually misused, the potential for such behaviour may be enough to deter new entry into, or limit competition in, contestable markets.

In allowing TNSPs to provide contestable connection services, the AEMC recognised this issue. To address some of the key competition concerns, the AEMC included in the NER a number of clauses to restrict TNSPs' ability to exercise their market power and limit information sharing that would advantage them or their affiliates. As summarised by the AEMC, these include, for example:¹⁶⁹

- 'requiring the Primary TNSP to publish certain information about connecting to its network on its website and provide certain information to connection applicants on request, to enhance the transparency of the connection process';
- 'strengthening the principles that underpin negotiations for services required to connect to the shared transmission network and removing the requirement for TNSPs to develop individual negotiating frameworks for approval by [AER]';
- 'providing for a process by which an independent engineer can be engaged to provide advice on a technical issue related to a connection if either the connecting party or the TNSP requests it'; and
- 'clarifying the process that applies to the resolution of disputes raised in relation to transmission connections'.

Other protections in the NER include but are not limited to:

- A requirement that a TNSP's offer to connect separates out the costs for negotiated transmission services and non-regulated transmission services (NER 5.3.6(b4)(2)).
- Limitations on the use of information provided to the TNSP, including a requirement that data and information provided to a TNSP not be used for the purpose of tendering for contestable services in relation to connections (NER 5.3.8(a1)).
- Timeframes that TNSPs are required to meet in respect of connection enquiries (NER 5.3).

As noted above, ENA considers these arrangements in the NER are comprehensive. ENA also considers that, if any gaps are identified, these should be addressed through the NER rather than through ring-fencing. In addition, Incenta suggested that the threat of competition is sufficient to ensure TNSPs offer competitive terms and conditions for connections, and that 'this threat of competition means that efficient outcomes can be expected even where incumbent TNSPs undertake the majority of contestable connection projects'.¹⁷⁰

In respect of ring-fencing in relation to the connections framework, the AEMC stated:¹⁷¹

¹⁶⁹ AEMC, *Transmission connection and planning arrangements, Rule determination*, 23 May 2017, Sydney, p. iv.

¹⁷⁰ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022 (Incenta Economic Consulting, Competition issues for contestable transmission projects, p. 4).

¹⁷¹ AEMC, *Transmission Connection and planning arrangements, Rule determination*, 23 May 2017, Sydney, pp. 167-168.

The Commission considers that negotiated transmission services are more akin to alternative control services than negotiated distribution services. This is because, under the final rule, the Primary TNSP is required to provide certain negotiated transmission services (connection services) on an exclusive basis. This is not the case for negotiated distribution services (where the DNSP is not required to provide the service). Imposing a form of separation at the transmission level similar to that imposed at the distribution level (i.e., between direct control services and other services) may therefore not be appropriate. The Commission is of the view that a more appropriate division would be between a TNSP's provision of prescribed transmission services and negotiated transmission services, and its non-transmission or other contestable transmission services.

The AEMC went on to note that amending the NER in relation to transmission ring-fencing was not within scope of the rule change request it was considering.

The AER agrees with the AEMC's view that negotiated transmission services are more akin to alternative control services (that is, a regulated distribution service) and the implication that negotiated transmission services should be provided within the ring-fenced entity. More generally, our view is that it is appropriate that the ability to impose ring-fencing controls applies to all monopoly transmission services. As a matter of principle, we therefore consider the ring-fencing framework should extend to negotiated transmission services, since these services can only be provided by TNSPs. However, we also acknowledge that there are costs associated with any amendments to the scope of a regulator's power, and that these costs must be carefully considered in determining whether any changes are in the long-term interests of consumers.

Specifically in respect of connections, we do not want to pre-empt the nature of any amendments to the guideline if a rule were to be made. Any further changes to our transmission ring-fencing guideline in the event of an amendment to our head of power would need to be consulted on in accordance with the transmission consultation procedures.¹⁷² However, we have several observations in respect of connections.

Significant investment is required over coming years to connect sufficient new generation as fossil fuel generators retire. It is critical that this be done quickly and at low cost. Approximately 52 renewable power projects are either committed or being commissioned at present, while over 500 projects have been publicly announced.¹⁷³ TNSPs will play a critical role in facilitating these connections in their role as the monopoly operator of the transmission network.

The regulatory framework provides for the contestable provision of some elements of transmission connections. This is a nascent market that should be supported where possible. The development and implementation of each generation project may cost several hundred million dollars to complete. Each project is likely to require a new connection the cost of

¹⁷² NER Rule 6A.20.

¹⁷³ See AEMO, *NEM Generation information*, January 2023. 'Renewables' in this regard includes solar and wind farms, hydro power stations, and batteries.

which is likely to be approximately 10% of the overall project cost.¹⁷⁴ As such, the potential benefits of improving competition and driving down the cost of connections are likely to be high, and these benefits will be passed through to consumers via lower wholesale prices.

Based on concerns raised by non-TNSP stakeholders, including both connecting parties and potential competitors, we are not confident that the market is operating as efficiently as it could. Further, while connecting parties have recourse to a dispute resolution process, we are conscious that they may have limited incentive to exercise this option where they must repeatedly engage with a TNSP to facilitate multiple network connections.

While the NER places restrictions on the behaviour of TNSPs, such as information restrictions, simply having the rules in place is not always sufficient to curb monopoly behaviour. For example, information restrictions can be difficult to enforce in practice where individual staff members are involved in the provision of both monopoly and contestable services. Similarly, office separation can also be appropriate where there is a risk of sensitive information being passed between staff members, whether intentionally or otherwise.

Incenta expressed the view that the arrangements implemented by the AEMC would require TNSPs to implement targeted and time-limited quarantining of staff to restrict the use of any information received in their provision of non-contestable services when tendering for contestable services.¹⁷⁵ However, without an explicit obligation, the AER has no means of monitoring and ensuring compliance.

This example is not intended to pre-empt the type of functional separation that the AER may impose to ring-fence negotiated transmission services from non-regulated transmission services if granted the requisite power. However, it illustrates a gap that we consider exists in the current framework that would appropriately be filled via the ring-fencing guideline.

At this stage, we consider a change to our transmission ring-fencing head of power would be beneficial, even if we ultimately concluded that the costs of functional separation between negotiated and non-regulated transmission services outweighed the benefits. For example, the threat of additional regulation in and of itself can provide an effective curb on anti-competitive behaviour.

For these reasons we intend to continue to progress our consideration of a potential rule change request to include negotiated transmission services within the scope of the ring-fencing framework. We understand this would be a significant change to the NER and, as such, will continue to consult and work closely with stakeholders as we further consider the merits of a change and potentially develop a draft rule change request. At this stage, we intend to publish a consultation paper in Q2 2023. We can appreciate Iberdrola's wish for a roadmap detailing how our effort (as well as a civil penalties framework, discussed in more detail below) will be implemented. However, such an effort would be premature, particularly since other government bodies are responsible for key elements of these processes.

¹⁷⁴ See AEMC, *Transmission connection and planning arrangements, Rule determination*, 23 May 2017, Sydney, p ii.

¹⁷⁵ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022 (Incenta Economic Consulting, Competition issues for contestable transmission projects, p. 15).

7.2 Civil penalties for breaches of the guideline

The guideline does not currently attract a civil penalty for non-compliance with our transmission ring-fencing guideline under the NER. Accordingly, the AER does not have authority to impose pecuniary penalties on TNSPs if they were to breach a ring-fencing obligation. This contrasts with breaches of the distribution guideline, which attract tier 1 civil penalties.

In the explanatory statement accompanying the draft guideline we noted this gap and our inclination to request Energy Ministers to classify compliance with the transmission ring-fencing guidelines as a civil penalty provision under the NER. We also asked stakeholders for feedback on whether initiating the process to attach civil penalties to non-compliance with our transmission ring-fencing obligations is an appropriate next step to the guideline review.

7.2.1 Submissions

The majority of stakeholders that expressed a view supported the AER advocating for the introduction of civil penalties for non-compliance with the guideline. This included AEO, CEIG, CitiPower, Iberdrola, PIAC, Snowy Hydro and Tilt Renewables.¹⁷⁶ The reasons for supporting this proposal were the effectiveness of civil penalties as a deterrent to non-compliance and for reasons of procedural consistency between DNSPs and TNSPs.

The ENA did not state either support for, or opposition to, introducing civil penalties but noted the importance of clear obligations if non-compliance is to attract significant civil penalties.¹⁷⁷ Transgrid was the only stakeholder to explicitly oppose the introduction of civil penalties. This was on the basis that TNSPs already operate in good faith and that there is no evidence of a need for civil penalties.¹⁷⁸

7.2.2 AER position and further process

Compliance with transmission ring-fencing requirements is critical for electricity markets to operate effectively. Non-compliance imposes costs and risks on other market participants, either because they are at a disadvantage in competing with a monopoly or because they cannot access monopoly services on reasonable terms and conditions, including price. Given the potential harms associated with non-compliance with our transmission ring-fencing framework, we consider it appropriate that breaches of the guideline should attract a civil penalty.

¹⁷⁶ See AEO, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3; CEIG, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 15 December 2022, p. 4; CitiPower, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 2; Iberdrola, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, pp. 2-3; PIAC, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 19 December 2022, p. 3; Snowy Hydro, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3; and Tilt Renewables, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 3.

¹⁷⁷ ENA, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 12.

¹⁷⁸ Transgrid, *Submission to Draft Ring-fencing Electricity Transmission Guideline (Version 4)*, 16 December 2022, p. 10.

In 2021, the Energy Ministers agreed to a Decision Matrix and Concepts Table, which is a tool for classifying civil penalty provisions.¹⁷⁹ The tool was used to classify, among other things, compliance with the distribution ring-fencing guideline as a Tier 1 civil penalty provision, meaning non-compliance attracts the highest financial penalty available. This was on the basis that a breach of the provision:

- would result in unacceptable market participant behaviour; and
- may result in financial gain to the contravener.

We consider that a breach of the transmission ring-fencing guideline similarly warrants a Tier 1 penalty. As such, we intend to write to Energy Ministers proposing that:

- compliance with the transmission ring-fencing guidelines be added to the list of Tier 1 civil penalty provisions in the National Electricity Regulations; and
- a note be added to the relevant NER clause 6A.21.1 identifying it as a civil penalty provision.

¹⁷⁹ Energy Ministers, *Decision Matrix for tiering classification of civil penalty provisions under the National Energy Laws – Final*, January 2021.

Appendix A – Table of revised clauses Draft to Final Version 4

Guideline clause name	Clause and page number in draft	Clause and page number in final	Amendment	Reason for change
Background and Summary	1.1.1, p 1	1.1.1, p 1	Clarify that this Guideline imposes obligations on those TNSPs that provide prescribed transmission services under Chapter 6A.	Some TNSPs who only provide non-regulated transmission services were concerned that they would be bound by legal separation requirements. Discussed at section 2.1.1.2 above.
Legal separation	3.1, p 6	3.1, p 6	Only require TNSPs to seek a waiver for material (i.e. non-minor) variations to existing agreements which lease excess battery capacity. Added in a new definition of “material variation”.	AER considers it may be administratively burdensome for TNSPs to seek waivers for minor variations to leasing agreements. Discussed further in section 5.2.7 above.
Discrimination	4.1, p 8	4.1, p 8	Remove second limb (cl 4.1(b)ii) within the non-discrimination general obligation.	AER considers cl 4.1(b) sufficiently broad to capture conduct which might have otherwise contravened subclause (b)ii.
Staff separation	4.3, p 10	4.3, p 10	Clarify that restrictions on staff sharing relates to the activities that certain staff of the TNSP are involved in.	To address TNSP stakeholders concern that the practical effect of the draft guideline was to restrict employment arrangements of certain staff.