



# **FINAL DECISION SA Power Networks ring-fencing waiver variation**

June 2021

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AER Reference: 12231696.1

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## Shortened forms

Shortened Form	Extended Form
AER	Australian Energy Regulator
DNSP	Distribution Network Service Provider
NEO	National Electricity Objective

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# 1 Summary

The AER has decided to grant a ring-fencing waiver, effective from 3 June 2021, to allow SA Power Networks to continue to provide maintenance and construction services to a single customer for specific telecommunication construction and maintenance services under an existing contract. The waiver exempts SA Power Networks' from its obligation to comply with clause 3.1 of the guideline (legal separation) in relation to those services from 1 July 2021 until 30 June 2023.

The customer has unilaterally exercised an option to extend the existing contract to 30 June 2023. The waiver provides an extension of time to an existing waiver granted to SA Power Networks on 28 September 2018,<sup>1</sup> thereby permitting SA Power Networks to fulfil its contractual obligations to this customer and meet its obligations under the Electricity Distribution Ring-Fencing Guideline (version 2) (the guideline). But for the customer's decision to exercise its option to extend the contract, SA Power Networks would not have applied to vary the existing waiver and it would have expired on 30 June 2021.

On 3 September 2018, SA Power Networks applied for a waiver from its obligations under clause 3.1 (legal separation) of the guideline to continue delivering contestable construction and maintenance services under 21 contracts.<sup>2</sup> Consistent with our decision to approve the existing waiver in 2018, we consider there is little or no harm to consumers or contestable markets from SA Power Networks continuing to provide these services under the last remaining contract. As the contract was awarded to SA Power Networks prior to the guideline coming into effect in 2018, there was no competition for provision of the contracted services at that time.

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<sup>1</sup> [AER - SA Power Networks waiver variation - September 2018](#).

<sup>2</sup> SA Power Networks, *Application for extension to waiver from AER Ring-fencing Guideline - legal separation: Other services maintenance and construction contracts*, 3 September 2018.

## 2 About ring-fencing

Ring-fencing separates the regulated and contestable parts of a distribution network service provider's (DNSP) network business via legal and functional separation obligations. Ring-fencing encourages competition in contestable markets by providing a level playing field for third party providers in new and existing markets for contestable services.<sup>3</sup> Without ring-fencing, there is a risk that a DNSP might cross-subsidise contestable electricity services with revenue earned from provision of distribution services. There is also a risk that a DNSP might discriminate in favour of an affiliate that provides contestable electricity services, potentially harming competition in contestable markets. Such outcomes could lead to less efficient prices for operation and use of both regulated and contestable electricity services and restrict the development of competition in contestable markets.

The guideline recognises that strict adherence to ring-fencing obligations might, in some circumstances, result in outcomes that are not in the long-term interests of consumers. This is why the guideline makes provision for ring-fencing waivers. Waivers provide the ring-fencing framework with flexibility by exempting a DNSP from specific obligations, subject to our approval. We consider that waivers should be considered on a case by case basis and in limited circumstances where cost benefit of alternatives is too high. DNSPs will normally be expected to comply with the guideline.<sup>4</sup>

Clause 5.3.2 of the guideline states that, in assessing a waiver application and deciding whether to grant a waiver (subject to any conditions) or refuse to grant a waiver, we must have regard to:

- i. the National Electricity Objective (NEO)
- ii. the potential for cross-subsidisation and discrimination if the waiver is granted or refused; and
- iii. whether the benefit, or likely benefit, to electricity consumers of the DNSP complying with the obligation (including any benefit or likely benefit from increased competition) would be outweighed by the cost to the DNSP of complying with that obligation.

Clause 5.3.2 of the guideline also states that we may have regard to any other matter we consider relevant. Our explanatory statement details some of the other matters we may consider when assessing a waiver application.<sup>5</sup>

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<sup>3</sup> AER, *Electricity Distribution Ring-fencing Guideline Explanatory Statement*, November 2016, p. 1.

<sup>4</sup> AER, *Electricity Distribution Ring-fencing Guideline Explanatory Statement*, November 2016, p. 6.

<sup>5</sup> AER, *Decision: DNSP Applications for Waivers from the Electricity Distribution Ring-fencing Guideline*, December 2017, pp. 15-17.

## 3 SA Power Networks' waiver application

### 3.1 SA Power Networks' original waiver

In December 2017, we granted a ring-fencing waiver to SA Power Networks exempting it from clause 3.1 of the guideline (legal separation) in relation to 21 construction and maintenance contracts.<sup>6</sup> This allowed SA Power Networks to continue performing the construction of transmission and telecommunications infrastructure, such as pylons or towers required by the contracts without being in breach of the guideline. The last contract was due expire on 30 June 2021.

On 3 September 2018, SA Power Networks submitted a further waiver application to us to vary the 2017 waiver. SA Power Networks sought this 2018 waiver to include four new contracts that were not covered by the original waiver, and therefore involved a breach of the guideline. SA Power Networks identified these contracts in August 2018. We granted the waiver application, without stakeholder consultation.<sup>7</sup>

### 3.2 SA Power Networks' current waiver application

On 13 May 2021, SA Power Networks submitted a waiver application to vary the existing waiver. SA Power Networks' latest waiver application relates to one contract for a single organisation.<sup>8</sup>

The initial contract term expires on 30 June 2021. However, the contract provides the customer with a unilateral and automatic right to exercise an option to extend the contract term. The customer has exercised this option, meaning the final contract with SA Power Networks will now conclude on 30 June 2023. Therefore SA Power Networks seeks this variation to fulfil its obligations under the existing contract signed prior to the commencement of the ring-fencing deadlines and in order to comply with the requirements of the guideline. Apart from extending the expiration date of the contract, there are no other changes to this contract.

SA Power Networks no longer signs new agreements or markets its ability to perform the service that are the subject of this contract.

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<sup>6</sup> [SA Power Networks' original waiver - 30 October 2017.](#)

<sup>7</sup> [SA Power Networks' ring-fencing waiver application - 3 September 2018](#)

<sup>8</sup> [SA Power Networks waiver application - 13 May 2021.](#)

## 4 Assessment

The guideline specifies that, in assessing a waiver application, we will consider the benefits to consumers of the DNSP being required to comply with the obligation, relative to the cost to the business of complying with the obligation.

In assessing SA Power Networks' original waiver application and its request to vary the waiver expiry deadline, we have considered the factors outlined in clause 5.3.2 of the guideline.<sup>99</sup> In addition to this, we have also considered:

- The likely cost of compliance to SA Power Networks consumers and/or the business.
- Potential harms to contestable markets from allowing SA Power Networks to continue providing transmission asset maintenance services for telecommunication assets only for the customer.

### 4.1 Balance of benefits and harms from complying

#### 4.1.1 Consumer harms

We consider there will be minimal to no harm to consumers by varying the waiver end date and requiring SA Power Networks to comply with its obligations in relation to providing telecommunication services to the customer.

SA Power Networks no longer signs new agreements or markets its ability to perform these services. The costs and revenue from this contract will be allocated according to SA Power Networks' Cost Allocation Methodology and regulated revenue will not subsidise these activities.

#### 4.1.2 Cost of compliance to SA Power Networks

In this case, we consider that the costs to SA Power Networks of complying with the obligation are genuine and could be significant. For example, if we were to refuse the waiver application, SA Power Networks may elect to novate the contract. This means that an alternate service provider may need to be sourced to provide these services which could cause disruption in the performance of elements of the contract and would impose an administrative burden and cost on SA Power Networks.

#### 4.1.3 Duration

SA Power Networks has applied to vary the waiver expiry date to 30 June 2023 in respect of ongoing telecommunication services for the customer.

#### 4.1.4 Public consultation

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<sup>99</sup> AER, *Electricity Distribution Ring-fencing Guideline*, October 2017, clause 5.3.2.



Under clause 5.3.2(b)(iii) of the guideline we may invite submissions on a waiver application, but we are not required to do so in all cases.<sup>10</sup>

SA Power Networks' original waiver in 2017 was open to consultation as part of our Draft Decision on Ring-fencing Waiver Applications. At that time, we received no submissions in, indicating that granting the waiver, which covered 21 contracts, was not of significant concern to stakeholders.<sup>11</sup>

Since granting the original waiver to extend the expiry date in 2017, no stakeholders have raised concerns with us about the operation of the waiver, and SA Power Networks has complied with the terms of the waiver. On that basis, we do not consider that consultation is required for this particular waiver application.

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<sup>10</sup> AER, *Electricity Distribution Ring-fencing Guideline*, October 2017, clause 5.3.2 (b)(iii).

<sup>11</sup> [AER, SA Power Networks Ring-fencing Waiver - August 2017.](#)

## 5 Decision

On balance, we consider that the potential cost to SA Power Networks if we did not grant the waiver application outweighs any minimal harm to consumers and is in the long-term interests of consumers. We also consider that there is very little scope for cross subsidisation or discrimination if the waiver is granted, as it merely allows the continuation of an existing contract, the costs of which are able to be allocated appropriately by SA Power Networks.

Therefore, we have decided to grant a waiver from SA Power Networks' obligation to comply with clause 3.1 of the guideline from 1 July 2021 until 30 June 2023 to allow SA Power Networks to continue to provide maintenance and construction services to the customer for certain telecommunication services under the existing contract.