



Electricity distribution Ring-fencing Guideline

Explanatory statement

November 2016

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Shortened forms

Shortened Form	Extended Form
ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
CAM	cost allocation method
COAG	Council of Australian Governments
DNSP	distribution network service provider
NEL	National Electricity Law
NEM	National Electricity Market
NEO	National Electricity Objective
NER or the rules	National Electricity Rules
NSP	network service provider
TNSP	transmission network service provider

Definitions

Terms	Definitions
affiliated entity	<p>in relation to a DNSP, means a legal entity:</p> <p>(a) which is a direct or indirect shareholder in the DNSP or otherwise has a direct or indirect legal or equitable interest in the DNSP</p> <p>(b) in which the DNSP is a direct or indirect shareholder or otherwise has a direct or indirect legal or equitable interest</p> <p>(c) in which a legal entity referred to in paragraph (a) or (b) is a direct or indirect shareholder or otherwise has a direct or indirect legal or equitable interest</p>
contestable electricity services	<p>means:</p> <p>(a) other distribution services and</p> <p>(b) other electricity services.</p>
electricity information	means information about electricity networks, electricity customers or electricity services, excluding aggregated financial information, or other service performance information, that does not relate to an identifiable customer or class of customer
existing service	in relation to a DNSP means a type of service that the DNSP was providing on 1 December 2016
information register	means the register established and maintained by a DNSP under cl. 4.3.5 of the Guideline
law	means any law, rule, regulation or other legal obligation (however described and whether statutory or otherwise)
legal entity	means a natural person, a body corporate (including a statutory corporation or public authority), a partnership, or a trustee of a trust, but excludes staff in their capacity as such
NEL	means, for the purposes of the application of this Guideline in a participating jurisdiction, the National Electricity Law set out in the schedule to <i>the National Electricity (South Australia) Act 1996 (SA)</i> , as applied by the participating jurisdiction and subject to any modification made to the National Electricity Law by that

jurisdiction

NER	means, for the purposes of the application of this Guideline in a participating jurisdiction, the rules called the National Electricity Rules made under Part 7 of the National Electricity Law, subject to any modification made to the National Electricity Rules by that jurisdiction
non-distribution services	(a) transmission services and (b) other services
office	Means, as the case may be: (a) a building (b) an entire floor of a building or (c) a part of a building that has separate and secure access requirements such that staff from elsewhere in the building do not have unescorted access to it
office register	Means the register established and maintained by a DNSP under cl. 4.2.4(a) of the Guideline
officer	in relation to a legal entity (such as a DNSP) means: (a) a director or company secretary of the legal entity (b) a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the legal entity or (c) a person who has the capacity to affect significantly the legal entity's financial standing
other distribution services	means distribution services other than direct control services note: this includes negotiated distribution services and distribution services that are not classified
other electricity services	means services for the supply of electricity, or that are necessary or incidental to the supply of electricity other than: (a) transmission services or (b) distribution services
other services	means services other than: (a) transmission services or (b) distribution services

regional office	means an office that has less than 25,000 customer connection points within a 100 kilometre radius of that office
staff	<p>of an entity (such as a DNSP), includes:</p> <ul style="list-style-type: none"> (a) employees of the entity (b) direct or indirect contractors to the entity (whether the contractors are individuals or corporate or other entities) (c) employees of direct or indirect contractors to the entity (d) individuals (including secondees) otherwise made available to the entity by another entity
staff position	in relation to a DNSP or a related electricity service provider, means a position within the organisational staffing structure of the DNSP or related electricity service provider (as the case may be) that involves the performance of particular roles, functions or duties.
staff register	means the register established and maintained by a DNSP under cl. 4.2.4(b) of the Guideline

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1 Summary

Our Electricity Distribution Ring-fencing Guideline (the Guideline) imposes obligations on distribution network service providers (DNSPs) to separate the legal, accounting and functional aspects of regulated distribution services from other services provided by a DNSP or an affiliated entity. This Explanatory Statement accompanies the Guideline.

We intend this Explanatory Statement to assist DNSPs and other stakeholders in understanding the Guideline. We also intend it to explain why we have reached the positions set out in the Guideline, including our consideration of views expressed to us by DNSPs and other stakeholders in submissions and other forums.

We are required to establish the Guideline by the National Electricity Rules (the NER).¹ The objective of ring-fencing is to provide a level playing field for third party providers in new and existing markets for contestable services, such as those for metering and energy storage services, in order to promote competition in the provision of electricity services. Without effective ring-fencing, DNSPs would hold significant advantages in such markets.

The NER provisions requiring us to establish the Guideline were made by the Australian Energy Market Commission (AEMC) which was giving effect to an agreement by the Council of Australian Governments (COAG) Energy Council.

The Guideline addresses two potential harms with two separate sets of obligations for DNSPs.

First, the Guideline addresses the risk of a DNSP cross-subsidising other services with revenue earned from provision of distribution (and transmission²) services. It does this through legal separation of the DNSP, which may only provide distribution (and transmission) services, from affiliated entities that may provide other electricity services. The legal separation obligation is supported by other obligations for the DNSP to maintain separate accounts, follow defined cost allocation methods (CAMs) and be able to report on transactions between itself and its affiliates.

Second, the Guideline addresses the risk of a DNSP favouring its own negotiated services or other distribution services, or an affiliated entity's other electricity services, in contestable markets. The Guideline does this by imposing behavioural obligations on DNSPs, including restrictions on sharing and co-locating staff, information and on co-branding of advertising materials.

Both of the above two sets of obligations align with the National Electricity Objective (NEO)³ by promoting the long term interests of consumers of electricity. Obligations addressing the

¹ NER, cl. 6.17.2(a), 11.86.8(a).

² Some DNSPs provide transmission services in addition to distribution services.

³ S. 7 of the National Electricity Law: The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to—
(a) price, quality, safety, reliability and security of supply of electricity; and

risk of cross subsidies promote efficient prices for direct control services. Obligations addressing the risk of favourable treatment promote the development of dynamic competitive markets for closely related services, such as metering, battery technologies and other contestable services.

It is important to note that the dividing lines established by the Guideline's legal separation obligations and by its non-discrimination obligations do differ in some respects. This is intentional and reflects the NER provisions under which we established the Guideline.

The Guideline legally separates a DNSP that provides distribution services from its affiliated entities that provide other services. Legal separation in combination with the Guideline separate accounting obligations will improve transparency over costs coming into a DNSP and mitigate risk of cross-subsidies.

The Guideline functionally separates a DNSP from its affiliated entities providing other electricity services, but also separates the DNSP's provision of direct control services from its own business units providing other distribution services. Collectively, we refer to these services as *contestable electricity services* and to business units or affiliated entities providing these as *related electricity service providers*. Functional separation means separation of staff and offices. Separating the provision of direct control services from the provision of other services will mitigate risk of DNSPs favouring their own contestable services over other providers—discrimination.

Below, we separately describe, at a high level, the Guideline's obligations to address risk of cross-subsidies and risk of discrimination. We then summarise the Guideline's approach to granting waivers from ring-fencing obligations. We follow by describing the Guideline's compliance and enforcement arrangements, and the transition to the new national ring-fencing framework from the previous jurisdictional arrangements. We conclude this summary chapter by reflecting briefly on the consultation we have undertaken in developing and finalising the Guideline. These issues are addressed more substantively in the following chapters of this Explanatory Statement.

Ring-fencing obligations designed to address risk of cross-subsidies

The Guideline ring-fencing obligations in relation to legal separation are designed to support and enhance the existing cost allocation arrangements that DNSPs are already subject to.

Under the National Electricity Rules (the NER) a DNSP must comply with its approved cost allocation method (CAM) for the attribution and allocation of costs to the services it provides. Cost allocation is important because the prices of regulated services are determined by the efficient costs of providing those services. Correct application of an approved CAM will see costs allocated to services in the same way over time, promoting price stability and certainty for customers.

The NER cost allocation framework, including a DNSP's CAM, only regulates costs already grouped to the DNSP. A CAM allocates a DNSP's costs between direct control, negotiated

(b) the reliability, safety and security of the national electricity system.

and other distribution services. It does not necessarily deal with the initial allocation of costs to the DNSP.

The Guideline states that a DNSP must only provide distribution services. As a consequence, other services cannot be offered by a DNSP and must be offered by a separate legal entity.⁴ The Guideline's accounting obligations and legal separation require a DNSP to enter into separate transactions for goods or services supplied to the DNSP by its affiliated entities and for goods or services supplied by the DNSP to its affiliated entities. This will provide greater transparency over costs coming into the DNSP from its broader corporate group and over services provided by the DNSP to other members of its broader corporate group.

While the Guideline prevents a DNSP from providing other services, it does not prevent an affiliated entity of a DNSP from providing other services.

Ring-fencing obligations designed to address discrimination

The Guideline's non-discrimination obligations require a DNSP not to favour its own related electricity service providers or their customers. A DNSP must:

- deal with competitors of its own related electricity service providers the same as its own related electricity service providers
- avoid providing, to its own related electricity service providers, any information, acquired through its dealings with a competitor of the related electricity service provider, that may advantage the related electricity service provider
- avoid providing to its related electricity service providers any electricity information acquired by providing direct control services, except where the DNSP:
 - provides access to that information to all third parties competing with its related electricity service providers
 - complies with the information sharing protocol it has established under the Guideline
- avoid advertising or promoting the services provided by its related electricity service providers
- have independent and separate branding of its direct control services from contestable electricity services .

In the absence of these provisions there is a risk of a DNSP's related electricity service providers gaining an advantage over their competitors in contestable markets, by reason of their relationship with the DNSP.

The Guideline includes two sets of specific obligations relating to functional separation.

The first set of specific obligations relates to staff and office separation for related electricity service providers. In this respect the Guideline includes two primary obligations:

⁴ The Guideline provides for waivers from the legal separation obligation. We discuss the circumstances in which we are likely to grant a legal separation waiver in chapter 5 (Waivers) of this Explanatory Statement.

- physical separation of a DNSP's offices from those of its related electricity service providers
- a prohibition on staff sharing between a DNSP and its related electricity service providers.

The provisions include several explicit exceptions and the potential for a DNSP to apply for a waiver from these obligations.

The second set of specific functional separation obligations in the Guideline relates to the DNSP's use of information. We have maintained the DNSP obligations set out in the Preliminary Positions Paper and Draft Guideline about information protection, sharing and disclosure. In the absence of these provisions, we consider there is a high risk of a DNSP's related electricity service providers gaining an advantage over their competitors in contestable markets by reason of their relationship with the DNSP.

A summary of the Guideline's obligations is provided in Table 1 below.

Establish and maintain registers

The Guideline includes requirements for DNSPs to maintain public registers of their information, office and staff sharing. Any interested party will be able to review these registers on a DNSP's website.

A DNSP's information register will record any other entity (including related electricity service providers) requesting access to information it acquires through providing direct control services, including a description of the kind of information requested by the entity. The description of the information must be sufficiently detailed to enable other parties to make an informed decision about whether they also want to obtain this information.

DNSPs must provide equal access to such information to related electricity service providers and to third parties. A third party may request that the DNSP include it on the information register, and in doing so request (shared) information, and the DNSP must comply with that request.⁵

For staff sharing, the Guideline requires a DNSP to establish and maintain a written register of its staff involved in provision or marketing of contestable electricity services by a related electricity service provider. Staff names need not be entered into this register, only descriptions of the staff positions.

A DNSP's office sharing register must record any instances of the DNSP sharing offices with related electricity service providers.

⁵ Confidential customer information must remain confidential.

Table 1 Ring-fencing Guideline—summary of obligations⁶

Harm affecting customers and markets	Ring-fencing obligation	
Cross-subsidies	Legal separation of DNSP from other entities	A DNSP cannot provide services that are not distribution services or transmission services
	Account separation / Cost allocation	<p>Accounts – DNSP must establish and maintain accounting procedures that enable it to demonstrate the nature and extent of transactions between the DNSP and its affiliates..</p> <p>Costs – DNSP must not allocate / attribute to distribution services costs that relate to other services.</p>
Non-discrimination	Not discriminate	A general obligation on the DNSP that it will not discriminate (either directly or indirectly) in favour of a related electricity service provider or its customers.
	No cross-promotion	A DNSP will not advertise or promote the services provided by its related electricity service providers.
	Functional separation	<p>Physical separation – DNSP must operate independent and separate offices to its related electricity service providers.</p> <p>Staff sharing – DNSP must ensure that staff directly involved in the provision or marketing of a direct control service or a regulated transmission service are not also involved in the provision or marketing of contestable services.</p>
	Information access and disclosure	<p>Protection – DNSP must protect confidential information provided by a customer or prospective customer for direct control services and ensure its use is only for the purpose for which that information was provided.</p> <p>Sharing – Where a DNSP acquires information in providing direct control services and shares this information with an affiliated entity, it must provide equal access to others. A DNSP must establish an information sharing protocol and a register of information requests.</p> <p>Disclosure – DNSP must not disclose confidential information acquired in providing direct control services to any party without the informed approval of the relevant customer or prospective customer to whom the information relates (unless exempt).</p>

Waivers from ring-fencing obligations

A waiver is a permission we may grant to a DNSP exempting it from having to satisfy one or more of the obligations in the Guideline’s provisions. However, not all of the Guideline’s provisions are subject to waivers. By limiting the availability of waivers we consider DNSPs

⁶ Refer to the Draft Guideline for the complete list of obligations.

and other stakeholders will have greater certainty about the ring-fencing framework with consequential benefits for investment and service provision. Waivers are not available in respect of obligations to:

- maintain separate accounts⁷
- apply an approved CAM to the allocation and attribution of costs between distribution services and other services⁸
- not discriminate between a related electricity service provider (or its customers) and the related electricity service provider's competitors (or their customers)⁹
- maintain registers for staff sharing and information sharing¹⁰
- protect confidential customer information.¹¹

The Guideline does allow for waivers from obligations to:

- legally separate the DNSP from entities providing other services
- functionally separate DNSP staff and premises from the activities of related electricity service providers
- separate branding of direct control services from contestable electricity services.

Where waivers are available, the process and assessment of a waiver application is discussed in chapter 5 of this Explanatory Statement.

We wish to make clear that we do not see the availability of waivers as representing a business-as-usual approach. We consider that the waiver criteria are likely to be met only when alternatives are inappropriate. That is, waivers are an exceptional measure only, and DNSPs will normally be expected to achieve compliance with the Guideline's obligations. Nonetheless, we also recognise that especially in the initial period of the Guideline's operation there may be need for waivers, particularly to transition DNSPs to their next distribution determination when service classifications may be amended.

Reporting, compliance and enforcement

The Guideline proposes placing a range of reporting and compliance requirements on DNSPs. This will be supported by a requirement for DNSPs to engage independent third parties to annually assess their compliance with ring-fencing obligations through compliance assessments. The main elements of the compliance requirements are for a DNSP to:

- establish and maintain appropriate ring-fencing procedures and practices
- demonstrate the adequacy of these procedures by an independent third party assessment

⁷ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.1(a).

⁸ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.2.

⁹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.1.

¹⁰ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.4 & 4.3.5.

¹¹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.3.2.

- report annually on its compliance with the Guideline
- notify us in writing within five business days of becoming aware of a material breach of its obligations under the Guideline.

With respect to compliance breaches by a DNSP, we may seek enforcement of the Guideline by a court in accordance with the NEL.

Any interested party may make a complaint to us about a possible breach of the Guideline by a DNSP. We will investigate complaints in accordance with our compliance and enforcement policy. At any time we may require a DNSP to provide a written response to particular concerns about compliance with the Guideline.

Transition to the new ring-fencing arrangements

For existing services, the Guideline requires DNSPs to comply with the Guideline's obligations as soon as reasonably practicable, but no later than January 2018. We consider this approach both recognises the range of circumstances faced by different DNSPs and reflects the need for certainty and confidence amongst participants, or potential participants, in developing markets.

For new services, DNSPs must comply with the Guideline immediately.

For services subject to a change in classification in a new distribution determination, DNSPs must comply with the Guideline within 12 months of the time the new distribution determination takes effect.

With respect to existing ring-fencing waivers, granted under existing jurisdictional ring-fencing arrangements, we have concluded that grandfathering those to the new national ring-fencing arrangements is not necessary. DNSPs with an existing waiver will need to consider their circumstances in light of the Guideline and, if necessary, submit to us an application for a new waiver. We consider this is not unduly burdensome as relatively few waivers have been granted under existing jurisdictional ring-fencing arrangements.¹²

Consultation

In developing the Guideline we undertook extensive consultation with DNSPs, customers and other stakeholders. This included publishing a preliminary positions paper, a draft guideline, an information paper and an exposure draft of the Guideline. We received around 80 written submissions overall. We also held workshops and public forums where stakeholders could express their views in-person. In addition, we held a large number of one-on-one discussions with various stakeholders, including DNSPs, third party providers of competitive services and consumer representatives.

We thank all stakeholders who have provided us with written submissions, attended our forums or have otherwise engaged with us. We have taken all written and verbal feedback and views into account in preparing and finalising the Guideline. In the chapters of this

¹² AER, *Electricity distribution ring-fencing — Existing jurisdictional waivers*, September 2016.

Explanatory Statement we describe the feedback and views we have received and our responses to submissions.

Details of our consultation process are provided at Appendix C of this Explanatory Statement. A full list of submissions on our Preliminary Positions Paper, Draft Guideline and Guideline Exposure Draft is provided at Appendix D. We set out stakeholder proposals in response to the Guideline Exposure Draft and our responses to those proposals at Appendix F. Submissions are available to view at our website www.aer.gov.au.

2 About the Ring-fencing Guideline

In this chapter we describe what ring-fencing is, its goals in this context and its interlinkages with other parts of the regulatory framework.

In establishing the Guideline we are giving effect to policy directions established by the COAG Energy Council and the AEMC. We are replacing existing ring-fencing arrangements established by National Electricity Market (NEM) jurisdictions with a single national ring-fencing approach.

While impetus for the Guideline was provided by the need for a suitable framework for metering contestability, COAG Energy Council and AEMC have been clear that ring-fencing is to have broader scope than only metering. The Guideline should support development of competitive markets for contestable services, provide clarity for new investment, provide a level playing field for all parties and accelerate innovation.

Ring-fencing is the identification and separation of a DNSP's monopoly business activities, costs, revenues and decision making from those associated with providing services in contestable markets. Ring-fencing promotes efficient costs for regulated services provided by DNSPs and limits their ability to discriminate in favour of their own related electricity service providers.

Some stakeholders have indicated they would prefer DNSPs to be prevented from owning businesses that provide services in contestable markets—structural separation. As an economic regulator we do not have authority to impose structural separation on DNSPs.

Compared to the Draft Guideline, the Guideline uses terminology that is clearer, more consistent and more closely aligned to the NER. Ring-fencing outcomes are in part determined by our classification decisions. Ring-fencing supports and enhances the existing cost allocation framework. The Shared Asset Guideline will continue to operate in conjunction with the Guideline, facilitating use of standard control assets to provide unregulated services.

In this chapter we first describe the background to the Guideline's development. We then describe what ring-fencing is and how it differs from structural separation. We go on to discuss terminology changes in the Guideline compared to the Draft Guideline. We conclude this chapter by discussing the Guideline's relationship to our Shared Asset Guideline, our service classification decisions, our Distribution Cost Allocation Guidelines and to a DNSP's approved CAM.

2.1 Background to the Guideline

The Australian Energy Regulator (AER) is the economic regulator for transmission and distribution of electricity in Australia's National Electricity Market (NEM). We are an independent statutory authority, our powers and functions are set in the National Electricity Law (NEL) and National Electricity Rules (NER).

The Guideline establishes a national approach to ring-fencing regulated distribution services and replaces State based ring-fencing arrangements. Since 2008, as a transitional

measure, we have administered ring-fencing arrangements that were established by jurisdictional regulators for each state and territory.

To date ring-fencing has been largely focussed on separating regulated poles and wires network services from contestable electricity retail and generation services. Now we are applying ring-fencing more broadly to ring-fence regulated distribution and transmission services from other services, including metering, connections and decentralised energy resources, such as energy storage services.

The existing jurisdictional ring-fencing guidelines have changed very little since they were first published in the early 2000s by individual jurisdictional regulators such as the Independent Pricing and Regulatory Tribunal (IPART) in NSW, the Essential Services Commission of Victoria (ESCV) the Essential Services Commission of South Australia (ESCOSA) the Queensland Competition Authority (QCA) and the Office of the Tasmanian Economic Regulator (OTTER). The jurisdictional guidelines do not adequately account for new and emerging technologies like solar PV, network energy storage or market reforms around metering and other new services which can be provided in contestable markets.

The need for a broader scope to ring-fencing was signalled in the Australian Energy Market Commission (AEMC) final rule determination on metering contestability in 2015.¹³ Those metering related rule changes resulted from an agreement by the Council of Australian Governments' (COAG) Energy Council on reforms to metering. In turn, this was one of a number of recommendations made by the AEMC in its Power of Choice Review.¹⁴ The rule changes will lead to, amongst other things, greater competition in the provision of metering services.

The COAG Energy Council announced last year that work between its officials and market agencies would include a review of ring-fencing arrangements in 2016.¹⁵ Stemming from this review, new ring fencing arrangements would:

- support development of competitive markets in services which are or should be contestable
- provide clarity and certainty in the market for new investment
- provide a level playing field for all parties providing energy services
- accelerate innovation and efficient investment.

We are required by the NER to develop a ring-fencing guideline by 1 December 2016 which is one year ahead of the commencement of metering contestability.¹⁶

Ring-fencing arrangements for transmission network service providers (TNSPs) are beyond the Guideline's scope.

¹³ AEMC, *National Electricity Amendment (Expanding competition in metering and related services) Rule 2015*, p. 78.

¹⁴ AEMC, *Final report — Power of choice review — giving consumers options in the way they use electricity*, November 2012.

¹⁵ COAG Energy Council, *Meeting Communique*, 4 December 2015.

¹⁶ NER, cl. 11.86.8(a).

2.2 What is ring-fencing?

Ring-fencing is the identification and separation of business activities, costs, revenues and decision making from those that are associated with providing services in a competitive market. Ring-fencing obligations that apply to DNSPs generally require the separation of the accounting and functional aspects of regulated distribution services from other services provided by the DNSP.

Ring-fencing promotes the long term interests of consumers by promoting efficient costs for regulated services provided by DNSPs. It does this by preventing DNSPs from cross-subsidising contestable (or other) services in other markets. Ring-fencing also limits the ability of a DNSP to discriminate in favour of its own related electricity service providers. We consider ring-fencing will support development of new and existing competitive markets by separating regulated monopoly services from contestable services, and accordingly promote achievement of the NEO. Ring-fencing levels the playing field for contestable services in competitive markets by mitigating the advantage a DNSP may otherwise have in providing those services.

A ring-fencing guideline sets out the obligations the network business must abide by to separate its regulated monopoly services from the contestable services its related electricity service providers offer to contestable markets. As noted by the AEMC, the following types of behaviours by DNSPs result in harm that ring-fencing aims to avoid:¹⁷

- cross-subsidising an affiliate's services in contestable markets with revenue derived from its regulated services
- discrimination in favour of a DNSP's related electricity service provider operating in a contestable market
- providing related electricity service providers with access to commercially sensitive information acquired through provision of regulated services
- restricting access of other participants in contestable markets to infrastructure services provided by the DNSP, or providing access on less favourable terms than to its related electricity service providers.

We expect the Guideline will aid development of competitive markets where competition is feasible and support efficient incentive-based regulation of monopoly networks where competition is not feasible.

2.2.1 Structural separation

Some stakeholders submitted that we should seek to structurally separate DNSPs from businesses providing services into contestable energy markets.¹⁸ Structural separation means full ownership separation. In effect it would mean requiring a DNSP to divest its

¹⁷ AEMC, *National Electricity Amendment (Expanding competition in metering and related services) Rule 2015*, December 2015, p. 399.

¹⁸ See for example, Red Energy, *Submission to Preliminary Positions Paper*, 2016, p. 3 or Origin *Submission to Preliminary Positions Paper*, 2016, p.1.

interests (ownership) in certain business activities. As noted in our Preliminary Position Paper and in the Explanatory Statement to our Draft Guideline, the NER does not provide us with authority to impose structural separation on a DNSP, such as would prohibit a business from engaging in certain activities.

In any case, structural separation may entail other costs. A DNSP may have certain efficiency advantages in the provision of a contestable service. This may be due to comparative advantage stemming from, for example, its scale and scope of network-related activities. If so, ring-fencing attempts to balance the objectives of promoting competition while at the same time providing DNSPs with a means (through related electricity service providers) to offer services in contestable markets. Given current policy settings, with the Guideline we aim to strike an appropriate balance between the costs and benefits of ring-fencing.

Having said that, we make no conclusions about the relative merits of structural separation as compared to a ring-fencing regime. This is ultimately a policy issue for governments through the COAG Energy Council, as it would require changes to the NER and the NEL.

2.3 Guideline terminology

Submissions in response to our Draft Guideline indicated that the terminology of the Draft Guideline required review.¹⁹ We have taken account of these views and adjusted the Guideline's terminology to make it clearer, more consistent and to better align it with NER defined terms. We have also added to the Guideline a section on defined terms (section 1.4 Definitions) which is repeated in this Explanatory Statement (see page iv). We consider these changes improve the Guideline's understandability and better align its outcomes and goals.

Stakeholders submitted that they found terms such as *network services* and *non-network services* confusing.²⁰ We had intended *network services* to mean the combination of *distribution services* and *transmission services*. Stakeholders pointed out that the NER definition of *network services* has a narrower meaning than we intended.²¹ In place of *network services* the Guideline now uses *distribution services* and *transmission services* which are defined by the NER. Rather than *non-network services* the Guideline now uses *other services*.

Concerns were also raised by stakeholders in their submissions around the Draft Guideline's use of *legal entity* when describing DNSPs. They pointed out that the range of DNSPs is

¹⁹ Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, Appendix B p. 5; Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, Attachment A p. 1; Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 1–2.

²⁰ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 5; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5; Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 2; Energy Networks Association, *Response to the AER Draft Guideline*, 28 September 2016, p. 5.

²¹ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016,

made up of a wide range of corporate structures, including some that are comprised of partnerships.²² The Guideline now defines the term *legal entity* to include partnerships.

Stakeholders noted that in some cases the Draft Guideline and its accompanying Draft Explanatory Statement used different terms interchangeably. For example, *unregulated distribution service* and *unclassified distribution service*. We have reviewed our use of these terms with a view to using them consistently. We now use *unregulated distribution service* to describe distribution services which we have not classified as direct control nor negotiated services.

We further touch on terminology issues in the context of discussing interactions between the Guideline and other regulatory instruments in the following chapters of this Explanatory Statement.

2.4 Who does the Guideline regulate

The Guideline imposes obligations on regulated DNSPs, not on other parties. This reflects our powers (and the Guideline provisions) under the NEL and NER.

The Guideline is one element in a framework of regulatory instruments, all of which regulate DNSPs. Relevant instruments include:

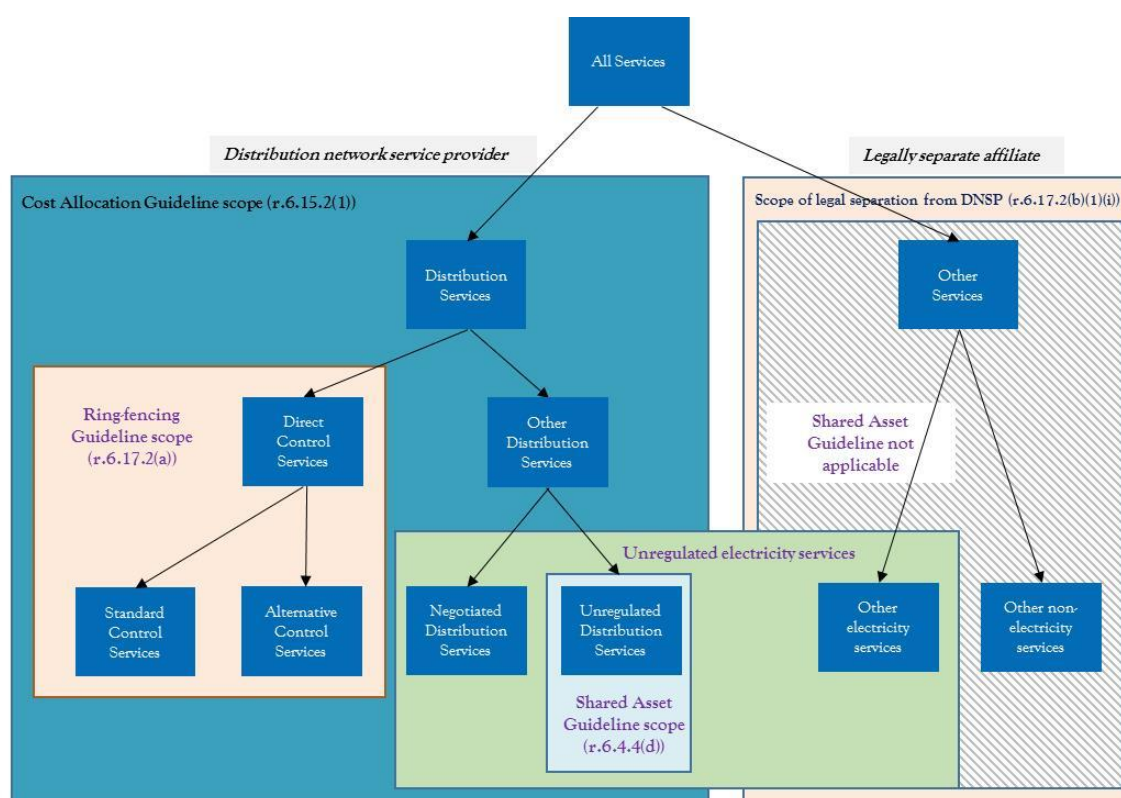
- the Guideline
- our Distribution Cost Allocation Guidelines
- a DNSP's approved Cost Allocation Method
- our Shared Asset Guideline
- our service classification decisions set out in our distribution determinations.

We discuss in detail the interactions between the Guideline and our Shared Asset Guideline in Appendix A of this Explanatory Statement. Appendix A necessarily touches on other interactions too.

Figure 1 below illustrates some of the key interrelationships between ring-fencing and other regulatory instruments. We then discuss the Guideline's relationship to our Shared Asset Guideline, to our service classification decisions, our Distribution Cost Allocation Guidelines and a DNSP's approved Cost Allocation Method.

²² ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 6.

Figure 1 Distribution services linkage to ring-fencing



Relationship to service classification

The Guideline provides for accounting and functional separation of direct control services from other services. The ring-fencing treatment of a particular service in part stems from its service classification. This is because the Guideline's functional separation obligations separate direct control services from other distribution services.²³ The decision on service classification is settled when we make our Distribution Determination for a DNSP. With respect to Figure 1 above, classification determines which 'box' a DNSP's services will fall into—aqua, yellow or pale green.

We first consider service classification for a forthcoming regulatory control period as part of the Framework and Approach (F&A), which is a preliminary process to consider key elements of the regulatory regime application to a DNSP. While classification is not finally settled until the Distribution Determination is made, the F&A provides an opportunity to review whether the regulatory arrangement applicable to each particular service offered by DNSP is still relevant for the next regulatory control period. For a DNSP, the F&A considers whether:

²³ The Guideline's obligations for legal separation, separate accounts and cost allocation apply to distribution services compared to other services. The term "distribution service" is defined by the NER chapter 10 Glossary: a service provided by means of, or in connection with, a distribution system.

- a service is a distribution service and is therefore potentially subject to regulation under the NER
- the service is provided to all customers or subset of customers
- there is potential for the service to become a contestable service and therefore subject to competition
- there are already alternative service providers making economic regulation unnecessary.

From time to time, a DNSP may commence providing a new service that was not considered at the time the classification of services was finalised. Our approach to service classification is to classify services in groupings rather than individually. This obviates the need to classify services one-by-one and instead defines a service cluster, that where a service is similar in nature it would require the same regulatory treatment. A new service might simply be added to the existing grouping and hence be treated in the same way for ring-fencing purposes. Alternatively, a distribution service that does not belong to any existing service classification is 'not classified' and would be treated as a contestable electricity service. .

Relationship to cost allocation

The cost allocation principles in the NER that underpin our Distribution Cost Allocation Guideline require the costs of providing distribution services to be attributed or allocated to the various types of distribution services.

These services include standard control services (use of shared system), alternative control services (user requested fee based services), negotiated services (services for which disputes may be settled by the AER) and unclassified services (distribution services the AER considers do not require price regulation). The classification of a service into one of the service grouping occurs at the time of the AER's Distribution Determination—typically once every five years. Importantly, the cost allocation provisions do not apply to any cost allocation between distribution services and other services, only between types of distribution services. This is discussed further below in relation to the need for legal separation.

Direct control services (Figure 1, light grey box), account for most of the revenue generated by a DNSP (close to 100 per cent of revenue in some cases). Direct control services are monopoly services and are therefore subject to economic regulation. That is, we set the prices and/or revenue a DNSP may earn from these activities.

Ring-fencing obligations for functional separation apply to the direct control services provided by a DNSP. Functional separation refers to the separation of staff and information where there is a risk that information prejudicial to competitive markets may be passed to an unregulated affiliate of the DNSP.

Relationship to the Shared Asset Guideline

The Shared Asset Guideline sets out our approach to sharing the benefits with consumers when a network business is paid for providing unregulated services by making available assets that also provide standard control services. The Guideline will support the Shared Asset Guideline by continuing to encourage a DNSP to make available its assets that

provide standard control services for other services, subject to the use being efficient and not materially prejudicing the provision of standard control services.

A change in our service classification approach is required to link the Guideline and Shared Asset Guideline. This is because the Guideline prohibits DNSPs from providing other services (i.e. non-distribution services). We will classify new services that make available standard control assets to provide other services as unregulated distribution services.

Classifying these new shared asset services will mean DNSP staff involved in these services will not be captured by the Guideline's obligations in respect of direct control services. This is appropriate because we do not expect there to be concerns around DNSP staff with electricity information providing these shared asset services. That is, DNSP staff would not breach the Guideline's non-discrimination obligations merely by making available assets for use by other parties.

Those other parties may include other parts of the DNSP that provide contestable and unregulated distribution services (e.g. metering services) or affiliated entities providing other electricity services (e.g. a battery services business) or third parties (e.g. telecommunications providers). In the short term, before a DNSP's next distribution determination when we will classify new shared asset services, we will treat the provision of standard control assets for other services as though we had already classified new shared asset services.

3 Measures targeting cross-subsidisation

In this chapter we describe the content and rationale for the Guideline's provisions that reduce risk of cross-subsidisation by a DNSP.

The Guideline includes a coordinated suite of measures to address cross-subsidisation. The measures cover legal separation, separate accounting and cost allocation. We consider that the obligations represent a targeted, proportionate and effective regulatory response to the risks of cross-subsidisation.

The legal separation obligations require a DNSP to provide only distribution (and transmission) services.²⁴ The Guideline prevents a DNSP from providing other services but it does not prevent an affiliated entity of a DNSP from providing these services subject to certain constraints.

The separate accounting obligations require a DNSP to establish and maintain appropriate internal accounting procedures to ensure it can show the extent and nature of transactions between it and its affiliated entities.

The Guideline's cost allocation obligations strengthen existing cost allocation arrangements in other regulatory instruments by explicitly preventing a DNSP allocating or attributing to distribution services costs that properly relate to other services. The allocation and attribution must be consistent with the cost allocation principles in NER cl. 6.15.2.

This chapter first summarises the approach to targeting cross-subsidies set out in the Guideline. We then describe the positions in the Guideline and our reasons for adopting them. We conclude the section by examining stakeholders' submissions by theme and describe how we have responded to their feedback.

3.1 Guideline position

Section 3 of the Guideline addresses cross-subsidy concerns by establishing obligations for:

- legal separation of the DNSP from other entities²⁵
- separate accounting²⁶
- cost allocation.²⁷

Each of these obligations is described in detail in this chapter.

Section 3 of the Guideline identifies the types of services to which the legal separation obligation applies. To be clear, legal separation does not have a geographic limit, so applies

²⁴ "Legal separation" refers to a requirement that network services be provide by one legal entity, and that other services be provided by one or more other legal entities (see cl. 6.17(2)(b)(1)(i)) of the NER).

²⁵ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.1.

²⁶ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.1.

²⁷ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.2.

to a DNSP beyond its monopoly local service area.²⁸ Legal separation is subject to transitional arrangements.

For separate accounting and cost allocation, the Guideline clarifies the services to which the obligation applies, removes the potential for waivers and confirms that there will be no transitional arrangements.

3.1.1 Legal separation

The NER states that our ring-fencing guideline may include provisions defining the need for and extent of "legal separation of the entity through which a DNSP provides network services from any other entity through which it conducts its business".²⁹

The Guideline states that a DNSP must provide only distribution services.³⁰ The Guideline prevents a DNSP from providing other services but it does not prevent a DNSP's affiliated entity from providing these services.³¹

Legal separation provides a means through which we can require a DNSP to establish and maintain separate accounts specifically for the provision of distribution services to the exclusion of costs relating to other services. Separate accounting and cost allocation alone would not prevent cross-subsidisation if a DNSP was to provide other services. This is because the distribution cost allocation principles otherwise apply to the allocation of costs between distribution services only.³² They do not apply to the allocation of costs between distribution services and other services. Legal separation of the DNSP from other services improves transparency over the costs allocated to the DNSP from its broader corporate group. For example, the DNSP must enter into separate transactions with its affiliated entities and we may request details of those transactions.

The NER cost allocation principles underpin the operation of a DNSP's CAM which is used by a DNSP to allocate costs between its distribution services. Under the NER we must approve a CAM that gives effect to and is consistent with the cost allocation principles.³³ In turn, when DNSPs report their cost information to us it is accompanied by audit assurance that the CAM has been properly applied. While this is necessary, it is not adequate to prevent the risk of cross subsidies. This is because, under the current framework, we do not have insight into how costs are allocated to the DNSP before the CAM is applied to allocate costs between distribution services. Legal separation will provide greater transparency in this regard.

We consider that the Guideline's legal separation obligations represent a targeted, proportionate and effective regulatory response. The obligations target the potential harm of cross subsidy. They are proportionate to the potential harm by separating a DNSP from its

²⁸ 'Local area/local' is defined in chapter 10 of the NER as the geographical area allocated to a Network Service Provider by the authority responsible for administering the jurisdictional electricity legislation in the relevant participating jurisdiction.

²⁹ NER cl. 6.17.2(b)(1)(i).

³⁰ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.1(b).

³¹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.1(c)(i).

³² NER cl. 6.15.2(1).

³³ NER cl. 6.15.4(b).

affiliated entities without blocking participation in markets for other services through the DNSP's affiliated entities. The obligations will be effective because they will enhance the regulatory framework's existing cost allocation arrangements.

The Guideline's legal separation obligations are part of a coordinated approach to reduce the risk of cross-subsidisation. Specifically:

- the obligations are targeted to focus only on the DNSP and on services other than distribution services (or transmission services)
- anticipated costs associated with the obligations (implementation, administration and compliance) are proportionate to the potential harm
- the obligations will provide sufficient certainty and confidence in the markets for both other services and regulated services, and provide clarity and certainty to DNSPs in terms of compliance.

The reasons for the component parts of the legal separation obligation are as follows.

Distribution services and other services

A DNSP must be able to provide all distribution services, regulated and unregulated, as well as regulated transmission services (where relevant), in order to meet its obligations under the NER. There is no requirement for a DNSP to provide other services.

By restricting a DNSP to provide only distribution (and transmission) services, we address concerns about the potential for a DNSP to cross-subsidise its other services through its distribution services, to the detriment of the long term interests of customers. We consider that legal separation is required to address this risk and that separate accounting and cost allocation, without legal separation, would not be effective.

NEM-wide application

A DNSP has a monopoly in providing regulated distribution services in its local area, creating a risk of the DNSP cross-subsidising other services if it is allowed to provide them in its local area. Therefore, as a minimum, the Guideline should prevent a DNSP providing other services within its local area.

There is also the risk of a DNSP cross-subsidising other services that it might provide outside of its local area through the distribution (and transmission) services that it provides within its local area.

For the same reasons that the new cost allocation and attribution requirements are necessary but not sufficient to address the risk of cross-subsidisation in its local area, the Guideline prevents a DNSP providing other services in any area — whether inside or outside of its local area.

Materiality threshold has been removed

The Guideline requires a DNSP to provide only distribution (and transmission) services.

The Draft Guideline included a threshold, or allowance, for provision of other services by a DNSP. The purpose of this threshold was to allow DNSPs to provide low levels of other services, including temporarily as they trial and develop new technologies, without incurring the cost of establishing a separate legal entity. As a result of further consultation on the materiality threshold, along with other amendments made to the final Guideline in relation to legal separation obligations, we have removed the materiality threshold.

We have now broadened the scope for ring-fencing waivers to include the Guideline's legal separation obligations. Under the Draft Guideline no waivers for legal separation were available. In light of the broader scope for waivers, we consider the threshold for other services is no longer justified or necessary. Should a DNSP consider it has valid reasons to provide other services from within its legal entity, instead of through an affiliated entity, it may apply to us for a waiver from the legal separation obligation. A DNSP may also make regulated assets (or other assets of the DNSP) available to affiliated entities, or to other parties, to use for the provision of other services, consistent with our Shared Asset Guideline.

In considering the threshold we have also taken into account feedback from DNSPs that the proposed level of the threshold, \$500,000 per annum, was insufficient for them to undertake meaningful activities. DNSPs submitted that the threshold should be increased, either by raising its absolute value or by establishing a range of thresholds for different categories of other services. We do not consider that raising the level of the threshold is an appropriate alternative. We consider both options proposed by DNSPs would compromise ring-fencing's purpose, to establish a level playing field for new entrants to emerging markets. On the other hand, retailers and other providers of contestable services submitted that the threshold, even at its proposed level of \$500,000, would impact on the development of emerging markets.

On balance, we now consider that removing the threshold will best promote the objectives of ring-fencing.

Submissions on legal separation

Submissions provided by DNSPs were generally opposed to implementing legal separation while submissions from third party providers, who may compete with DNSPs in competitive markets (or already do), were in favour of legal separation.

Some DNSPs proposed that cost allocation either already does, or could, adequately deal with the risk of cross subsidies so that legal separation would not be necessary.³⁴ For example, Endeavour Energy submitted:³⁵

...introducing robust cost allocation methodology frameworks, coupled with information gathering and cross referencing regulatory accounts with statutory accounts, provides transparency and oversight as to how the DNSP allocates its cost between regulated and contestable services. This removes the ability to cross subsidise contestable service costs with regulated revenue and ultimately negates the need for mandated legal separation.

³⁴ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7; United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 4-5.

³⁵ Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

Similarly, Energex submitted:³⁶

A DNSP's CAM is the appropriate regulatory instrument to ensure the allocation of a DNSP's costs between its distribution services and non-distribution services.

Some DNSPs submitted that legal separation may erode existing economies of scope and scale that currently result in lower prices for electricity customers.³⁷ Some DNSPs also proposed that legal separation may undermine the application of the Shared Asset Guideline.³⁸ For example, Spark Infrastructure (part owner of SA Power Networks, CitiPower and Powercor) submitted:³⁹

it is important to ensure that the measures put in place ... do not inadvertently stifle competition, innovation and efficiency ... This includes efficiently utilising existing networks to provide value adding non-traditional energy delivery services and sharing the benefits of this with customers as currently required through the Cost Allocation Methodology and Shared Asset Guideline.

Similarly, AusNet Services submitted:⁴⁰

By preventing a DNSP from providing such [other] services, the AER would compromise the efficiency incentives promoted by the Shared Asset Guideline – which ultimately will result in a loss of benefits to end users.

In contrast to DNSPs, third party providers including retailers submitted support for legal separation. For example, AGL submitted:⁴¹

Legal separation creates clear boundaries between providers of prescribed distribution services and providers of other services, as well as clear governance obligations at Board level;

Accounting separation injects an important degree of transparency and discipline in the observation of non-discrimination and cost allocation obligations;

Similarly, the Australian Energy Council (representing retailers) submitted:⁴²

Legal separation of the DNSP from other entities should create clear boundaries between providers of prescribed distribution services and providers of other services ... The requirement for DNSPs to maintain consolidated and separate accounts for standard control services, alternative control services and other services provided by DNSPs is also welcomed by the Energy Council.

Several DNSPs commented in their submissions on the special circumstances created by a DNSP which also operates other services that are also regulated activities. These submissions proposed either the insertion of a new provision in the Guideline to permanently

³⁶ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 9.

³⁷ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7.

³⁸ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 1; Energy Networks Association, *Response to the AER Draft Guideline*, 28 September 2016, p. 4; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 9; United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

³⁹ Spark Infrastructure, *Submission on the AER's Draft Ring-Fencing Guideline for Distribution Network Service Providers*, 28 September 2016, p. 1.

⁴⁰ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

⁴¹ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

⁴² Australian Energy Council, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

excuse such services from the Guideline's legal separation obligations, or the provision of waivers for these circumstances. ActewAGL Distribution submitted:⁴³

AAD owns several gas distribution networks, whose operation and maintenance is outsourced .., there is no possible competition benefit from requiring AAD to legally separate its regulated gas distribution business from its regulated electricity distribution business. Those businesses are monopoly businesses and not subject to competition.

Similarly, Essential Energy submitted:⁴⁴

We suggest the inclusion of some sort of waiver clause from the need for a separate legal entity where the impacted business is operating in another regulated market or is merely the result of a government arrangement. This is because, in its present form, the Guideline would require both Essential Energy's water business and generation assets to sit under a new legal entity.

With respect to the materiality threshold, submissions again tended to divide along industry lines. DNSPs proposed that the threshold is too low⁴⁵ while third parties and retailers argued the threshold should be restricted to certain activities or removed altogether⁴⁶. For example, Ausgrid submitted:⁴⁷

...setting the materiality threshold for exempting the need for legal separation at \$500,000 for all non-distribution services is too low, and in effect would capture all incidental services provided by the DNSP.

In contrast, AGL submitted:⁴⁸

Although the proposed \$500,000 threshold appears to be relatively low, it still has the potential to adversely affect competition in emerging markets considering that volumes and revenues in such emergent markets are naturally very low ... the exception should only apply to the provision of contestable services 'that are incidental to, but necessary to support the provision of, the DNSP's network services'.

It was common for submissions from DNSPs to include proposals that the threshold be changed to equal 1 per cent of the DNSP's approved annual regulated revenue.⁴⁹ Other proposals included the establishment of a range of separate thresholds for different services or for certain types of activities.⁵⁰ For example, Ergon Energy submitted:⁵¹

⁴³ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 15.

⁴⁴ Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

⁴⁵ SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 15-16.

⁴⁶ Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1; Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

⁴⁷ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 1.

⁴⁸ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

⁴⁹ Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 6; Energy Networks Association, *Response to the AER Draft Guideline*, 28 September 2016, p. 5; United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

⁵⁰ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 12.

⁵¹ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 8.

... services could be grouped according to market influences and an appropriate materiality threshold (proportionate to the harm to be avoided) applied to each, rather than a single threshold aggregated across all services.

In response to submissions, we maintain our view that requiring the legal separation of a DNSP from the provision of other services is appropriate to give all stakeholders confidence that DNSPs will not use their monopoly position in some types of distribution services to subsidise other services in competitive markets.

In contrast to the Draft Guideline, the Guideline now provides for waivers from the legal separation obligation. While the Guideline itself does not constrain legal separation waivers to any particular circumstances, our intention is generally not to grant waivers other than in specific circumstances. For example, there may be cases where a DNSP provides other services which are also regulated, either by us or by another economic regulator. Also in respect of other services a DNSP is required to provide by law. This could include services provided to other NSPs in accordance with jurisdictional requirements. In such cases, subject to a range of considerations, we are likely to grant waivers on application by a DNSP. See chapter 5 of this Explanatory Statement for a full discussion of waivers and the factors we will take into account when considering an application for a waiver from the legal separation requirement.

With respect to the operation of the Shared Asset Guideline, we consider the Guideline's legal separation obligations are complementary rather than conflicting. This is because the Shared Asset Guideline is intended to apply to a narrow range of uses of assets that otherwise are used to provide standard control services. See Appendix A for a detailed discussion of the interaction between the Guideline and the Shared Asset Guideline.

We note that the regulatory framework in this area may require further refinement to more clearly demarcate the boundaries of the application of the Shared Asset Guideline compared to the ring-fencing Guideline. At this time such work is beyond our scope. Our intention now is to provide as much guidance as possible to DNSPs and other stakeholders on the application of these complementary instruments.

3.1.2 Separate accounting

The NER state that a ring-fencing guideline may include provisions defining the need for and extent of "the establishment and maintenance of consolidated and separate accounts for standard control services, alternative control services and other services provided by the DNSP".⁵²

The Guideline states:⁵³

"A DNSP must establish and maintain appropriate internal accounting procedures to ensure that it can show the nature and extent of transactions between it and its affiliated entities".

⁵² NER cl. 6.17.2(b)(1)(ii).

⁵³ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.1(a).

This obligation will promote transparency and accountability to reduce the risk of cross-subsidisation. The effectiveness of this obligation will be supported by legal separation, subject to the granting of any waivers from legal separation obligations. In turn, this accounting obligation will support the effectiveness of the Guidelines' cost allocation obligations.

We consider the Guideline's separate accounting obligations represent a targeted, proportionate and effective regulatory response. The obligations can be targeted at the types of transactions that give rise to concern—transactions between a DNSP and its affiliated entities.

The anticipated costs associated with these regulatory obligations (including implementation, administration and compliance) are proportionate to the potential harm. We also consider that the obligations will increase transparency and disclosure of relevant transactions, and will improve accountability, certainty and confidence.

The reasons for the component parts of the separate accounting obligations are as follows.

Establish and maintain appropriate internal accounting procedures

Legal separation prevents a DNSP from providing other services (as defined in the Guideline), but does not prevent the DNSP's affiliated entities from providing such services.

The separate accounting obligation is targeted at preventing cross-subsidisation between:

- distribution services and
- other services.

In this context, the requirement for a DNSP to establish and maintain internal accounting procedures enables the DNSP to:

- isolate its costs associated with its distribution services and
- expose transactions between the DNSP and its affiliated entities.

Internal accounting procedures are necessary to enable a DNSP to respond accurately to any regulatory information instrument that may be served by us.

Report on transactions

The Guideline foreshadows that we may serve a regulatory information instrument on a DNSP that requires the DNSP to report on transactions with its affiliated entities.⁵⁴

This provision does not, of itself, create a separate obligation for a DNSP to provide information to us. Any reporting requirement would only arise under a regulatory information instrument served on the DNSP by us.

No waiver

⁵⁴ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.1(a) Note.

We consider no waivers should be allowed in relation to the separate accounting obligations. These are essential elements of the Guideline for giving effect to objectives of transparency and accountability. Making waivers available could undermine certainty and confidence in markets for other electricity services and customers' confidence in efficient prices for distribution services.

Submissions on separate accounting

Some DNSPs commented in submissions that the Draft Guideline's separate accounting provisions mirrored the requirements of our Distribution Cost Allocation Guidelines and our Regulatory Information Notices.⁵⁵ Some DNSPs also commented that the Guideline goes further than those instruments by requiring DNSPs to maintain a record of their transactions with affiliated entities. And some DNSPs appear to have misinterpreted this requirement as meaning that they must report their affiliated entity transactions to us as a matter of course. For example, TasNetworks submitted:⁵⁶

one of the key principles of ring-fencing is to ensure there is no cross-subsidisation between the regulated monopoly services and those provided in a competitive market. This principle is currently addressed and implemented via the CAM and supported by the SAG. However, the Draft Guideline appears to seek to go beyond this key principle by requiring a DNSP to report on transactions between it and its related body corporate

Not all DNSPs submitted that they had concerns about the Draft Guideline's separate accounting requirements, at least in principle.⁵⁷ For example, Energex submitted:⁵⁸

Energex supports obligations to establish and maintain appropriate internal accounting procedures necessary to report the extent and nature of related party transactions under section 3.2.1.

However, Energex went on to ask that the final Guideline confirm that a separate set of regulatory accounts is not required because this would duplicate existing requirements to report related party transactions in annual regulatory information notice reports.

Third party providers tended to submit broad support for the Draft Guideline's approach to legal separation, reporting and cost allocation, without commenting specifically on the separate accounting requirements. An exception was Simply Energy which submitted:

The 'Separate accounts' clause ... is a critical part of the AER's approach, but it is only a start. Effective oversight of these related party transactions requires the AER to obtain sufficient information to determine if payments to related parties are on an arms-length basis or represent a shift of costs from the related party to the regulated business. This is critical because otherwise regulated revenue can be used to subsidise or insure the related party's activities in the competitive market.

In response to submissions, we consider the Guideline's separate accounts provisions are important to providing stakeholders with confidence that risk of cross-subsidies is addressed.

⁵⁵ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 11; Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 13.

⁵⁶ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 15.

⁵⁷ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 13.

⁵⁸ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 9.

While cost allocation broadly is also addressed by a DNSP's CAM and reporting through regulatory information notices, the Guideline is intended to provide transparency on interactions between the DNSP and its affiliated entities.

We acknowledge that our powers to issue regulatory information notices are provided by the NEL and that the Guideline does not extend our powers to issue regulatory information notices. However, we consider it enhances transparency and predictability to include references in the Guideline to our potential use of regulatory information notices to collect information on DNSP transactions with affiliated entities. To the extent these provisions mirror existing provisions in the regulatory framework then DNSPs should be able to readily comply with the Guideline.

3.1.3 Cost allocation

The NER states a ring-fencing guideline may include provisions defining the need for and extent of "allocation of costs between standard control services, alternative control services, and other services provided by the DNSP".⁵⁹ Cost allocation is an important element of ring-fencing.

We acknowledge existing regulatory instruments also deal with cost allocation. In particular we note NER cl. 6.15, our Distribution Cost Allocation Guidelines, a DNSP's approved CAM and the Shared Asset Guideline. However, we consider additional obligations are necessary in the Ring-fencing Guideline, as the scope of the Cost Allocation Guideline and CAMs is currently limited to the attribution and allocation of costs between categories of distribution services (i.e. not between distribution and non-distribution services).⁶⁰

Stakeholders have asked how existing instruments and new ring-fencing obligations will interact.⁶¹ These instruments operate together, and the ring-fencing guideline should be read accordingly, so that collectively they achieve the desired ring-fencing outcome and avoid cross-subsidisation in the long-term interest of consumers.

Therefore, the Guideline requires a DNSP to allocate or attribute costs to distribution services in a manner that is consistent with its approved CAM. The allocation and attribution of costs to distribution services must also be consistent with the cost allocation principles in NER cl. 6.15.2.

We consider that in the absence of these provisions there is risk of cross-subsidisation between distribution services and non-distribution services. We consider these obligations will improve certainty and confidence in the attribution and allocations of costs between distribution and other services. They will also promote economic efficiency in charges for regulated distribution services, as well as transparency and accountability to reduce cross-subsidisation risk. They will complement legal separation and separate accounting provisions.

⁵⁹ NER cl. 6.17.2(b)(1)(iii).

⁶⁰ NER cl. 6.15.2 refers.

⁶¹ See for example submissions by United Energy, Ergon Energy, Citipower Powercor and SAPN, Ausgrid, AusNet Services, Jemena, Essential Energy.

The reasons for the component parts of the separate cost allocation obligations are as follows.

No allocation or attribution of other services' costs to distribution services

A DNSP must not allocate or attribute the costs of providing other services to distribution services. This obligation is designed to minimise the risk of cross-subsidisation by introducing an absolute prohibition on the attribution and allocation of costs to distribution services that properly relate to other services. It goes beyond the cost allocation provisions in NER cl. 6.15, our current Distribution Cost Allocation Guidelines and a DNSP's approved CAM, to cover the allocation and attribution of costs between distribution services and non-distribution services.

Without such an obligation, there is a risk that a DNSP may attribute or allocate costs to distribution services that properly relate to other services. This may lead to a DNSP's non-distribution services being cross-subsidised by its distribution services.

Further, the Guideline sets out that a DNSP should not allocate or attribute the costs of providing other services to the distribution services it provides. This makes clear that where a DNSP's related electricity service provider or affiliated entity provides other distribution services, the costs of doing so must not be allocated to the DNSP.

Cost allocation principles

This obligation requires a DNSP to attribute and allocate costs to distribution services in a manner that is consistent with the cost allocation principles in NER cl. 6.15.2.

The cost allocation principles currently apply only to the attribution and allocation of costs between distribution services. However, these principles have equal relevance to the attribution and allocation of costs between distribution and other services. This is because the principles fundamentally are concerned with ensuring that only costs that properly relate to a service are attributed or allocated to it. The principles are widely accepted and are currently reflected in all DNSPs' CAMs.

While we are aware that some DNSPs account for cost allocation between network and other services, not all do. Since we have no other power under the NER to require CAMs to reflect the allocation and attribution of costs to other services, the cost allocation provisions of the Guideline will mean that DNSPs in reporting are required to allocate and attribute all costs for provision of network services, and not include any expenditure that cannot be allocated or attributed to the distribution services it provides.

We expect DNSPs to reflect this broader obligation into their CAMs at the next opportunity these are revised.

No waiver

We consider waivers should not be allowed in relation to the cost allocation obligation. Waivers could undermine certainty and confidence in the market for non-network services, and customers' confidence in efficient prices for regulated services.

Submissions on cost allocation

DNSPs generally submitted that there is already sufficient regulation of the allocation of costs to services such that we can have confidence the risk of cross-subsidies is adequately managed.⁶² In particular, several DNSPs indicated that their CAMs deal with the allocation of costs to distribution services in addition to the allocation of costs amongst distribution services.⁶³ For example, ActewAGL submitted:⁶⁴

...the approved CAM precludes a DNSP from cross subsidising between distribution and non-distribution services (for example by allocating to distribution services Costs Relating To Non-Distribution Services).

However, not all DNSPs submitted that they were opposed to the Draft Guideline's cost allocation obligations. For example, SA Power Networks, Powercor and CitiPower submitted only minor drafting changes to those cost allocation provisions.⁶⁵ Also, as described above in relation to legal separation, some DNSPs submitted that broadening the cost allocation provisions could be a substitute for legal separation in respect of other services, even services provided by DNSPs in competitive markets.⁶⁶

Non-DNSP stakeholders generally offered support for the Draft Guideline's cost allocation provisions. Some stakeholders agreed with us that the existing cost allocation framework incorporates a weakness in that our Cost Allocation Guidelines deal only with the allocation of costs between distribution services, not the allocation of costs between distribution services and other services. For example, Red/Lumo Energy submitted:⁶⁷

...the current cost allocation principles that apply to DNSPs under rule 6.15 of the National Electricity Rules (NER) only apply to the attribution and allocation of costs between distribution services (i.e. not between distribution and non-distribution services).

Some stakeholders suggested that our existing Cost Allocation Guidelines require review with a view to making obligations on DNSPs more stringent.⁶⁸ For example, the Australian Energy Council submitted:⁶⁹

[the Draft Guideline's] effectiveness in achieving this goal [of minimising cross subsidies] is inherently linked to the terms of the supporting cost allocation guideline. Accordingly the Energy Council recommends a review of this guideline with a view to greater prescription in the means for allocating costs between different services.

In response to submissions, we maintain our view that there is indeed a gap in the existing regulatory framework in respect of the allocation of costs between distribution services and

⁶² Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 10.

⁶³ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7; Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 6.

⁶⁴ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 10.

⁶⁵ SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4 of marked-up Draft Guideline.

⁶⁶ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 10.

⁶⁷ Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1.

⁶⁸ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

⁶⁹ Australian Energy Council, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2,

other services. While we understand that some DNSPs have approved CAMs that deal with the allocation of costs between distribution services and other services, this is not a mandatory requirement of the NER nor of our Cost Allocation Guidelines. We think it is important that the Guideline addresses this issue to provide confidence that risk of cross-subsidies is addressed. While the Guideline's cost allocation provisions do sometimes reflect the existing cost allocation requirements, we consider this is appropriate because ring-fencing and cost allocation are intrinsically linked.

4 Measures targeted at discrimination (functional separation)

This chapter describes the content and rationale for obligations in the Guideline designed to reduce the risk of discrimination by the DNSP (non-discrimination obligations).

The Guideline includes complementary sets of general and specific obligations on a DNSP not to discriminate, or otherwise provide favourable treatment to its own business units providing other distribution services or to its affiliated entities providing other electricity services. For ease of reference, we collectively term these services as *contestable electricity services*. To be clear, contestable electricity services include negotiated distribution (or transmission) services, unclassified distribution services and other electricity services (non-distribution electricity services). A DNSP's own providers of contestable electricity services include business units of a DNSP that provide negotiated services and unclassified distribution services, plus affiliated entities providing other electricity services.

In developing these obligations we considered the relationship between DNSPs and related electricity service providers, the kinds of services each might provide and the circumstances that could give rise to more favourable treatment by the DNSP. The obligations represent a targeted, proportionate and effective regulatory response to the risks of discrimination by a DNSP.

The general non-discrimination obligations in the Guideline prevent a DNSP from providing discriminatory or otherwise favourable treatment (either directly or indirectly) to providers of contestable electricity services (its business units providing other distribution services and affiliated entities providing other electricity services). In the absence of these obligations we consider there is a risk of related electricity service providers gaining an advantage over competitors in contestable markets for energy-related services by reason of their relationship with the DNSP.

The first set of specific obligations relating to functional separation includes obligations in two areas:

- physically separating a DNSP from related electricity service providers
- preventing staff sharing between a DNSP and related electricity service providers.

The Guideline's non-discrimination and specific functional separation provisions include several explicit exceptions and provide for DNSPs to apply for waivers.

The second set of specific functional separation obligations in the Guideline relates to the DNSP's use of information. We have refined the Draft Guideline's non-discrimination obligations for information protection, sharing and disclosure. In the absence of these provisions we consider there is a risk of a DNSP's related electricity service providers gaining an advantage over their competitors in contestable markets for energy-related services by reason of their relationship with the DNSP.

This chapter first summarises the approach to targeting discrimination by DNSPs set out in the Guideline. We then compare these with the positions adopted in our Draft Guideline and

our reasons for maintaining or revising them as appropriate. We conclude the chapter by examining stakeholders' submissions and describe how we have responded to stakeholder feedback.

4.1 Guideline position

The NER requires accounting and functional separation of the provision of direct control services by DNSPs from the provision of other services by DNSPs (cl. 6.17.2(a)). One of the purposes of functional separation is to limit the potential for competitive disadvantage to arise in connection with the DNSP's provision of distribution services.

This purpose would be substantially undermined if the DNSP personnel performing the relevant activity (namely, providing distribution services as employees or contractors of the DNSP), whether or not those staff are formally or directly involved in the supply of other services by the DNSP, are nevertheless able to perform that activity in a way that gives rise to competitive disadvantage. The possibility of competitive disadvantage arises because distribution services are either:

- a key input into the supply of the other services or
- complementary to the supply of the other services

by business units of the DNSP (providing other distribution services), or by affiliated entities (providing other electricity services), or by a third party (providing other distribution services or other electricity services).

Thus, it is appropriate that our obligation to develop guidelines for the functional separation of the provision of direct control services be interpreted as including the power to develop guidelines that include non-discrimination requirements in relation to the supply of distribution services.

The objective of avoiding discrimination is to be achieved by provisions in chapter 4 of the Guideline that provide for:

- general obligations not to discriminate⁷⁰
- specific obligations for functional separation⁷¹
- specific obligations for controls on information access and disclosure.⁷²

We have made the following amendments to the general prohibition on discrimination:

- adopted the defined term *related electricity service provider*, instead of *related body corporate*
- adopted the term *contestable electricity services* instead of *competitive or contestable energy-related services*.

⁷⁰ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.1.

⁷¹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.

⁷² AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.3.

- clarified the meaning of *independent and separate branding*. We have moved this section and the restriction on cross promotion to the Guideline’s specific obligations section.
- expanded the term “*related electricity service provider*”, for the purposes of clause 4.1 of the Guideline, to include customers or potential customers of the DNSP itself. This is to ensure that DNSPs do not discriminate in favour of their own customers in circumstances where the DNSP provides services directly to customers (such as under a deemed or statutory contract between the DNSP and the customer of an electricity retailer).

We have made the following amendments to the Guideline’s specific non-discrimination obligations:

- adjusted the obligation for a DNSP’s office to be separated from the offices of its related electricity service providers—to remove the reference to separate buildings; separate offices are now defined as potentially including separate floors, or secured areas, of a single building⁷³
- included an exemption for the Guideline not to apply in respect of providing assistance to another NSP in response to an event such as an emergency that is beyond the NSP’s reasonable control
- included an exemption for physical office separation not to be required in regional areas, subject to review—including where a third party applies to vary or revoke this exemption in specific locations
- refined the prohibition on remunerating staff or incentivising staff based on the performance of affiliated entities; the Guideline prohibits DNSPs from providing incentives to staff to act in a manner contrary to the DNSP’s obligations under the Guideline
- the staff sharing exemption that previously applied to a ‘senior executive’ now refers to an ‘officer’, which is a defined term
- moved the following provisions from the general non-discrimination obligations section (4.1 of the Guideline) to the specific functional separation obligations section (section 4.2 of the Guideline):

restriction on advertising and promoting services⁷⁴

requirement for independent and separate branding⁷⁵.

We have made the following amendments to the Guideline’s section on information access and disclosure:⁷⁶

- narrowed the scope so the DNSP is only required to protect confidential information

⁷³ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 1.4 Definitions.

⁷⁴ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(b).

⁷⁵ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(a).

⁷⁶ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.3.

- excluded from the definition of confidential information at clause 4.3 of the Guideline any aggregated financial information that does not relate to an identifiable customer or class of customer
- provided exceptions to the prohibition on disclosure where disclosure is required by law or for the purpose of complying with the law and where disclosure is necessary to enable the DNSP to provide its distribution services, its transmission services, or its other services (a DNSP may provide other services under a waiver)
- required DNSPs to provide information to third parties included on an information register
- required DNSPs to publish an information sharing protocol.

We consider the anticipated costs associated with these regulatory obligations (including implementation, administration and compliance) are proportionate to the potential harm.

4.1.1 General non-discrimination obligations

The Guideline's general prohibitions on discrimination will mitigate the risk of a DNSP providing a competitive advantage to a related electricity service provider in the supply of other distribution services or other services. The Guideline obligates DNSPs not to discriminate in favour of their related electricity service providers, or customers of their related electricity service providers, or their own customers.

Without limiting its scope, under the general prohibitions the DNSP is required to:

- deal with a related electricity service provider as if it were not a related electricity service provider
- deal with a related electricity service provider and its competitors in the same way
- provide the same quality, reliability and timeliness of service to a related electricity service provider and its competitors
- avoid providing information to a related electricity service provider that the DNSP has obtained through its dealings with a competitor of that provider that may advantage the provider.

In the absence of these provisions, there is a risk of a DNSP's related electricity service provider gaining an advantage over its competitors (including a potential new competitor) in contestable markets for energy-related services by reason of their relationship with the DNSP.

The reason for the above obligations is as follows.

Not favour a related electricity service provider or its customers⁷⁷

The obligation prevents a DNSP from providing favourable discriminatory treatment (either as direct discrimination or as indirect discrimination)) to its related electricity service providers or to customers of its related electricity service providers.

⁷⁷ AER, *the Guideline*, cl. 4.1(b).

This obligation is targeted at preventing a DNSP taking action that would:

- give its related electricity service provider a financial benefit that is not available to its competitors
- give customers of its related electricity service provider a financial or non-financial benefit that would not be available to them if they were customers of a competitor of the related electricity service providers
- advantage its related electricity service provider in competing to provide contestable services.

This obligation is necessary to minimise the potential for a DNSP to undermine competition in contestable markets for services in which a related electricity service provider competes.

This general non-discrimination obligation prohibits a DNSP from discriminating in favour of its business units providing negotiated services or unclassified distribution services, in addition to its affiliated entities. This would include when it provides a direct control service to its negotiated or unregulated distribution service business unit, for example staff or offices used for providing negotiated or unclassified distribution services.

This general non-discrimination obligation also prohibits a DNSP from providing recommendations or providing information in favour of a related electricity service provider.

The Guideline includes a non-exhaustive list of instances where the general obligations not to discriminate may apply.⁷⁸ These specific instances are not intended to expand the scope of clause 4.1(b).

A DNSP must deal with its related electricity service providers on an arm's length basis. We expect a DNSP to contract with its related electricity service providers on a commercially efficient basis, as if it were dealing with a non-related third party. This is intended to be consistent with, and to complement, the approach set out in our Expenditure Forecast Assessment Guideline and its treatment of related party contracts and margins.

The requirement to deal at arm's length does not restrict efficient purchasing policies. The Guideline does not prevent a DNSP from purchasing from a related electricity service provider provided that there is no cross-subsidy discrimination in favour of a related electricity service provider. It also does not prevent bulk procurement and passing on those savings or lower prices to related electricity service providers. However, the DNSP should be prepared to deal on similar terms with competitors, including offering the benefits of these economies of scale, where possible.

In the second and third instances, a DNSP must offer to deal with competitors of its related electricity service providers (or customers of those competitors) on substantially the same terms and provide the same quality, reliability and timeliness of service as those for its related electricity service provider (or customers of its affiliated entity). This prevents a DNSP giving more favourable treatment to its related electricity service provider, or customers of its related electricity service provider, over a competitor, or customer of a

⁷⁸ AER, *the Guideline*, cl. 4.1(c).

competitor, of its related electricity service provider. It promotes a level playing-field in the competitive and contestable energy-related markets in which a DNSP's related electricity service provider competes. For example, the DNSP would be prohibited from providing a faster connection service if a customer goes through the DNSP's own related electricity service provider compared with another provider.

In the fourth instance, a DNSP must avoid providing to its related electricity service provider information that it has obtained from a competitor of its related electricity service provider. This is intended to avoid a related electricity service provider receiving an advantage in the competitive and contestable energy-related markets in which it competes by reason of its relationship with the DNSP, and the access the DNSP has to information from many parties.

No waiver

No waivers are allowed for these general obligations not to discriminate, as waivers could undermine competition in the market for non-network services. We consider this approach will support establishment of a level playing field for provision of non-network services.

Submissions on general non-discrimination provisions

Most submissions supported in principle the objectives of the general obligations on a DNSP not to discriminate between its related electricity service providers and competitors of those entities.⁷⁹ However, several stakeholders submitted that the drafting of the obligations is too broad.⁸⁰ Some stakeholders submitted that the application of obligations should take into consideration the potential for competition.⁸¹ AusNet Services submitted that the non-discrimination provisions should apply to distribution services only.⁸²

We have sought to tighten the scope of the Guideline compared to the Draft Guideline. It now applies in connection with direct control services provided by the DNSP, or contestable electricity services by another legal entity.

ActewAGL submitted that the Guideline's non-discrimination provisions are too rigid and that, potentially, a DNSP could be in breach even where they are attempting to provide equal standards of service.⁸³

⁷⁹ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 2, 3; Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 1–4; Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 10; Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October 2016, pp. 4–5; SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 8; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

⁸⁰ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 8; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

⁸¹ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12; SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 8; United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

⁸² AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 8.

⁸³ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 13; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

We accept that a DNSP may attempt to provide the same level of service but that for reasons beyond the DNSP's control, a competitor of the related electricity service provider is not given the same level of service. The phrase "in like circumstances" at cl. 4.1(c)(ii) and (iii) means that where a DNSP is attempting to comply with its obligation but there is some external factor which affects different providers of unregulated distribution services differently, and which prevents the DNSP from doing so, the DNSP will not be in breach of the Guideline.

More generally, the phrase "in like circumstances" recognises that there may be legitimate reasons, not based on the identity of the related electricity service provider or on its relationship (or lack thereof) with the DNSP, for the DNSP to provide different terms and conditions, or different standards of service, to one provider of unregulated distribution services over another.

4.1.2 Specific obligations for functional separation

The Guideline introduces functional separation obligations in the following areas:

- physical separation / co-location
- staff sharing
- separate branding and cross promotion.

These obligations complement the general obligations not to discriminate and the information access and disclosure obligations. They are targeted so that a DNSP does not favour its related electricity service providers or their customers. Exceptions incorporated in the Guideline, and the potential for a DNSP to apply for a waiver, will ensure these obligations are targeted and proportionate.

The obligation should assist to minimise the potential for a DNSP to provide an inappropriate competitive advantage to a related electricity service provider that provides other distribution services or other electricity services.

In the absence of these provisions, there is a risk of a DNSP's related electricity service provider gaining an advantage over its competitors in contestable markets by reason of its relationship with the DNSP. This may include other entrants being deterred from offering to provide services, thereby undermining a competitive market.

Our reasons for the component parts of the Guideline's functional separation obligations are as follows.

Physical separation/co-location

The DNSP will be required to use separate offices for providing direct control services. These must be separate from offices used to provide competitive or contestable energy-related services by other service providers or related electricity service providers.⁸⁴ Separate

⁸⁴ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.1(a).

offices may include a floor of a building or part of a building that has separate and secure access.

The obligations for functional separation will keep apart a DNSP from its related electricity service providers offering services into contestable markets. This will assist in preventing the businesses and their employees from sharing, inadvertently or otherwise, commercially sensitive information. The commercial incentive to share this information suggests a proactive obligation aimed at prevention, such as functional separation, is warranted to reduce this risk. This obligation is particularly targeted at preventing related electricity service providers from gaining an advantage in contestable markets. The Guideline provides exemptions to the general requirement for physical separation.

The Guideline provides an exemption for office separation where staff.⁸⁵

- do not have access to electricity information
- have access to electricity information but do not have opportunity to engage in conduct that is contrary to the DNSP's obligations under cl. 4.1
- only have access to electricity information to the extent necessary to perform services that are not electricity services

Electricity information is defined to mean information about electricity networks, customers or services other than aggregated financial information or other service performance information that does not relate to an identifiable customer or class.

These exceptions are warranted because we consider there is a low risk of (and incentives for) such staff assisting related electricity service providers gain an inappropriate competitive advantage in contestable markets.

The Guideline also includes an exemption to make it clear that the prohibitions on sharing offices do not apply in circumstances beyond the DNSP's reasonable control, such as an emergency.⁸⁶

The Guideline also provides an exemption for regional offices that have less than 25,000 customer connection points within a 100 kilometre radius of the office.⁸⁷ This exemption is warranted because in remote areas the potential for development of competition is limited. There will likely be cost savings to consumers from allowing the DNSP to operate from a single office.

Finally, the Guideline provides opportunity for a DNSP to seek a waiver in relation to the physical separation obligation where there is a clear justification.⁸⁸ Section 5 of the Guideline deals with how a DNSP would apply for any such waiver and how we would assess it.

Staff sharing

⁸⁵ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.1(b)(i).

⁸⁶ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.1(b)(ii).

⁸⁷ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.1(b)(iii).

⁸⁸ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.5.

The Guideline requires a DNSP to ensure that its staff directly involved in the provision of direct control services are not also involved in the provision or marketing of contestable electricity services by a related electricity service provider.⁸⁹

This obligation complements and supports the physical separation obligation, discussed above. It is designed to prevent a DNSP's staff from using information that they acquire in providing regulated network services to advantage its related electricity service providers. In this way, it is targeted at minimising the potential for related electricity service providers gaining an inappropriate competitive advantage.

The Guideline details several circumstances in which the requirement for staff separation does not apply.

The Guideline provides an exemption for staff who:

- do not have access to electricity information⁹⁰
- have access to electricity information but do not have opportunity to engage in conduct that is contrary to the DNSP's obligations under cl. 4.1⁹¹
- only have access to electricity information to the extent necessary to perform services that are not electricity services.⁹²

These exemptions are warranted because we consider there is low risk of (and incentives for) such staff assisting related electricity service providers to gain an inappropriate competitive advantage in contestable markets in these circumstances.

The requirement for staff separation does not apply to a member of staff who is an officer, as defined in the Guideline (the definition includes directors and secretaries), of both a DNSP and a related electricity service provider. Rather, it targets staff with day-to-day access to information. It may be appropriate for a chief executive and a small number of other senior executives to manage both a DNSP and a related electricity service provider. However, this does not excuse these staff from complying with the other obligations in cl. 4 of the Guideline. The Guideline also includes a requirement that DNSPs maintain a public register of the nature of the positions of its members of staff with a role across entities.⁹³

The Guideline includes an exemption to make it clear that the requirements for staff sharing do not apply in circumstances beyond the DNSP's reasonable control, such as an emergency. The Guideline also includes an exemption from the staff sharing obligations for staff located at a regional office.

The Guideline precludes a DNSP from giving incentives (financial or otherwise) to its staff to act in manner that is contrary to the DNSP's obligations under this Guideline, such as rewarding staff based on the performance of an affiliated entity.

⁸⁹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.2(a).

⁹⁰ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.2(b)(i)(a).

⁹¹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.2(b)(i)(b).

⁹² AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.2(b)(i)(c).

⁹³ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.4(b).

Finally, the Guideline allows a DNSP to seek a waiver in relation to the physical separation obligation in limited circumstances, as described in Section 5 of the Draft Guideline.

Branding and cross promotion

The Guideline's separate branding and cross-promotion obligations complement each other. They are important to mitigate the risk of a DNSP, intentionally or unintentionally, influencing customers' choices in contestable markets in which:

- a DNSP's affiliated entity competes or
- business units of the DNSP provide services that are not direct control services.

The Guideline requires a DNSP to use "independent and separate branding" for its direct control services.⁹⁴ The requirement to use independent and separate branding is described as "such that a reasonable person would not infer from the respective branding that the DNSP and the related electricity service provider are related".

A DNSP must not advertise or promote together its direct control services and its contestable electricity services that are not direct control services (including by way of cross-promotion).⁹⁵

A DNSP must also avoid advertising or promoting the services provided by its related electricity service providers.⁹⁶ This is intended to avoid the DNSP encouraging, or being perceived to encourage, the use of its related electricity service providers, in preference to competitors in contestable markets. It is intended that a DNSP must not use its role as a monopoly provider of regulated network services to advertise or promote any individual service provider in another market, including its related electricity service providers.

The separate branding and cross promotion provisions of the Guideline have been moved to the specific obligations for functional separation section of the Guideline because:

- these obligations are specific in nature
- a waiver is available in respect of the specific provisions.

It is intended that the DNSP should use separate branding and should not cross promote services provided by related electricity service providers or which it provides but are not direct control services. DNSPs may apply for a waiver where they provide distribution services which are not direct control services, but there is no competitive market for that particular service. As an example, several DNSPs provide metering services which are not direct control services but there is no competitive market. It would be unnecessary and inefficient to require the DNSP to use separate branding in circumstances where there is not a contestable market or where there is no reasonable prospect of a contestable market emerging.

⁹⁴ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(a)(i).

⁹⁵ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(a)(ii).

⁹⁶ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(a)(iii).

The Guideline includes an exemption from separate branding obligations for regional offices.⁹⁷ This means that, where an office is considered a regional office and the Guideline's office separation obligations do not apply, the separate branding obligations are also automatically waived. We consider this is a practical approach. The alternative, to mandate separate branding obligations in the context of regional offices where there is potentially limited or no competition, would likely result in wasted resources.

For offices that are not regional offices, a DNSP must submit waiver applications should it consider that separate branding obligations should not apply. We will assess such waiver applications on their merits.

Submissions on specific obligations for functional separation

Submissions on separate offices

Submissions that addressed the Draft Guideline's functional separation obligations tended to divide along industry lines, with DNSPs preferring a less stringent approach while non-DNSPs supported strict separation requirements.

A number of submissions, particularly from non-DNSPs, supported the Draft Guideline requirement of some form of physical separation.⁹⁸ In contrast, DNSPs submitted that the specific functional separation requirement of separate offices is not necessary.⁹⁹ They further submitted that obligations for physical separation should not prevent a DNSP and its related electricity service providers from having offices in different parts (including different floors) of a single building.¹⁰⁰ Several DNSP submissions supported placing restrictions on staff movement within offices as a less costly alternative to requiring the use of separate

⁹⁷ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(b).

⁹⁸ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 14; AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Australian Energy Council, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1.

⁹⁹ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 14; Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 1; AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12; Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 6; Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11; Energy Queensland, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 14; SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 10; TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 17; United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

¹⁰⁰ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 14; AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12; Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11.

buildings.¹⁰¹ Several submissions advocated the use of security passes as a method of restricting staff movement within offices.¹⁰²

As an example, AusNet Services submitted:¹⁰³

If a DNSP occupied a multi-floor commercial space, it could separate staff on different floors and prevent unauthorised access by using security passes. Alternatively, single floors could also be separated into two or more secure office spaces requiring pin-code or security pass access.

Other DNSPs stated in their submissions that the costs of the costs of requiring separate buildings would be significant. The costs may be disproportionate to the harm.

Energex submitted:¹⁰⁴

The costs for Energex to comply with the obligations requiring physical separation will be significant, noting that contractual arrangements for the lease of property will need to be varied. Energex considers the physical separation requirements to be severe and disproportionate to the harm the AER seeks to prevent.

In our Explanatory Statement to the Draft Guideline we explained our objective in including this provision:¹⁰⁵

This will prevent the businesses and their employees from mixing and sharing, inadvertently or otherwise, commercially sensitive information. The commercial incentive to share this information suggests a proactive obligation aimed at prevention, such as functional separation, is warranted to reduce this risk.

Several DNSPs noted that our stated objective could be achieved through less stringent separation requirements, such as separating work areas within a single building rather than requiring use of separate buildings. For example, AusNet Services submitted:

Such security measures provide the same benefits of building separation by preventing the comingling of ring-fenced staff with other staff, while avoiding the costs and resource implications for DNSP and its related bodies corporate which arise with the stricter form of separation required by the AER.

We consider then that the objectives set out in our Explanatory Statement to the Draft Guideline are appropriate. However, we agree with many of the comments in submissions that our objectives may be achieved by requiring physical separation but removing the requirement to operate in different buildings. This approach will help DNSPs to avoid unnecessary costs of maintaining different buildings, while maintaining our original goal of preventing staff from mingling through the ordinary course of business.

¹⁰¹ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 14; Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, pp. 1, 13; AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12; TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 17; United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

¹⁰² ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 14; AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12; Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11.

¹⁰³ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹⁰⁴ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11.

¹⁰⁵ AER, *Draft Ring-fencing Guideline Explanatory statement*, August 2016, p. 37.

Accordingly, the Guideline requires DNSPs to have offices for direct control services that are separate from any office from which:

- its business units provide other distribution services
- an affiliated entity provides other distribution services or other electricity services

However, we have removed the requirement to operate in a different building. This means staff can operate from separate floors or parts of a floor in the same building, provided appropriate security/access arrangements are in place.

Regional offices

DNSPs servicing regional areas submitted that the requirement for physical separation would result in additional property costs in regional areas.¹⁰⁶ Further, the potential for contestable markets to develop in these areas is limited.¹⁰⁷ For example, Ergon Energy submitted:¹⁰⁸

There is expected to be a significant impact on property costs that would inevitably be passed through to the customer in order to comply with the proposed ring-fencing requirements.

Ergon Energy also submitted:¹⁰⁹

Furthermore, ring-fencing requirements should strike the right balance between the establishment and maintenance of a level playing field in the provision of energy services in both existing and emerging markets, and the ability for DNSPs to operate effectively within those markets, consistent with the NEO. In this regard, Ergon Energy is concerned that certain aspects of the Draft Guideline will operate to force DNSPs out of new and emerging markets and will restrict their future participation in initiatives that have been developed in pursuit of a more sustainable and efficient market. This is of particular concern to Ergon Energy as we continue to focus on minimising cost increases for our regional Queensland customers.

Essential Energy submitted:¹¹⁰

The ability to provide emerging market services to customers at the lowest price possible is particularly pertinent to rural DNSPs, both in terms of providing a service in regions that may be overlooked by many other market participant, but also whose customers may feel reassured contracting with a provider who has a real and constant presence in the area particularly when it comes to post installation servicing.

We agree that in regional areas the requirement for physical separation may impose unnecessary additional costs. We also accept that the potential for development of competition may be limited in regional and remote areas. Therefore, we have included an exemption to the physical separation requirements for regional offices that have less than 25,000 customer connection points within a 100 kilometre radius of the office. We may vary or revoke this exemption from the office separation requirement. We envisage that a current

¹⁰⁶ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11; Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹⁰⁷ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11; Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

¹⁰⁸ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 11.

¹⁰⁹ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹¹⁰ Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

or potential competitor of the DNSP would contact us if the particular regional office was supplying to a contestable, or potentially contestable, market. We also envisage that a DNSP might apply for the exemption to be given a broader scope in some cases.

Submissions on staff sharing

We received submissions that both supported and opposed our approach to staff sharing between the DNSP and affiliated entities.

Several third party providers stated in their submissions that we should also require separation of senior management.¹¹¹

Metropolis do not support senior executives being excluded from the Staff Sharing restrictions.¹¹²

However, several DNSPs supported maintaining the position of providing an exception for senior executives.¹¹³

In their submissions, Origin Energy and Energy Consumers Australia noted that the Guideline included an exception for senior executives but that a higher standard of compliance should be applied, so they proposed that a “shared staff” register should be introduced.¹¹⁴ Origin stated:¹¹⁵

Furthermore, to ensure that staff movements are able to be monitored and audited, there must be an explicit obligation on the DNSP to maintain and submit at regular intervals, or when certain conditions are triggered, a shared staff register. This register must include staff shared across the DNSP and its related business, whether these staff had previously held positions directly involved in network services, when they held these positions and how often they have switched.

We agree there is merit to this proposed approach. We have included in the Guideline a requirement that DNSPs maintain a public register of the nature of the positions of its members of staff who are an officer, as defined, of the DNSP and also the related electricity service provider. This higher level of compliance will assist in providing transparency. It will also assist in making staff included on the register aware of their obligations. It will make other parties dealing with those staff aware that these staff have a role within the DNSP and its related electricity service providers. We consider that the cost of complying with this requirement is proportionate to the harm.

For the Guideline, we have had regard to the reasoning that we applied in the Explanatory Statement to the Draft Guideline, when we stated:¹¹⁶

¹¹¹ EnergyAustralia, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4; ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 5; Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; PIAC, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Total Environment Centre, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹¹² Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹¹³ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 16.

¹¹⁴ Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October 2016, p. 5; Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

¹¹⁵ Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

¹¹⁶ AER, *Draft Ring-fencing Guideline Explanatory statement*, August 2016, p. 37.

This obligation complements and supports the physical separation obligation, discussed above. It is designed to prevent a DNSP's staff from using information that they acquire in directly providing regulated network services to advantage a related body corporate that provides a non-network energy-related service. In this way, it is targeted at minimising the potential for a related body corporate gaining an inappropriate competitive advantage.

We also stated in the Explanatory Statement to the Draft Guideline:¹¹⁷

...this does not excuse these senior executives from complying with the rest of the non-discrimination obligations in the Draft Guideline, or from the competitive advantage restrictions.

Removing the exception for officers would require the DNSP or its affiliated entity to engage different boards of directors in addition to senior executive staff. This would be a significant cost and may not be proportionate to the harm. Further, even where staff have a role within both entities they are still bound by the Guideline's non-discrimination obligations not to share information. On balance, with the inclusion of the higher standard of compliance, we have decided to maintain the exemption in the Guideline.

In its submission, Energy Consumers Australia sought clarity around the definition of the term "senior executive".¹¹⁸ AusNet Services proposed in its submission that the Guideline use the term "officer".¹¹⁹

We agree that the term "senior executive" could be ambiguous. In the Guideline we have used the term "officer" instead of "senior executive". "Officer" is defined in the Guideline in a similar way as by the *Corporations Act (2001)*. We consider there is unlikely to be a material difference between the two terms because both refer to individuals with a relatively senior role within an entity. This is consistent with our objective to keep lower level staff separate. The benefit of using "officer" is that it has a well-established legal definition.¹²⁰ We have therefore refined this exemption in the Guideline to allow "officers" to have a role within both the DNSP and the affiliated entity.

Several DNSPs submitted that staff sharing obligations are unnecessary as it is unlikely that a DNSP could confer an advantage on its affiliates. Also, that other sections of the Guideline address the objectives of those staff sharing obligations.¹²¹

Some DNSPs further submitted that functional separation should not apply to field staff.¹²² Other submissions sought clarification on whether the reference to staff included contractors and field staff.¹²³ ECA and Simply Energy submitted that if a DNSP and its affiliated entity engaged a contractor together they may circumvent the non-discrimination provisions.¹²⁴

¹¹⁷ AER, *Draft Ring-fencing Guideline Explanatory statement*, August 2016, p. 37.

¹¹⁸ Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October 2016, p. 5.

¹¹⁹ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹²⁰ NEL, s. 2.

¹²¹ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 15.

¹²² SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 10.

¹²³ Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

¹²⁴ Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October

ActewAGL submitted:¹²⁵

It is very unlikely that AAD staff, by virtue of AAD's role in relation to a monopoly electricity distribution network, could confer a competitive advantage on a related body corporate in any other industry including, for example, the telecommunications or gas industries.

ActewAGL also submitted:¹²⁶

Further, any potential risk of inappropriate subsidisation by a DNSP of an entity in the gas or other industry is covered by the operation of the CAM, and clause 6.15.2(3) of the NER, as explained above.

As noted above, the staff separation provisions were added to the Guideline to avoid information being used to advantage a related electricity service provider in the supply of other distribution services and other electricity services.¹²⁷ They complement the information sharing and disclosure provisions.

We maintain that there is a risk of information being disclosed that could provide an advantage to a DNSP's related electricity service providers. Importantly, the information disclosure and sharing provisions alone will not prevent such information sharing. Physical separation is also required to assist the information sharing and disclosure provisions. This would include field staff and contractors.

However, we agree that there may be some staff who are shared between a DNSP and related electricity service providers who possess electricity information but, due to the nature of their role, would not use the information in a way that would confer an advantage on the affiliated entity. These staff are bound by the Guideline's information sharing and disclosure obligations which restrict use of information. The risk of sharing information in a way that would confer an advantage on related electricity service providers is low. In addition, the CAM would ensure that the DNSP is not subsidising employee services to the related electricity service providers. Accordingly, we consider it appropriate to provide an exemption to the staff sharing provisions and a corresponding exception to the physical separation/co-location provisions for staff who:

- have access to electricity information but do not have, in performing their roles, any opportunity to use that electricity information to engage in conduct that is contrary to the DNSP's obligations under clause 4.1; or
- only have access to electricity information to the extent necessary to perform services that are not electricity services (such as general administration, accounting, payroll, human resources, legal, or information technology support services).

Cl. 4.2.4 requires DNSPs to establish and maintain a written register that identifies the classes of offices and staff to whom it has not applied cl. 4.2.1(a) and / or 4.2.2(a). The compliance obligations at chapter 6 of the Guideline may also require the DNSP to

¹²⁵ 2016, p. 5; Simply Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.
ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 15.

¹²⁶ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 15.

¹²⁷ AER, *Draft Ring-fencing Guideline Explanatory statement*, August 2016, p. 37.

demonstrate that sharing certain staff or classes of staff will be unlikely to facilitate information sharing that would provide an advantage to related electricity service providers.

Some submissions also stated that the Guideline should prohibit common, or shared, incentive structures, such as employee share schemes.¹²⁸ Further, it would be difficult for senior executives not to favour related electricity service providers where they have incentives to do so.¹²⁹

However, several DNSPs submitted that the restriction on the remuneration of staff should be limited to incentive arrangements that encourage conduct otherwise prohibited by the Guideline.¹³⁰ Further, that such a restriction should not prohibit staff from participating in employee share schemes.¹³¹ AusNet Services submitted:¹³²

There are incentive payment schemes, which are a common part of the employees' remuneration. These schemes generally comprise rewards based on performance against the employees' individual accountabilities and also on the business corporate performance, such that there is a sense of sharing with employees.

The other example is the group-wide employee share schemes, which provide a similar function, supporting staff association with the company as an employer of choice. For example, at AusNet Services, staff members have the opportunity to participate in a share investment plan, which is for shares in the listed, head company.

Both of these schemes would be prohibited under the Draft Guideline, disenfranchising less senior staff, skilled workers, administrative staff etc., including all those employees who are able to operate across businesses under clause 4.2.2(b). In our view, this outcome is unjustified and goes beyond the ring-fencing policy intent to minimise discriminatory behaviour.

...

Accordingly, we propose amendments to clause 4.2.2 to prohibit remuneration or incentive arrangements which would encourage conduct which is otherwise prohibited by the Guideline. This ensures that the provision more clearly achieves the AER's policy.

Employee share schemes and incentive payment schemes are problematic where linked to the performance of other entities within the group. The concern is that there may be an incentive to encourage employees to share information with other staff who work for an affiliated entity. Hence, we applied the prescriptive approach in the Draft Guideline.

The prescriptive nature of the Draft Guideline may have prevented participation in group-wide employee share schemes or other group-wide performance incentives and discriminates against less senior staff. This may have been the case even where there is only a weak incentive.

We have refined the prohibition in the Guideline, compared to the Draft Guideline, to adopt an "in principle" approach having regard to the objective of this provision. The Guideline

¹²⁸ EnergyAustralia, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

¹²⁹ ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 5; Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹³⁰ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹³¹ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹³² AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

prohibits providing incentives to staff to act in a manner that is contrary to the DNSP's obligations under the Guideline.

Some stakeholders submitted that the staff sharing exception should also apply to equivalent transmission services.¹³³ Other submissions stated that functional separation should not apply between distribution services.¹³⁴

Emergency response

Energex submitted that we should make clear that the Guideline does not prevent DNSPs from sharing staff or working with related electricity service providers in an emergency.¹³⁵

Potentially, in an emergency, DNSPs may need to utilise all DNSP and related electricity service provider staff to support network activities. There may be other circumstances that are beyond a DNSP's reasonable control where a coordinated response would be more efficient. We do not intend to restrict the way that DNSPs and related electricity service providers would be able to respond in such circumstances. The Guideline makes clear that prohibitions on sharing offices or staff do not apply in circumstances beyond the DNSP's reasonable control, such as an emergency.

Other

EnergyAustralia submitted that the AER should investigate whether directors have completed training courses for the purpose of improving internal governance.¹³⁶ We consider that a requirement to investigate whether directors have completed training courses would be beyond the scope of this Guideline.

Submissions on separate branding

Several stakeholders submitted their concerns about the obligation for independent and separate branding between a DNSP and its related electricity service providers.¹³⁷ Some submissions considered that this requirement needs clarity as the term "brand" is not clear.¹³⁸

We agree with submissions that the Guideline could be improved by providing clarity around what is meant by the obligation to have "separate and independent branding". Accordingly, we have amended the Guideline to describe "independent and separate branding" as follows:

such that a reasonable person would not infer from the respective branding that the DNSP and the related electricity service provider are related.

¹³³ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 11.

¹³⁴ SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 10.

¹³⁵ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹³⁶ EnergyAustralia, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

¹³⁷ Energy Queensland, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹³⁸ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 15.

Several DNSPs submitted that they should be able to continue to use branding, or “secondary branding”, amongst their group.¹³⁹ For example, ActewAGL submitted:¹⁴⁰

Any obligation in relation to branding must be commercially realistic and recognise that it is not possible to entirely divorce the branding of two entities that are related bodies corporate.

The SAPN CitiPower Powercor submission stated:¹⁴¹

Restrictions on a DNSP cross-promoting and advertising the services of its related bodies corporate should only apply to services provided to small customers in downstream markets, where it is a credible scenario that customers may confuse regulated and unregulated service provision from the related body corporate

Further:¹⁴²

A DNSP's related entity should be able to leverage from the regulated brand if it does not confuse customers as to whether the services are regulated or not. The goodwill that the DNSP has developed is often from community philanthropy, not funded by regulated allowances.

In contrast, some submissions included statements that the draft Guideline's separate branding provisions should be strengthened.¹⁴³ For example, the separate branding will prevent customers from confusing the services of the DNSP and its related electricity service providers.¹⁴⁴ Additionally, separate branding should avoid related electricity service providers leveraging from the known branding of the DNSP.¹⁴⁵

For example, ERM Power stated:¹⁴⁶

DNSPs must have independent and separate branding of their distribution services from an affiliate including advertising and promotion. We regard the requirement for separate branding to be important so that the DNSP and its affiliate are seen to be distinct, stand-alone entities to customers. This restriction will ensure customers do not confuse the services that each delivers and the affiliate is not provided with the advantage of leveraging from the known branding of the network.

ERM Power believes that as currently worded, the restrictions on advertising and use of brand are relatively easy to circumvent and we urge the AER to consider whether further measures can be place on ensuring the affiliate is not able to refer to the DNSP in promoting its brand or advertising.

We note that the submissions we received on the use of consistent branding can largely be grouped into two opposing views. In reaching a conclusion on this issue we have had regard

¹³⁹ Energy Queensland, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 16.

¹⁴⁰ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 13.

¹⁴¹ SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 8.

¹⁴² SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 9.

¹⁴³ ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 5; Simply Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

¹⁴⁴ ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 5.

¹⁴⁵ ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 5; Simply Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

¹⁴⁶ ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 5.

to the goal of these obligations. That is, to provide for independent and separate branding is so that customers do not confuse the services provided by a DNSP and by its related electricity service providers.¹⁴⁷

While several submissions supported removing the requirement to use independent and separate branding we did not receive any that addressed the issue of the use of consistent branding influencing customers' choices. Further, submissions did not address how customers would be confused by the use of branding by a DNSP that is different to the branding of an affiliated entity.

On balance, we conclude that adopting consistent branding may influence customers' choices. The risk of using consistent branding potentially results in a DNSP's related electricity service provider gaining an unfair advantage over its competitors by reason of its relationship with the DNSP. Accordingly, we consider it appropriate that the final Guideline includes a requirement that DNSPs use independent and separate branding for their own services.

Ergon Energy submitted that changes to the branding requirements may confuse customers. For that reason changes to websites and call centres arising from separate branding obligations will need careful management to avoid customer confusion.¹⁴⁸ Energy Queensland submitted that the guideline should avoid requiring branding and related changes until after storm season which may require a longer transition period.¹⁴⁹

The issues raised by Ergon Energy and Energy Queensland are predominantly transitional issues which are discussed in chapter 7 of this Explanatory Statement.

4.1.3 Specific obligations for information access and disclosure

The NER state that ring-fencing guidelines may include provisions defining the need for and extent of:

- limitations on the flow of information between the DNSP and any other person¹⁵⁰
- limitations on the flow of information where there is the potential for a competitive advantage between those parts of the DNSP's business which provide direct control services and those parts which provide any other services.¹⁵¹

The Guideline imposes obligations on a DNSP as to how it is to deal with confidential information. "Confidential information" in the Guideline refers to electricity information acquired or generated by a DNSP in connection with its provision of direct control services, that is, not already publicly available. It includes electricity information:

- that the DNSP derives from that information

¹⁴⁷ AER, *Draft Ring-fencing Guideline Explanatory statement*, August 2016, p. 35.

¹⁴⁸ Ergon Energy Retail, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1.

¹⁴⁹ Energy Queensland, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹⁵⁰ NER cl. 6.17.2(b)(iv).

¹⁵¹ NER cl. 6.17.2(b)(v).

- provided to the DNSP by a customer or prospective customer of regulated distribution services, or by another party, such as an affiliated entity or another retailer, in relation to a customer or prospective customer of regulated distribution services.

Information generated by a DNSP includes information about its distribution network that is not derived from any particular item of information provided to the DNSP by a third party. This may be broader than the categories of confidential information defined in the NER.

Information derived by a DNSP includes aggregated information (for example, information relating to a particular group of customers or a particular type of service) that no longer includes some aspects of the information originally provided to the DNSP by a third party (for example, the information that is no longer included may be information that identifies a particular customer or a particular location at which a service is provided).

Aggregated financial information and service performance information that does not relate to an identifiable customer is specifically excluded from the definition of confidential information. Service performance information is information about matters such as overall timeliness and reliability in the provisioning and maintenance of services.

The Guideline requires a DNSP:

- to keep confidential information confidential and only use it for the purpose for which it was provided
- not to disclose confidential information unless:
 - it has the explicit informed consent of the relevant customer or prospective customer to whom the information relates
 - the disclosure is required by law
 - the disclosure is necessary to enable the DNSP to provide its distribution services, transmission services or other services
 - the DNSP complies with cl. 4.3.4 in relation to that information.
- where it shares with an affiliated entity electricity information acquired or generated in connection with providing regulated distribution services, it must provide access to that information on an equal basis to third parties competing with the affiliated entity.

To be clear, a DNSP may not disclose (including share) information with an affiliated entity in contravention of cl. 4.1, notwithstanding the information sharing provision in cl. 4.3.4. For example, it may not disclose to an affiliated entity information the DNSP has obtained through its dealing with a competitor of the affiliated entity where the disclosure would, or would be likely to, provide advantage to the affiliated entity.

In the absence of the above provisions, there is a risk of a DNSP's related electricity service providers gaining an unfair advantage over their competitors in contestable markets by reason of their relationship with the DNSP.

The Guideline's information access and disclosure obligations are designed to complement the general obligations on a DNSP not to discriminate. The reasons for these obligations are as follows.

Protection of information

A DNSP must keep confidential information confidential and only use it for the purpose for which it was provided. This would also protect information provided to the DNSP by any other party in relation to a particular customer or potential customer.

This imposes a positive obligation on a DNSP to protect the information it receives. We consider this obligation is necessary because a DNSP might otherwise share information it receives with related electricity service providers and achieve an inappropriate competitive advantage in the provision of other distribution services or other electricity services.

This obligation supports and complements the obligations in relation to the sharing and disclosure of information.

Disclosure of information

A DNSP must not disclose confidential information to any party, including related electricity service providers, without the explicit informed consent of the relevant customer or prospective customer to whom the information relates.

This obligation is necessary because a DNSP might otherwise disclose information to its related electricity service provider and so give it an inappropriate competitive advantage in the provision of other distribution services or other electricity services.

This obligation will support and complement the obligations in relation to the protection and sharing of information.

Sharing of information

Where a DNSP acquires or generates electricity information in the course of providing regulated distribution services, and shares that information with related electricity service providers, it must provide access to that information on an equal basis with third parties who are competing with the related electricity service providers in relation to distribution services or other electricity services. The DNSP is only required to provide information to the third party where the third party has requested that it be included on the information register in respect of that information.

DNSPs will be required to establish an information sharing protocol setting out how and when it will make the information available to third parties and must make the protocol publicly available. Where a DNSP discloses information to any other party it must do so on terms and conditions that require the other party to comply with cl. 4.3 in relation to that information.

This is a positive obligation on a DNSP to make available to others on an equal basis the information that it provides to its affiliated entity. The obligation is necessary to prevent a DNSP providing information only to its related electricity service providers, thereby giving an inappropriate competitive advantage in the provision of contestable electricity services. As explained above, a DNSP may not share information under this provision with related electricity service providers where this would be in contravention of cl. 4.1. This obligation

will support and complement the obligations in relation to the protection and disclosure of information.

Submissions on specific obligations for information access and disclosure

We received several submissions on the obligations for information access and disclosure. Several submissions were supportive of the intent of these obligations.¹⁵² For example, Red / Lumo Energy submitted:¹⁵³

Red and Lumo support the obligations that apply to DNSPs in relation to information access and disclosure. More specifically, we support the requirement for DNSPs to:

- protect information provided to DNSPs for providing direct control services and ensure it is used only for the purposes that it was provided for;
- share information it acquires in providing direct control services on an equal basis;
- not to disclose information acquired in providing direct control services, including related body corporate, without getting the explicit informed consent of the relevant customer.

However, a number of stakeholders submitted that the obligations were more onerous than necessary, or unworkable.¹⁵⁴ Further, that the NER and other legislation already impose obligations on DNSPs in relation to information disclosure so the additional requirements in the Guideline are unnecessary and potentially inconsistent with these provisions.¹⁵⁵ Several DNSPs submitted that the Draft Guideline's information protection provisions were too broad because they applied to all information rather than just commercially sensitive information.¹⁵⁶ For example, Energex submitted:¹⁵⁷

Section 4.3 of the Draft Guideline places obligations on DNSPs in relation to restricting information disclosures. Energex supports the intent of these obligations. The NER have long-established and effective confidentiality provisions under clause 8.6 that apply to all DNSPs. Energex considers that the proposed obligations extend beyond the existing NER obligations and are unworkable as currently drafted.

AusNet Services made similar comments.¹⁵⁸

¹⁵² AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3; Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 9; Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3; Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1; TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 17.

¹⁵³ Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

¹⁵⁴ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12; Energy Queensland, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3; TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 17.

¹⁵⁵ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 14; AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 13; Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 13; Energy Queensland, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 9; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 16.

¹⁵⁶ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 13; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 10; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 17, 18.

¹⁵⁷ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹⁵⁸ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 13.

In our view, the obligations around keeping information confidential and obtaining consent (in clauses 4.3.1 and 4.3.3 respectively) are unnecessary because such requirements result in:

- duplication with existing privacy law requirements and general confidentiality obligations existing at law which all DNSPs are bound by; and
- results in potential inconsistency with comprehensive requirements in the NER for use and disclosure of metering data.

The information access and disclosure section of the Draft Guideline was quite broad. It was not limited to confidential information so, potentially, the DNSP would be in breach of the Draft Guideline if it disclosed publicly available information. We have altered the scope of the Guideline's information sharing provisions so that they now only apply to confidential information. Confidential information is defined to mean electricity information acquired or generated by a DNSP in connection with its provision of direct control services, that is not already publicly available.

ActewAGL submitted that the Guideline should provide an exception to the information sharing provisions for complying with other binding obligations.¹⁵⁹ Energex stated that some information is shared within a corporate group for management purposes and should not be required to be disclosed to third parties.¹⁶⁰

We agree that there are situations where a DNSP may be required to disclose information to other persons, including related electricity service providers. A DNSP may be required by law, or for the purpose of complying with the law, to disclose information. It may also be necessary for the DNSP to disclose information to enable it to provide its distribution services, transmission services or other services. The Guideline includes additional exceptions to the prohibition on disclosing information to allow for disclosure some situations.

We understand, for example, that a DNSP may be required to share aggregated information within its corporate group for management or reporting purposes. The Guideline states that, provided the information does not relate to an identifiable customer, or class of customers, it is excluded from the prohibition on disclosing information. This will allow DNSPs to aggregate information for management and reporting purposes.

Energy Consumers Australia submitted that DNSPs should be required to publish an information sharing protocol that will outline the means by which the DNSP will give effect to the requirement for equality of access to information.¹⁶¹

We consider that an information sharing protocol will assist in ensuring that the disclosure of information is done transparently and consistently. It will ensure that all parties have equal access to electricity information acquired or generated by the DNSP.

¹⁵⁹ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 17.

¹⁶⁰ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 13.

¹⁶¹ Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October 2016, p. 6.

The Guideline also requires DNSPs to maintain a register (an “information register”) of all other parties who request access to the information identified at cl. 4.3.3(a). Anyone may request to be included on the information register. The DNSP must share that information with the requesting party unless it comes within one of the permitted exceptions under cl. 4.

4.1.4 Conduct of service providers

The Guideline requires DNSPs to ensure that any new agreements with parties who provide services to the DNSP contain provisions which mirror the non-discrimination, staff separation and information access and disclosure provisions of the Guideline. We consider that this is appropriate for ensuring that these obligations apply where the DNSP has engaged external contractors to perform particular tasks rather than carrying out those tasks using the DNSP’s own staff. Waivers are available in respect of this obligation.

The Guideline also requires DNSPs not encourage or incentivise its services providers to engage in conduct that would be contrary to the Guideline if the DNSP engaged in the conduct itself. This will ensure that DNSPs do not take advantage of their decision to outsource particular tasks by seeking to influence their service providers to behave in ways that the DNSP would not be able to behave if it were carrying out those tasks itself.

These provisions of the Guideline do not require DNSPs to vary or replace any existing agreements. The requirement to include particular provisions only applies to new agreements, and where the parties otherwise choose to vary an existing agreement. The phrase “new or varied agreement” is intended to refer to the establishment of new or varied terms and conditions on which services are provided. For example, it is not intended to refer to a new or varied order for services under an existing agreement, or to the exercise of an option under an existing agreement.

These provisions are not intended to require that service providers maintain their own separate registers under clause 4 of the Guideline. Establishing, maintaining and keeping the registers required by clause 4 of the Guideline is the responsibility of the DNSP itself.

5 Waiver provisions

The Guideline provides for waivers in relation to the functional separation of accommodation or employees, co-branding obligations and in respect of legal separation. Core ring-fencing obligations for cost allocation, separate accounts, non-discrimination and information protection cannot be waived.

We will assess waiver applications with respect to the potential for cross-subsidisation, discrimination and with a view to the net benefits in terms of the long term interests of consumers. Our assessment of waiver applications will include consideration of the likely impacts of granting waivers on contestable markets.

We have broadened the availability of waivers compared to the Draft Guideline, which precluded waivers for legal separation. We consider this is necessary to give us flexibility to respond to circumstances as they arise, including those which we are currently unable to foresee.

There are two specific circumstances in which we are likely to grant a waiver from legal separation obligations. First, in relation to other services provided by a DNSP that are also regulated services, whether regulated by us or by another economic regulator. Second, in relation to other services that a DNSP is required by law to provide. In other circumstances we are unlikely to grant a waiver, but we will assess waiver applications on their merits.

Where a waiver from legal separation obligations is granted, we consider that it would usually be appropriate to also grant waivers from office and staff separation obligations and, potentially, obligations restricting co-branding. In all cases, we will assess applications for waivers from the Guideline's non-discrimination obligations on their merits.

Our process for assessing waiver applications is flexible so that we may undertake a public consultation assessment process or, if appropriate, undertake more targeted consultation with specific parties. We intend to undertake public consultation processes unless the benefit of doing so would be outweighed by the associated time and cost.

In this section we first summarises the approach to waivers set out in the Guideline. We go on to discuss stakeholder submissions and describe how we have responded to that feedback. We then describe the waiver application process and the matters that we will generally consider to be relevant in assessing a waiver application. We conclude this section by discussing the duration of a waiver and how a waiver may be varied.

5.1 Guideline position

The Guideline specifies that:

- Waivers will be available in relation to functional separation of either accommodation and/or employees, legal separation and co-branding obligations.
- Core ring-fencing obligations in relation to cost allocation, general non-discrimination obligations and information protection cannot be waived. Even where a waiver from particular obligations has been granted to a DNSP, that DNSP must still comply with all other obligations prescribed in the Guideline.

- We will assess waiver applications having regard to the NEO, the potential for cross subsidisation and discrimination, the balance between the benefits of the relevant obligation for consumers and the costs to the DNSP of complying with the obligation, and any other matters we consider relevant. The DNSP making the application must be able to demonstrate why the waiver should be granted with reference to these matters.
- The duration of a waiver will be limited. It may be granted to cover the (then) current regulatory control period and upcoming regulatory control period.

Our approach to waivers allows flexibility in how we process and assess a waiver application, including enabling us to review a waiver within a regulatory control period.

In developing the waiver framework for the Guideline, we have considered the following design matters:

- the need for predictability, and simplicity, of the waiver process for DNSPs and other stakeholders,
- the need for flexibility in how we assess a waiver application,
- transparency about the information we expect in an application and how it will assess an application, and
- the aim to minimise regulatory burden.

The specific regulatory obligations are set out in section 5 of the Ring-fencing Guideline, and described in more detail below.

5.2 DNSP application for a waiver

The Guideline allows a DNSP to apply in writing for a waiver under cl. 5.2. A DNSP may submit a waiver application either for itself, or for itself and one or more other DNSPs who are affiliated entities of the DNSP.

A waiver may permit a DNSP to not comply with obligations to:

- legally separate from affiliated entities providing other services¹⁶²
- physically separate provision of its direct control services and regulated transmission services from the offices from which a related electricity service provider provides contestable electricity services
- ensure that its staff directly involved in the provision of a direct control service or a regulated transmission service are not also involved in the provision or marketing of contestable electricity services by a related electricity service provider
- use independent and separate branding for its direct control services from branding used by a related electricity service provider¹⁶³
- not promote its direct control services and contestable electricity services together, nor promote services provided by a related electricity service provider¹⁶⁴

¹⁶² AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.1.

¹⁶³ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(a).

A waiver application must include all necessary information and materials to enable us to assess the application, including:

- the Guideline obligation(s) and service(s) subject to the waiver application
- reasons for the waiver application including the likely benefits to consumers of granting the waiver
- the proposed commencement date for the proposed waiver, the proposed expiry date (if any) and the reasons for requesting those dates. For example, it may be that, in the absence of the waiver, the DNSP would not be complying with the relevant obligation under the guideline on and from the commencement date of that obligation.
- details of the costs associated with the DNSP complying with the obligation if the waiver were refused
- the regulatory control period(s) to which the waiver would apply
- any further measures the DNSP will undertake if the waiver were granted, such as an all regulated services CAM where a DNSP is applying for waiver from legal separation obligations.

5.2.1 AER consideration of a waiver application

Matters we will consider

In considering whether to grant a waiver from the Guideline's non-discrimination obligations, we will consider a range of issues. These include:

- whether a waiver would better achieve the NEO, the potential for cross-subsidisation and discrimination if the waiver is granted
- the benefits of the relevant obligation for the long term interests of consumers
- the costs to the DNSP of its compliance with the obligation
- the effect of granting a waiver on competition in markets for contestable electricity services.

We may also consider such other matters as we think are relevant.

Legal separation waivers

There are two broad circumstances in which we would be inclined to grant a waiver from the Guideline's legal separation obligation. First, in respect of other services provided by a DNSP that are also subject to economic regulation, whether by us (for example gas network services) or by another economic regulator (for example water network services). Second, in respect of other services a DNSP is required by law to provide (for example isolated network services in remote areas). In other circumstances we are unlikely to grant waivers from the Guideline's legal separation obligation but we will consider individual waiver applications on their merits.

¹⁶⁴ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.3(a).

The Guideline itself does not include constraints on our ability to grant waivers from the legal separation obligation because circumstances may arise whereby imposing legal separation would not provide benefits for contestable markets but would impose costs on DNSPs. While we are unable to foresee all such circumstances, we consider that having flexibility to respond to such circumstances will promote the long term interests of electricity consumers, consistent with the National Electricity Objective.

We recognise that allowing waivers from legal separation obligations is a change from our Draft Guideline. Some stakeholders may consider it a significant change. Previously we had considered that not providing a general waiver provision for legal separation would promote certainty and confidence in the ring-fencing framework. However, having considered submissions and the range of circumstances that DNSPs operate under and the range of jurisdictional obligations they have, we now give greater weight to the need for flexibility.

In respect of a DNSP providing other services which are also regulated services, such as a DNSP with a gas or water network business, we will only grant a waiver subject to the DNSP agreeing to establish a CAM that deals with all of its regulated services. Through this additional cost allocation requirement we can have greater confidence that costs are being allocated to distribution (and transmission) services appropriately. Subject to the DNSP submitting an all regulated services CAM to us for approval, we will agree to waive the Guideline's legal separation obligation in respect of those regulated other services.

AER assessment of the waiver application

We expect some waivers will be inconsequential in nature, while others may have more far reaching implications in the development of contestable markets for electricity services. In assessing a waiver application it is important that we have flexibility in how we choose to assess an application on a case by case basis, to ensure that we provide procedural fairness for each application, while minimising unnecessary administrative and compliance burdens.

Interim waivers

Under the Guideline we may grant an interim waiver. We consider it likely that interim waivers will be granted in exceptional circumstances only. Significant factors in deciding to grant an interim waiver will be that:

- we consider we will not be able to make a final decision about the waiver application before the date on which the DNSP would be non-compliant with our Guideline in the absence of the waiver; or
- we consider it reasonable to allow the DNSP a transitional period where we have decided not to grant, or to vary or revoke, a substantive (that is, non-interim) waiver, or to vary or revoke a regional office exemption. In this case, the interim waiver will include an expiry date.

In deciding whether to grant an interim waiver we will consider, amongst other things, the likely impact on the DNSP and on other parties of deciding to grant or to not grant the interim waiver, and (where we have not yet made a final decision on the waiver application) whether there is a reasonable possibility that we will decide to grant a final waiver at a later date, and any other issues we consider relevant.

If we grant an interim waiver in order to allow the DNSP a transitional period, we will also make a final decision not to grant, or to revoke, the relevant substantive waiver at the same time, or to vary or revoke the relevant regional office exemption at the same time. Thus, in these circumstances, we will not be making a further decision on the substantive waiver or the regional office exemption at a later date. The DNSP must therefore comply with the relevant obligation once the interim waiver has expired.

An example of a scenario where we would be inclined to grant an interim waiver is a change in service classification which, without an interim waiver, would make a DNSP immediately non-compliant with the Guideline. Where a DNSP has sought a waiver in relation to the consequences of a change in service classification, it may be appropriate to grant an interim waiver until we make a final decision on the waiver application. It may also be appropriate to grant a further interim waiver, once the final decision has been made, to allow the DNSP a limited period of time to make arrangements to become compliant with the Guideline.

Procedural fairness

DNSPs that submit waiver applications are entitled to procedural fairness in relation to our decisions about whether to grant a waiver, to refuse to grant a waiver, or to vary or not vary a waiver. We are conscious that other interested parties may also be entitled to procedural fairness in relation to our determination of a waiver application. As the facts, circumstances and other considerations relevant to a waiver decision may vary considerably from case to case, adoption of a one-size-fits-all approach to ensuring procedural fairness is not appropriate.

This section of the Explanatory Statement sets out the policies we propose to follow in carrying out the various procedural steps involved in considering and determining a waiver application, subject to consideration of each waiver application on a case-by-case basis.

Decision-making timeframes

We will endeavour to make a final decision on each waiver application within 90 days of the application being validly lodged in accordance with cl. 5.2 of the Guideline. If we consider that the waiver application, as lodged, does not fully comply with cl. 5.2, we will notify the DNSP accordingly within 10 business days of receiving the application.

If we consider that we will not be able to make a decision to grant, or refuse to grant, a waiver within that 90 day timeframe, we may decide to grant an interim waiver.

Consultation processes

When we receive a waiver application we will consider whether it is accompanied by sufficient non-confidential information for us to undertake consultations with other interested parties. We may reject a waiver application if, having regard to the information submitted and its confidentiality, we form the view that we are not able to undertake adequate consultations with other interested parties.

Depending on the nature and scope of the requested waiver, we may conduct a public consultation or may decide to consult with a smaller group of interested parties instead. For some minor matters, we may decide that no consultation is required, but we anticipate that

this is likely to be quite rare. We have a strong general preference for undertaking consultation on waiver applications.

If, having considered the waiver application, we are of the view that the waiver should not be granted, we will consult further with the applicant(s) before making a decision to refuse to grant the waiver, but may decide not consult with anyone else.

Where we consider that a waiver application has been made on trivial or vexatious grounds, we may decide to reject the application based only on a preliminary view. In making such preliminary assessments we will still comply with our procedural fairness obligations. We will review the waiver application submitted, and will consult with the applicant DNSP before making a final decision to reject it. In these circumstances, it is less likely that we will consult with other parties or invite public submissions.

If we are proposing to impose conditions when granting a waiver, or to limit the scope or duration of a waiver, or to otherwise carry out subsequent consultations after our initial round of consultations, we will consult with the relevant DNSP and with all other interested parties who have participated in the consultation process previously. We may also choose to undertake these further consultations as a public process.

We note AGL Energy and the Australian Energy Council submitted that they did not support a fast track waiver approval process. Ergon Energy also noted the current Queensland jurisdictional arrangements do not allow for a fast track process. While we are not proposing a specific fast track approval process, our process above provides us with flexibility to consider and decide minor matters efficiently.

Publication of waivers

In all cases, we intend to publish the terms and conditions of any waiver we grant.

If we have undertaken a public consultation process we will usually publish a decision that explains our reasons for granting, or refusing to grant, a waiver (other than an interim waiver).

If we have not undertaken a public consultation process, we may either:

- publish a decision that explains our reasons, or
- on request by any party, provide a statement of our reasons to the DNSP and to other parties who have participated in the consultation process. We may also decide to publish this statement if we consider it appropriate to do so.

5.2.2 Duration of a waiver

Submissions to us indicate that stakeholders hold a range of views on the appropriate duration of a waiver. In its submission on our Preliminary Positions Paper, Energy Australia agreed with us that any waiver should apply for a defined period of time. On the other hand, Essential Energy submitted that waivers should be for an indefinite period of time. Ergon Energy noted the operational impact of durability of a waiver, including on staff and investment in systems and equipment.

It is possible that over time, as circumstances change and the market develops, the basis upon which we grant any waiver application is no longer valid. Therefore, we think that it is prudent to include a sunset date on any waiver, to ensure we reassess the appropriateness of any waiver after a reasonable period of time.

We further consider a sunset period should be linked to a DNSP's regulatory control periods on the basis that if a change to a waiver is made, it enables the DNSP to consider the treatment of any cost implications in its revenue proposal. Also, the regulatory determination process provides a sensible trigger to review an existing waiver.

We note that the circumstances necessitating a waiver may arise during a regulatory control period. If a waiver application is made towards the end of a regulatory control period and the sunset date for a waiver is set for the current regulatory control period, the waiver might apply for a very short period of time before requiring the DNSP to reapply for the waiver at the next regulatory control period. This is likely to create unnecessary regulatory burden for DNSPs. We consider a more practicable and balanced approach is to allow a waiver to be set for the current and next regulatory period. This would mean that a waiver could potentially be sought and granted for at least one whole regulatory control period and potentially up to two regulatory control periods.

5.2.3 Reviewing a waiver within a regulatory control period

Given our position that waivers cease by the end of the current or next regulatory control period, we consider it is necessary to be able to review a waiver within a regulatory control period, to enable us to reassess the appropriateness of any waiver. This would most likely only occur if new information came to light, or circumstances changed, which would change our views on the need for the waiver.

If we propose to vary or revoke a waiver (including any conditions that we have imposed in relation to a waiver), we will:

- give the DNSP to whom the waiver was been granted at least 40 days notice before making any decision to vary or revoke the waiver
- give consideration to the same matters as we consider for the assessment of a waiver application.

We will usually either publish a decision or a statement of our reasons that explains our reasons for deciding to vary or revoke the waiver.

If we vary a waiver, we will publish the terms and conditions of the waiver as varied.

5.2.4 Treatment of existing jurisdictional waivers

In the Preliminary Positions Paper, we suggested the possibility of 'grandfathering' existing waivers or exemptions under current jurisdictional ring-fencing obligations. Having now refined the scope and approach of the Guideline, we consider grandfathering is not necessary. Our reasoning is:

- except in Victoria, jurisdictional ring-fencing obligations will be replaced by the new guideline

- ring-fencing obligations warranting application to all DNSPs have been specified in the Draft Guideline
- the compliance transition period will give DNSPs sufficient time to apply for new waivers where necessary
- circumstances where waivers may be justifiable have been identified and there will be a fit-for-purpose process for DNSPs to obtain waivers.

DNSPs with existing waivers will need to consider their circumstances and, if necessary, submit applications to us for new waivers. We consider the regulatory burden created by this requirement in respect of existing waivers will be minimal because relatively few ring-fencing waivers have been issued under existing jurisdictional arrangements. For details of waivers granted under jurisdictional ring-fencing arrangements, see our information paper *Electricity distribution ring-fencing—Existing jurisdictional waivers* (published October 2016).

Submissions on the availability of, applications for and granting of waivers

Stakeholders generally were supportive of the Draft Guideline's approach to waivers which narrowed their application to particular circumstances, compared to our Preliminary Positions Paper in which we had proposed large scale use of waivers.¹⁶⁵ However, in other respects submissions displayed a significant split between DNSPs and non-DNSP stakeholders in terms of waiver availability and scope. DNSPs generally sought broader application of waivers while non-DNSP stakeholders proposed the greatest possible restriction on waiver application.

Several DNSPs submitted proposals for the extension of waivers to cover not only the Guideline's staff and office separation obligations but also obligations for legal separation and in some cases the obligations for separate accounts and cost allocation.¹⁶⁶ For example, Ergon Energy submitted:¹⁶⁷

Ergon Energy believes under limited circumstance waivers should be available for all obligations.

Similarly, ActewAGL submitted:¹⁶⁸

The final guideline should allow a DNSP to apply for a waiver in respect of the application of all clauses in that guideline.

DNSPs that submitted support for broadening the scope of waivers nominated a range of reasons, from the general to the very specific. Some DNSPs submitted that allowing waivers would give us flexibility to adjust our ring-fencing approach to a range of circumstances.¹⁶⁹ Also, that it would indicate we are conscious of the costs that would be imposed on DNSPs

¹⁶⁵ Total Environment Centre, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1; PIAC, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹⁶⁶ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 18.

¹⁶⁷ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹⁶⁸ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 17.

¹⁶⁹ AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, pp. 5-6.

and their customers by a strict application of the Guideline's legal separation obligations in all circumstances.¹⁷⁰

More specifically, TasNetworks submitted that waivers from the Guideline's legal separation obligations should be available in recognition of markets where prospects for competition in related markets are limited.¹⁷¹

We consider the ring-fencing waiver provisions are critical to recognition of different market circumstances across the NEM and hence the proportionality of the ring-fencing obligations that are applied.

Ergon Energy submitted:

- it should not have to legally separate its stand-alone power systems servicing remote communities¹⁷²
- bridging waivers for legal separation should be available to cover some services until the next distribution determination when service classifications may be reconsidered¹⁷³
- waivers from information sharing obligations should be available in relation to its affiliated retailer Ergon Energy Queensland.¹⁷⁴

Other DNSPs, such as Energex and SA Power Networks (representing also CitiPower and Powercor), also submitted support for bridging waivers in terms of the Guideline's legal separation obligations.¹⁷⁵

A small number of DNSPs (and the Energy Networks Association) submitted concerns that other regulated services they provide, which are not electricity distribution services, may have to be legally separated.¹⁷⁶ For example, Essential Energy submitted:¹⁷⁷

We suggest the inclusion of some sort of waiver clause from the need for a separate legal entity where the impacted business is operating in another regulated market or is merely the result of a government arrangement.

We understand Essential Energy operates at least one network water distribution business and some generation assets in remote communities.

Similarly, ActewAGL submitted it was concerned about the prospect of having to legally separate its network gas distribution business from its electricity distribution business.¹⁷⁸

ActewAGL indicated that divesting its gas network assets to a separate legal entity would create costs for no benefit because, as a regulated monopoly business, there were no competitive neutrality issues raised by its gas business.

¹⁷⁰ Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p.

¹⁷¹ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 14.

¹⁷² Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹⁷³ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7.

¹⁷⁴ Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 12.

¹⁷⁵ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7; SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7.

¹⁷⁶ Energy Networks Association, *Response to the AER Draft Guideline*, 28 September 2016, pp. 4-5.

¹⁷⁷ Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, Appendix B p. 1.

¹⁷⁸ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 6.

Some DNSPs submitted that waivers are a second-best approach to dealing with circumstances where the potential benefits of ring-fencing are unlikely to be realised. For example, TasNetworks submitted that applying for waivers, the uncertainty around outcomes and the limited time period of waivers (up to 2 regulatory control periods) will create additional costs for DNSPs.¹⁷⁹ TasNetworks and Ausgrid submitted proposals for ex ante assessment of the benefits of ring-fencing in particular circumstances, rather than a blanket application of ring-fencing obligations with limited opportunity for ex post exemptions through waivers.¹⁸⁰

Non-DNSP stakeholders submitted that waivers should either not be available at all, or should only be available in limited circumstances.¹⁸¹ To the extent that waivers will be available, non-DNSP stakeholders submitted that we should establish strict criteria for assessing waiver applications. Also, that our waiver application assessments should incorporate public consultation processes. For example, Origin Energy submitted:¹⁸²

We believe that irrespective of the nature of a waiver application, to ensure the integrity and transparency of the ring-fencing regime the AER must consult publicly on all waiver applications. We accept that in some instances it may be practicable to adopt a simpler process, however, engagement with stakeholders must be retained.

Similarly, PIAC submitted:¹⁸³

While we understand that the AER's approach is aimed at allowing itself the flexibility to consider and decide minor matters efficiently, this should not undermine transparency.

The Total Environment Centre submitted that the Guideline should indicate in which circumstances we will consult publicly on waiver applications and when we will not.¹⁸⁴

Some non-DNSP stakeholders submitted broad support for the Draft Guideline's waiver provisions. For example, Red / Lumo Energy submitted:¹⁸⁵

We support the decision that does not permit the core ring-fencing obligations of legal separation, cost allocation and information protection to be waived.

In response to submissions, we maintain our view that restricting ring-fencing waivers to only some of the Guideline's provisions is appropriate. Core ring-fencing obligations around separate accounts, cost allocation, protection of customer information and distinctly separate branding will not be subject to waivers. This approach will promote confidence and consistency in the ring-fencing framework.

¹⁷⁹ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

¹⁸⁰ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 12.

¹⁸¹ EnergyAustralia, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2; Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4; Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5; ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 4.

¹⁸² Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5.

¹⁸³ PIAC, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹⁸⁴ Total Environment Centre, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹⁸⁵ Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

As discussed above, the Guideline differs from the Draft Guideline in that we have now allowed for waivers from the legal separation obligation. It should be noted that waivers cannot be sought for the separate accounting and cost allocation obligations. . We consider this will promote confidence in the ring-fencing framework for third parties in contestable markets.

6 Reporting, compliance and enforcement

The Guideline establishes a base level of monitoring and reporting but additional requirements may be imposed on a DNSP to address specific concerns, should they arise. Ensuring effective compliance with the Guideline's obligations will be important to promote confidence in the outcomes.

The Guideline requires a DNSP to establish and maintain internal procedures to ensure compliance with its ring-fencing obligations. We may require a DNSP to demonstrate the adequacy of these procedures and to report on its compliance with ring-fencing obligations. We may make ring-fencing compliance reports publicly available.

The Guideline requires a DNSP's compliance with ring-fencing obligations to be independently verified annually and a report submitted to us within four months of the end of a financial year. Also, a DNSP must self-report to us a material breach of its ring-fencing obligations within 5 business days of the breach occurring. We may seek enforcement of ring-fencing obligations by a court in the event of any breach of those obligations by a DNSP.

Any interested party may submit a complaint to us about a possible breach of ring-fencing obligations by a DNSP. We will investigate complaints in accordance with our compliance and enforcement policy.

In this section we first summarises the approach to reporting, compliance and enforcement set out in our Preliminary Positions Paper. We then describe the approach set out in the Guideline. We conclude this section by discussing stakeholder views on reporting, compliance and enforcement.

6.1 Guideline position

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.

In developing the reporting, compliance and enforcement framework for the Guideline we have considered a range of principles. These include that an effective reporting, compliance and enforcement regime should encourage compliance by DNSPs. It should also detect and redress any areas of non-compliance.

We consider there is sufficient justification for annual reporting of a DNSP's compliance with its ring-fencing obligations, supported by an independent third party assessment. There is also a case for real time obligations on DNSPs to self-report incidents of non-compliance, to provide greater transparency about any such incident. ..

The Guideline binds DNSPs. Accordingly, the ring-fencing obligations (including the monitoring and reporting requirements) are focused on the DNSP rather than on other entities or on contestable markets.

Public confidence will be enhanced by transparency about DNSP compliance and the ability for customers and service providers in competitive markets to raise concerns about DNSP non-compliance with us.

It should be noted that the NER ring-fencing provisions are not pecuniary penalty provisions. We therefore have no authority to issue fines in relation to breaches of the Guideline's ring-fencing obligations.

The compliance reporting and enforcement obligations in section 6 of the Guideline are described below.

Maintaining compliance

A DNSP must establish and maintain appropriate internal procedures to ensure it complies with its obligations under the Guideline.

A DNSP must establish, maintain and keep a range of records:

Establish and maintain accounts

- separate accounts¹⁸⁶
- cost allocation and attribution¹⁸⁷

Office & staff registers

- offices¹⁸⁸
- staff¹⁸⁹

Information sharing and information disclosure

- information sharing protocol¹⁹⁰
- information register.¹⁹¹

In providing independent assurance that a DNSP is complying with the Guideline's obligations, an independent assessor must verify the DNSP is appropriately maintaining the records listed above.

A DNSP must also establish and maintain appropriate internal accounting procedures to ensure that it can demonstrate the extent and nature of transactions between it and its affiliated entities.¹⁹²

In addition to annual compliance reports, we may also require the DNSP to demonstrate the adequacy of these procedures upon reasonable notice.

¹⁸⁶ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.1.

¹⁸⁷ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.2.

¹⁸⁸ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.4(a).

¹⁸⁹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.2.4(b).

¹⁹⁰ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.3.4(d).

¹⁹¹ AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 4.3.5.

¹⁹² AER, *Ring-fencing Guideline—Electricity Distribution*, cl. 3.2.1(a).

Compliance reporting

A DNSP must prepare an annual ring-fencing compliance report and submit it to us within four months of the end of the DNSP's regulatory year, except for the regulatory year - 2016 or 2016-17 (as the case may be) - in which this guideline commences.

Annual compliance reports must describe measures taken to ensure compliance with ring-fencing obligations, identify any breaches and address non-network activities in accordance with 3.1(b) of the Guideline.

An annual compliance report must also identify and describe the purpose of all transactions between the DNSP and affiliated entities. For example, it may be the DNSP purchasing vegetation management services from an affiliated entity in order to keep power lines clear of hazards. Alternatively, a DNSP may hire vehicles from an affiliated entity to perform visual line maintenance inspections.

Annual compliance reports must be accompanied by an assessment of compliance by a suitably qualified independent authority.

Annual compliance report will be made publicly available by the AER.

Compliance breaches

A DNSP must notify us in writing within five business days of becoming aware of a material breach of its ring-fencing obligations. This initial notification need not be the only report to us by a DNSP in relation to a compliance breach. We consider it likely that a DNSP would report to us within five business days of it becoming aware of a compliance breach, then follow-up with subsequent reporting on details of the breach, how it occurred and what actions are being taken to prevent a recurrence. We have not mandated such subsequent reporting because we consider DNSPs will have a strong incentive to provide such follow-up details.

We may seek enforcement of the Guideline by a court in the event of any breach of ring-fencing obligations by a DNSP, in accordance with the NEL.

Any interested party may make a complaint to us about a possible breach of ring-fencing obligations by a DNSP, and we will investigate complaints in accordance with our compliance and enforcement policy.

At any time, we may require a DNSP to provide a written response to particular concerns about its compliance with its ring-fencing obligations.

Stakeholders interested in further understanding our intended approach to enforcement of the Guideline's obligations should review our *Compliance and Enforcement Statement of Approach*, published April 2014 (our Statement of Approach).¹⁹³ In our Statement of Approach we state:¹⁹⁴

¹⁹³ Available at the [AER website](#).

¹⁹⁴ AER, *Compliance and Enforcement Statement of Approach*, April 2014, p. 5.

We consider that a culture of compliance is critical to the achievement of the national energy laws objective and to build consumer confidence in energy markets. The prevention of contraventions of obligations under the national energy laws is preferable to the AER taking enforcement action after a breach has occurred. Through our work we seek to encourage a culture of compliance.

Ultimately, responsibility rests with businesses to meet their obligations under the national energy laws. We encourage businesses to continuously review the effectiveness of their compliance policies, systems and procedures to ensure that they are complying with their obligations.

Submissions on reporting, compliance and enforcement

Stakeholder submissions on the compliance and enforcement provisions of the Draft Guideline tended to diverge according to whether they were provided by DNSPs or non-DNSPs. DNSPs generally sought lighter reporting, compliance and enforcement requirements and improved clarity around their obligations. Non-DNSP stakeholders generally submitted support for the reporting, compliance and enforcement regime set out in the Draft Guideline and often proposed establishing further requirements.¹⁹⁵

Some non-DNSP stakeholders submitted that we could do more to provide confidence to potential third party providers to encourage them to enter competitive markets in competition with DNSPs.¹⁹⁶ Amongst these submissions there was a strong focus on pecuniary (financial) penalties. For example, AGL submitted:¹⁹⁷

... the availability of pecuniary penalties is important given the potential harm to consumers and the market in the event of non-compliance with the Guideline.

Similarly, Metropolis submitted:¹⁹⁸

Metropolis support the reporting measures identified, however the compliance regime is manifestly inadequate ... Pecuniary penalties have precedent within the market, and appear to be an appropriate method of dealing with breaches.

A number of non-DNSP stakeholders submitted that DNSP annual ring-fencing compliance reports should be made public.¹⁹⁹ And at least one non-DNSP stakeholder submitted that the Guideline should limit the engagement of an auditor by a DNSP to two consecutive years.²⁰⁰ Energy Consumers Australia submitted that we should require the most senior

¹⁹⁵ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5; Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3; Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4; Total Environment Centre, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 1.

¹⁹⁶ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5; Simply Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

¹⁹⁷ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 6.

¹⁹⁸ Metropolis, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

¹⁹⁹ EnergyAustralia, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5; Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October 2016, p. 6; ERM Power, *Submission to AER Draft Ring-fencing Guideline*, 26 September 2016, p. 6; Origin Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5; Red & Lumo Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 5;

²⁰⁰ Australian Energy Council, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

executive of the DNSP to take personal responsibility for the DNSP's compliance with ring-fencing obligations.²⁰¹

As noted above, DNSP submissions were quite different to other submissions. Ausgrid submitted that the compliance provisions of the Draft Guideline were too stringent.²⁰² Ausgrid also queried whether we have authority to impose ring-fencing compliance reporting on a DNSP.²⁰³ SA Power Networks, CitiPower and Powercor submitted that they did not support applying penalties for non-compliance.²⁰⁴ They also proposed that, should penalties be established, lesser penalties should apply to DNSPs who self-report breaches of ring-fencing obligations.

Some DNSPs submitted that the Draft Guideline wasn't sufficiently clear about the obligations imposed on DNSPs, leading to difficulties in ensuring compliance. For example, TasNetworks submitted:²⁰⁵

The lack of clarity around the scope of services that the proposed ring fencing obligations apply to needs to be resolved. Ambiguity will make it difficult for DNSPs to implement systems and processes to ensure compliance.

Similarly, Energex submitted:²⁰⁶

...Energex considers that a key driver of minimising compliance costs is removing the ambiguity in the Draft Guideline, particularly around the scope of services that the proposed obligations apply to.

Some DNSPs submitted that the Draft Guideline's time limit for self-reporting of ring-fencing breaches, 5 business days, was insufficient and should be extended. For example, Endeavour Energy submitted:²⁰⁷

...the proposed requirement to self-report within five business days is likely to reduce the quality of the reporting provided to the AER, including any proposed remediation actions. Rather Endeavour Energy would favour a reporting requirement more in the order of 20 business days to allow sufficient time to fully review the circumstances and to determine an appropriate course of action to achieve compliance.

Energex submitted that the standard of audit assurance set out in the Draft Guideline was too stringent and would lead to high costs.²⁰⁸ Energex proposed that the compliance assessment standard should be a limited assurance review rather than an audit.

In response to submissions, we note that non-DNSP stakeholders favour imposition of pecuniary penalties for Guideline breaches. We do not have authority under the NER to impose such penalties in respect of ring-fencing obligations. A rule change would be required to give us that authority. The existing approach to enforcement allows us to seek a

²⁰¹ Energy Consumers Australia, *Submission in response to the Australian Energy Regulator's Draft Guideline*, 3 October 2016, p. 7.

²⁰² Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 2.

²⁰³ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 13.

²⁰⁴ SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 16.

²⁰⁵ TasNetworks, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 19.

²⁰⁶ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 16.

²⁰⁷ Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

²⁰⁸ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 16.

court order to enforce compliance with the Guideline. We consider this is appropriate, to focus on achieving DNSP compliance with the Guideline's obligations rather than focus on penalties for non-compliance.

The Guideline specifies that DNSP annual compliance reports may be made public. At this stage we intend to publish annual compliance reports as a matter of course.

In response to DNSPs' submitted views that the compliance regime is too stringent, we consider it balances the competing needs to minimise cost and provide confidence that the Guideline's obligations are being adhered to. The requirement for self-reporting of Guideline breaches within five business days is not an onerous requirement. It reflects the existing self-reporting requirement for Queensland DNSPs Energex and Ergon Energy.

Breaches of the Guideline's obligations are a serious matter. We and participants in contestable markets require transparency around these issues. As noted above, a DNSP's initial self-report to us need not be the only report provided about a specific ring-fencing breach. We recognise that DNSPs may wish to supplement their initial report with further details about the circumstances of a breach and their follow-up actions. If necessary and appropriate, we may also take steps to investigate any self-reported breaches.

We consider that DNSPs' submitted concerns about the clarity of the Guideline's obligations have been addressed by broader amendments to the Guideline's terminology and other changes.

With respect to the audit standard for DNSP annual compliance assessments, we have not adopted a specific audit standard. Therefore, there is not an audit standard nor a review standard of compliance assessment. Rather, there is a broad requirement for DNSPs to demonstrate, via the annual independent third party assessment, that they are compliant with the Guideline's obligations. It is also up to DNSPs to appoint a suitably qualified independent party to undertake their annual compliance assessment. DNSPs should note that we will monitor ring-fencing compliance reports for who is appointed to undertake them, their comprehensiveness, clarity and detail.

While we understand the rationale for the stakeholder proposal to limit appointment of an independent compliance assessor to no more than two reporting periods, we do not consider this would be appropriate. We do not see our role as extending to intervening in the engagement of third parties by a DNSP. Rather, we consider the Guideline should, as much as practicable, focus on the desired outcomes and leave implementation of policies and procedures to achieve those outcomes to the DNSPs concerned.

Where we consider a DNSP's compliance assessment reporting is inadequate, we may issue regulatory information notices to gather further information. In the longer term, we note that all stakeholders will form views as to the effectiveness of the Guideline's compliance and enforcement regime. Should stakeholders consider the regime requires amendment, for example to allow us to issue pecuniary penalties, they may pursue rule changes to grant us such powers.

7 Implementation and transition issues

Immediate implementation of the Guideline's obligations would create costs for DNSPs as they amend their corporate processes and structures to comply with the new arrangements. Those costs would be passed on to electricity customers. To mitigate transitional costs we are allowing DNSPs some flexibility in how quickly they become compliant with the Guideline.

For existing services, DNSPs should comply with the Guideline's obligations as soon as practicably possible, but no later than January 2018. For new services, DNSPs should comply with the Guideline immediately. Where we change the classification of a service, a DNSP will have 12 months to comply with the Guideline in respect of the service for which classification was amended.

We consider most implementation costs are likely to be associated with legal and functional separation, but that DNSPs ought to be able to comply with the accounting obligations, the cost allocation and attribution obligations, and the non-discrimination obligations, quickly if not immediately. We expect implementation costs will vary across DNSPs because of the difference between their existing jurisdictional ring-fencing obligations and the Guideline's obligations.

Responsibility for costs relating to non-discrimination branding and advertising measures will sit with the affected entity.

7.1 Transition to the Guideline

On publication, DNSPs in all states and territories that have adopted the NER become subject to our Guideline.

On publication, our Guideline supersedes existing state and territory jurisdictional ring fencing guidelines which apply to electricity distribution. These existing state and territory jurisdictional guidelines include ring fencing guidelines for the ACT, New South Wales, Queensland, South Australia and Tasmania.

The NER does not give us authority to revoke the existing jurisdictional ring fencing requirements in Victoria or the Northern Territory. These requirements will continue to apply until they are revoked by the relevant jurisdiction.

Further, our revocation of ring fencing regulation only applies to electricity distribution. State and territory jurisdictional ring fencing codes and guidelines, so far as they apply to other markets, such as gas, continue in force for each relevant jurisdiction

7.2 Guideline position

For existing services, the Guideline requires DNSPs to comply with the Guideline's obligations as soon as reasonably practicable, but no later than January 2018. We consider this approach both recognises the range of circumstances faced by different DNSPs and reflects the need for certainty and confidence amongst participants, or potential participants, in developing markets.

For new services (including services that have completed a trial phase but have not moved into ongoing supply to customers as at 1 December 2016), DNSPs must comply with the Guideline immediately. We consider this is reasonable because, for a new service, there are no legacy arrangements that would require amendment. DNSPs considering provision of new services will understand their ring-fencing obligations. They will be able to make arrangements to align the provision of a new service with those obligations.

For services subject to a change in classification, DNSPs must comply with the Guideline within 12 months of the time our distribution determination that imposes the change in classification takes effect.

7.3 Costs of implementation

Our analysis and stakeholder's submitted views suggest most implementation costs will be associated with obligations for functional separation and to a lesser extent, legal separation.²⁰⁹

Compared to the Draft Guideline, the Guideline should be less costly for DNSPs to comply with because we have further targeted the harms we intend to mitigate. As a consequence of our more targeted approach, the Guideline allows staff to be shared where doing so does not otherwise compromise the DNSP's compliance with the Guideline's obligations. Also, rather than mandate that contestable services must be provided from a separate building, as the Draft Guideline suggested, the Guideline specifies that DNSPs may occupy the same building so long as DNSP staff and contestable staff are prevented from mingling. For example by occupying separate floors or by securing parts of the building for DNSP staff or for staff providing contestable services.

Responsibility for costs relating to non-discrimination branding and advertising measures will sit with the affected entity. We note that transition costs may vary across individual DNSPs.

7.4 Transition to compliance

For existing services, the Guideline requires DNSPs to comply with the Guideline's obligations as soon as reasonably practicable, but no later than January 2018. We consider this approach both recognises the range of circumstances faced by different DNSPs and reflects the need for certainty and confidence amongst participants, or potential participants, in developing markets.

For new services, DNSPs must comply with the Guideline immediately.

For services subject to a change in classification, DNSPs must comply with the Guideline within 12 months of the time the distribution determination takes effect.

Enforcement during transition to compliance

²⁰⁹ CitiPower, Powercor and SA Power Networks, *Electricity Ring-Fencing Guideline – Preliminary Positions Paper*, 30 May 2016, p. 24; ActewAGL, *ActewAGL Distribution response to AER electricity ring-fencing guidelines preliminary positions paper*, May 2016, p. 13; Endeavour Energy, *Re: AER electricity ring fencing guideline – preliminary positions paper (April 2016)*, May 2016, p. 26.

We intend to take a practical approach to enforcing Guideline compliance during the period DNSP's will be transitioning to the new national ring-fencing arrangements. We recognise that in some cases existing regulatory arrangements and corporate structures for service delivery may not be able to align, for external reasons, with the Guideline's obligations before the Guideline takes full effect on 1 January 2018. To manage such transitional issues we may, on application, grant temporary waivers or provide letters of comfort to DNSPs that specific ring-fencing requirements will not be enforced. Our approach to transitional issues will depend on the circumstances that may arise.

In particular, we note existing service classifications may not be the most suitable in the context of our new national ring-fencing approach. We are unable to adjust service classifications until a DNSP's next distribution determination. We note service classification issues are most pronounced for SA Power Networks in South Australia and Power and Water Corporation in the Northern Territory. We discuss these issues separately below.

SA Power Networks' transition

SA Power Networks currently has a relatively large number of services classified as negotiated services. In other jurisdictions, many, if not most, of the services classified as negotiated services in South Australia, are classified instead as alternative control services.²¹⁰

When the Guideline's obligations take full effect on 1 January 2018 we understand that SA Power Networks could, under the Guideline, incur a range of costs and experience significant corporate disruption if required to comply with the Guideline's non-discrimination provisions in respect of its negotiated services. We consider SA Power Networks' circumstances could be managed through one or more temporary waivers.

While unable to pre-empt our decision on a potential future waiver application, we would consider granting waivers for SA Power Networks' negotiated services, at least for the period of its current distribution determination.

Power and Water Corporation's transition

At time of writing, Power and Water Corporation was preparing for its first distribution determination under the NEL/NER regulatory framework. We became responsible for economic regulation of Power and Water Corporation on 1 July 2015. As a transitional measure we are administering the Northern Territory's existing regulatory framework established under jurisdictional arrangements. Our 2019-24 distribution determination for Power and Water Corporation will be regulated under the same arrangements under which we regulate other NEM distributors.

We understand Power and Water Corporation's service structure does not align with the NER service classification structure. Also, that its corporate structure, as an integrated utilities provider, is relatively complex from a ring-fencing perspective.

²¹⁰ SA Power Networks' classification structure reflects the historical regulatory approach under jurisdictional arrangements prior to regulatory responsibility transferring to us. NER cl. 6.2.1(d) requires us, when classifying distribution services, to retain the previous classification approach unless a different classification is clearly more appropriate.

At this stage we consider waivers may be an appropriate means of managing transitional issues for Power and Water Corporation. We are prepared to work with Power and Water Corporation to assist it in understanding the Guideline's implications, how transitional issues can be managed and to confirm an appropriate pathway to compliance with the Guideline's obligations.

Submissions on implementation and transition issues

DNSPs submitted that they would incur costs in making changes to their corporate structures, internal processes and information systems to comply with the Guideline.²¹¹ Some submitted that their transitional costs would be more significant if they were required to comply with the Guideline quickly. For example, ActewAGL submitted:²¹²

Employing new staff takes time. DNSPs should not be forced into employing staff into new roles who are not adequately qualified for those roles as a result of the ring-fencing guidelines.

Similarly, Essential Energy submitted:²¹³

...a DNSP may be contracted to a building lease that cannot be revoked with the six-month period outlined in the draft Guideline. Forcing the DNSP to move energy related services staff to new premises ahead of the lease expiry will only lead to higher electricity prices for customers as the existing distribution services lease costs can no longer be shared with the energy related services business.

DNSP's typically focused on transition periods of 12 months or more.²¹⁴ For example, Energex submitted that we should provide for:²¹⁵

...a minimum 12 month transitional period for legal and functional separation obligations as well as branding obligations and a 3 month period for separate accounts/cost allocation and general non-discrimination obligations.

Similarly, ActewAGL submitted:²¹⁶

Any transition period shorter than a year would create a serious risk of inefficiencies arising.

Ausgrid submitted:²¹⁷

The transitional period for functional separation should be extended to at least 12 months to allow sufficient time for implementation. Complying with the Guideline's obligations will require extensive physical, staff and system changes.

²¹¹ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 7; AusNet Services, *Re: Draft Ring-fencing Guideline*, 28 September 2016, p. 15; Endeavour Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, Attachment A, p. 1; Ergon Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 13;

²¹² ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 18.

²¹³ Essential Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, pp. 6-7.

²¹⁴ United Energy, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 7; Jemena, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 4.

²¹⁵ Energex, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 2.

²¹⁶ ActewAGL Distribution, *Electricity Ring-fencing guideline ActewAGL response to AER draft guideline*, 28 September 2016, p. 18.

²¹⁷ Ausgrid, *Re: Electricity Distribution Ring-fencing Guideline – Response to Draft Guideline*, 28 September 2016, p. 8.

Some DNSPs submitted that transitional arrangements should be aligned with financial years to further alleviate cost pressures. For example, SAPN, CitiPower and Powercor submitted.²¹⁸

...the Businesses' statutory financial year is a calendar year (i.e. January to December) aligning with our majority owner's financial year. Implementing structural changes one month before the end of the financial year will be problematic ... costs in relation to system duplication, governance and compliance (e.g. audit fees) will be unnecessarily incurred. Statutory reporting of any new legal entities for one month is an unreasonable burden.

Most electricity retailers, third party providers and consumer peak bodies did not comment on transitional issues in their submissions on the Draft Guideline. An exception was AGL, which submitted:²¹⁹

Considering the pace of change in the energy market, AGL considers that network businesses and their associated commercial ventures should be required to transition to the new framework as expeditiously as possible ... The right competitive architecture needs to be in place as soon as possible to ensure that the market entry of new products and services can keep pace with the availability of new technologies and evolving customer expectations.

In response to submissions, we consider the Guideline balances the need for implementation of effective ring-fencing with the transitional costs that will be incurred by DNSPs and ultimately paid for by electricity consumers. The Guideline does this by requiring that DNSPs comply with the Guideline's obligations as soon as reasonably practicable but no longer than 1 January 2018.

²¹⁸ SAPN, CitiPower, Powercor, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 15.

²¹⁹ AGL, *Submission to AER Draft Ring-fencing Guideline*, 28 September 2016, p. 3.

Appendix A — Shared assets

The purpose of this Appendix is to explain how the Guideline affects the regulatory treatment of shared assets.

The following regulatory decisions and instruments work together to determine the treatment of a DNSP's shared assets:

- the AER's service classification decisions
- the AER's Cost Allocation Guideline
- the DNSP's approved Cost Allocation Method
- the AER's Shared Asset Guideline
- the AER's Ring-fencing Guideline.

We consider the nature of, and relationship between, these decisions and instruments before explaining how together they affect the regulatory treatment of shared assets.

Service classification

Cl. 6.2.1 of the NER provides that we can:

- classify a DNSP's distribution service as:
 - a direct control service, which may in turn be either:
 - a standard control service or
 - an alternative control service.
 - a negotiated distribution service
- not classify a DNSP's distribution service, in which case it is treated as an unregulated distribution service.

We must have regard for the matters in cl. 6.2.1 of the NER in classifying a DNSP's distribution services, including the form of regulation factors in section 2F of the NEL.

Our service classification for a DNSP for any regulatory control period must be set out:

- initially in our framework and approach paper²²⁰; and
- ultimately in our distribution determination²²¹.

The service classification is important because it:

- details which services a DNSP can provide, having regard to the Guideline – a DNSP cannot provide non-distribution services (unless the DNSP is granted a waiver that allows it to do so)
- determines whether, and how, a distribution service is regulated under chapter 6 of the NER

²²⁰ NER, cl. 6.8.1(b)(2)(i).

²²¹ NER, cl. 6.12.1(1).

- determines the distribution services to which a DNSP attributes and allocates its costs under its Cost Allocation Method and the Cost Allocation Guideline
- identifies the services that may utilise shared assets, to which the Shared Asset Guideline may therefore apply.

Cost Allocation Guideline and Cost Allocation Method

We have prepared a Cost Allocation Guideline in accordance with cl. 6.15.3 of the NER. The Cost Allocation Guideline gives effect to the cost allocation principles in cl. 6.15.2 of the NER.

A DNSP's Cost Allocation Method details how it will attribute and allocate its costs between its distribution services. A DNSP must have a Cost Allocation Method approved by us in accordance with cl. 6.15.4 of the NER. Cl. 6.15.1 of the NER requires a DNSP to comply with its approved Cost Allocation Method. A DNSP may amend its Cost Allocation Method from time-to-time in accordance with cl. 6.15.4(f) of the NER and must amend its Cost Allocation Method when required to do so by the AER under cl. 6.15.4(g) of the NER.

A DNSP usually only attributes or allocates costs for an asset between its services when the asset is first established. The DNSP does this based on its expected future use of the asset. In this way, the costs of an asset related to a DNSP's standard control services are reflected into the regulatory asset base for those services.

Shared Asset Guideline

The cost allocation provided by a DNSP's approved Cost Allocation Method may become inaccurate if the use of an asset changes over time (i.e. if the actual use is inconsistent with the expected use).

For example, an electricity pole that was previously used solely to provide standard control services may, over time, also be used to support fibre optic cable for communication purposes. This is an example of a shared asset. Other common examples of shared assets include a DNSP's IT systems, fleet and ducts. These assets contribute to multiple revenue streams.

Cl. 6.4.4 of the NER provides that a shared asset is one that contributes to standard control services and one of:

- an unregulated distribution service²²²
- a non-distribution service²²³
- a service provided by means of, or in connection with, a dual function asset²²⁴.

We have prepared a Shared Asset Guideline in accordance with cl. 6.4.4(d) of the NER to deal with the regulatory treatment of shared assets, which gives effect to the shared asset principles in cl. 6.4.4(c) of the NER. One of these principles provides that "the Distribution Network Service Provider should be encouraged to use assets that provide standard control

²²² NER, cl. 6.4.4(a)(1).

²²³ NER, cl. 6.4.4(a)(2)(i).

²²⁴ NER, cl. 6.4.4(a)(2)(ii).

services for the provision of other kinds of services where that use is efficient and does not materially prejudice the provision of those services”.²²⁵.

The Shared Asset Guideline is therefore drafted on the premise that DNSPs can and should use regulated assets for both regulated and other services (including other distribution services). The Shared Asset Guideline specifies how we may reduce a DNSP’s annual revenue requirement for standard control services by a share of the DNSP’s forecast revenue from its shared assets.

The Shared Asset Guideline is therefore the means for us to share costs fairly between customers when a DNSP’s Cost Allocation Method becomes outdated because of a change in the use of a regulated asset.

Impact of the Ring-fencing Guideline

The Ring-fencing Guideline does not change any of the regulatory framework or instruments relating to:

- service classification
- cost allocation
- shared assets.

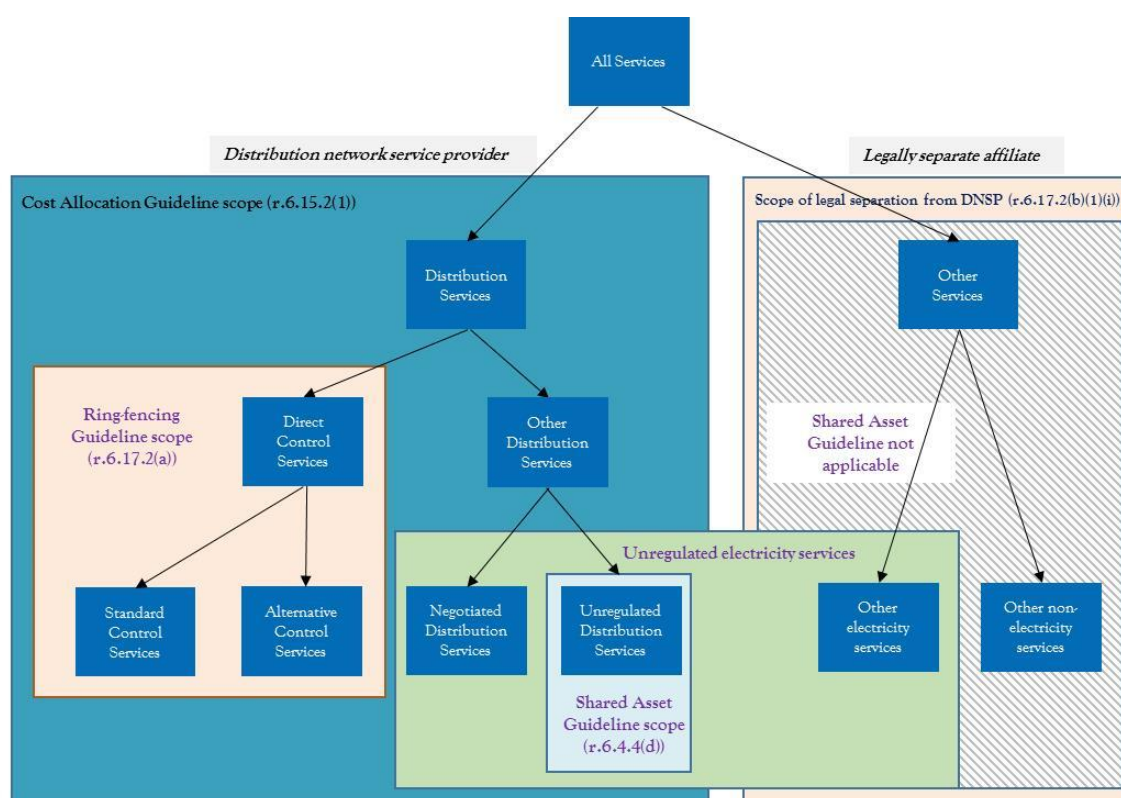
The Guideline’s legal separation obligations preclude a DNSP from providing other services to anyone (whether an affiliated entity or another third party), unless the DNSP is granted a waiver or unless one of the other exceptions set out in cl. 3.1 of the Guideline apply. The effect of this is that the Shared Asset Guideline will in future:

- only apply to other distribution services and any service provided by means of, or in connection with, a dual function asset – as provided for by cl. 6.4.4(a)(1) and 6.4.4(a)(2)(ii) of the NER
- apply to the grant of rights of use in respect of an asset under cl. 3.1(d)i. of the Guideline’
- not apply to other services because a DNSP cannot provide them (unless the DNSP is granted a waiver or unless another exception in c. 3.1 of the Guideline applies). Cl. 6.4.4(a)(2)(i) of the NER, which contemplates an asset being shared between a standard control service and a non-distribution service, will therefore not be relevant (again, unless the DNSP is granted a waiver or another exception under cl. 3.1 of the Guideline applies).

This change is illustrated in the following diagram. The light blue box shows where the Shared Asset Guideline will apply and the hashed box shows where it will no longer apply by virtue of the Guideline.

²²⁵ NER, cl. 6.4.4(c)(1).

Figure 2 Distribution services linkage to ring-fencing



The Guideline, in conjunction with our service classification for a DNSP, will therefore determine which services a DNSP can provide. Importantly, the Guideline itself does not change a DNSP’s current service classification and does not pre-empt the classification process we must undertake during each regulatory determination process.

Our intention is that whenever a regulated distribution asset is used (i.e. made available by a DNSP to an affiliated entity or third party) for *any* purpose, the actual “asset provision service” that the DNSP provides will not be classified (as a direct control or negotiated distribution service) but will be treated as an unregulated distribution service. The DNSP would be able to provide this unregulated distribution service in accordance with the Guideline because it is a distribution service (even though it is unregulated).

The Shared Asset Guideline would then apply to the DNSP’s asset provision service in its usual manner, such that a share of its unregulated revenues would be applied to reduce its standard control services’ revenues.

Our future classification decisions will therefore be important to the treatment of shared assets. We intend to release a Service Classification Guideline in 2017 to further explain the framework for making service classification decisions.

Outcomes being promoted

The above regulatory treatment will promote the following outcomes:

- Ensure standard control services’ customers benefit from assets that are included in a DNSP’s regulatory asset base for standard control services being used for other purposes.

- Encourage the use of “assets that provide standard control services for the provision of other kinds of services where that use is efficient and does not materially prejudice the provision of those services”, as is provided for in cl. 6.4.4(c)(1) of the NER. This principle supports the National Electricity Objective by minimising the residual cost borne by standard control services’ customers from their use of regulated assets.
- Discourage or prevent cross-subsidies and discrimination in contestable markets.

Appendix B — Guideline case studies

The purpose of this Appendix is to explain how the Guideline's obligations impact a DNSP's head office functions. We first examine the requirements for physical separation / co-location and then those for staff sharing.

Case study 1—Physical separation / co-location

Cl. 4.2.1(a) of the Guideline requires that a DNSP must not use the same office to provide direct control services as the office from which either the DNSP or an affiliated entity provides contestable electricity services. The Guideline therefore requires the separation of offices from which a DNSP provides its direct control services from offices from which other distribution services or other electricity services are provided.

Cl. 4.2.1(b) provides several exemptions to the general requirement in cl. 4.2.1(a). These exemptions are for:

- Office accommodation for staff who, in the course of their duties, do not have access to electricity information. For example, staff providing general administration, accounting, payroll, human resources, legal, or information technology support services.
- Office accommodation for staff who, in the course of their duties, have access to electricity information only to the extent necessary to provide services that are not, for the purposes of the NEL, necessary or incidental to supply of electricity. For example, staff performing back-office administrative roles but who are not directly providing or marketing distribution services.
- Office accommodation for staff who, in the course of their duties, have access to electricity information but do not have, in performing their roles, functions or duties, any opportunity to use that electricity information to engage in conduct that is contrary to the DNSP's obligations under cl. 4.1. Again, we expect this will include staff performing back-office administrative roles, such as coordination of metering data or undertaking billing.
- DNSPs assisting another NSP respond to an event beyond that NSP's control. An example of this kind of office sharing is a response to an emergency, such as a significant bushfire affecting a DNSP or TNSP.
- Offices in regional areas, which the Guideline defines to be those with fewer than 25,000 customer connection points within a 100-kilometer radius of the office. Cl. 5.6 of the Guideline allows us to vary or revoke this exemption from the office separation requirement. We envisage that a current or potential competitor of the DNSP would make contact with us if the particular regional office is in fact servicing a contestable, or potentially contestable, market. Equally, a DNSP may request that we expand the scope of this exemption to apply to offices outside of the 100 kilometer boundary.

In addition to the above exemptions, cl. 4.2.5 of the Guideline allows a DNSP to apply to us for a waiver from the office separation requirement. The effect of this is that, subject to the identified exemptions and to any waiver we may grant, no DNSP staff with access to information that is necessary, and not incidental, to the supply of direct control services should be co-located in an office with anyone who provides contestable electricity services.

If, before the Guideline's application, a DNSP had offices where the provision of direct control services was co-located with other distribution services or other electricity services then, once the Guideline takes effect, and following the transitional period, it would need to re-locate the provision of either its:

- direct control services or
- providers of contestable electricity services.

Where a DNSP relies on the exemptions in cl. 4.2.1(b) of the Guideline to avoid separating its offices, cl. 4.2.4(a) requires the DNSP to maintain a register of those offices and to make this publicly available on the DNSP's website.

Case study 2—Staff separation

Cl. 4.2.2(a) of the Guideline requires that a DNSP's staff that provide or market direct control services must not provide or market contestable electricity services for either the DNSP itself or an affiliated entity. The Guideline therefore requires the separation of staff providing or marketing a DNSP's direct control services from its own, or an affiliate's, staff providing or marketing contestable electricity services.

Cl. 4.2.2(b) of the Guideline provides similar exemptions to the general requirement in cl. 4.2.2(a) that apply for office separation discussed above. These exemptions are for:

- staff who, in the course of their duties, do not have access to electricity information and, given the nature of their role, would not be able to assist the DNSP to discriminate in favour of an affiliate
- staff who, in the course of their duties, have access to electricity information, but do not have, in performing the roles, functions or duties of their staff position, any opportunity to use that electricity information to engage in conduct that is contrary to the DNSP's obligations under cl. 4.1
- staff who, in the course of their duties, have access to electricity information only to the extent necessary to perform services that are not, for the purposes of the NEL, necessary or are incidental to the supply of electricity
- DNSPs who are assisting another DNSP respond to an event beyond that DNSP's control
- offices in a regional area—again, cl. 5.6 of the Guideline allows us, on application by any party, to vary or revoke this exemption from the office separation requirement.

As with office separation, cl. 4.2.4 of the Guideline allows a DNSP to apply to us for a waiver from the staff separation requirement.

The effect of the Guideline is that, subject to any waiver and to the transitional arrangements, no staff should provide and market direct control services if they also:

- provide or market contestable electricity services
- have access to information that is necessary, and is not incidental, to the supply of electricity.

If, before the application of the Guideline, a DNSP had staff that did provide or market both:

- direct control services
- other distribution services or other electricity services

then the DNSP would need to arrange for these staff to cease doing so.

Where a DNSP relies on cl. 4.2.2(b) to not separate its staff, cl. 4.2.4(b) of the Guideline requires the DNSP to maintain a register of those staff positions publicly available on the DNSP's website.

Outcomes being promoted

The above requirements for office separation / co-location and staff sharing aim to promote the following outcomes:

- prevent DNSPs and their staff from mixing and sharing, inadvertently or otherwise, commercially sensitive information
- minimise the potential for a DNSP providing an inappropriate competitive advantage to itself or an affiliated entity that provides contestable electricity services
- discourage or prevent discrimination by a DNSP in favour of itself or an affiliated entity in the provision of contestable electricity services.

Case study 3—DNSP linesman providing services to a TNSP

A TNSP may want a DNSP's linesman to assist with its transmission network maintenance. Cl. 3.1 of the Guideline permits a DNSP to provide transmission services, so legal separation is not an issue in this circumstance.

In terms of functional separation, provision of transmission maintenance services is not a distribution direct control service. Therefore, it is a contestable electricity service. Cl. 4.2.1(a) of the Guideline requires unregulated electricity services to be provided from an office separated from the DNSP's provision of direct control services. Cl. 4.2.2(a) of the Guideline prevents DNSP staff from providing unregulated electricity services. However, for the purposes of this case study, we assume that the linesman would not have access to electricity information that is beneficial to the TNSP in a way that would contravene the DNSP's general non-discrimination obligations under cl. 4.1 of the Guideline.

Cl. 4.2.1(b)i of the Guideline states that the office sharing prohibition does not apply to office accommodation for staff without access to electricity information, or without an opportunity to use electricity information contrary to the cl. 4.1 general obligations. Cl. 4.2.2(b)i of the Guideline provides the same exemption for staff sharing as is provided by cl. 4.2.1(b) for office sharing.

Because the DNSP linesman would be unlikely to have electricity information nor an opportunity to use such information contrary to the general non-discrimination obligations in cl. 4.1 of the Guideline, the DNSP linesman, in this circumstance, would not be subject to the office or staff sharing prohibitions.

Cl. 4.2.4 of the Guideline requires the DNSP to maintain registers of offices and staff that are shared under cll. 4.2.1(b)i and 4.2.2(b)i of the Guideline. Therefore, the DNSP must establish office sharing and staff sharing registers and place on those registers the linesman's staff position and home office.

Case study 4—DNSP staff member who has access to electricity information

A DNSP's staff member performing a planning function has access to electricity information about customer loads across the DNSP's distribution system, up-coming customer connection activity and when and how the DNSP plans to augment its distribution system over the coming years. This activity is integral to the DNSP's provision of direct control services.

The staff member therefore has access to electricity information in his or her planning role for the purposes of cl. 4.2.1(b)i and 4.2.2(b)i of the Guideline.

The DNSP operates in a jurisdiction where new customer connections are contestable so it competes with accredited service providers to connect new customers to the distribution system. Connection services are therefore contestable electricity services for the purposes of the Guideline.

The DNSP is considering whether the staff member in question can spend part of his or her time contributing to the planning function and part of his or her time marketing and providing contestable connection services (through either the DNSP itself or an affiliate entity).

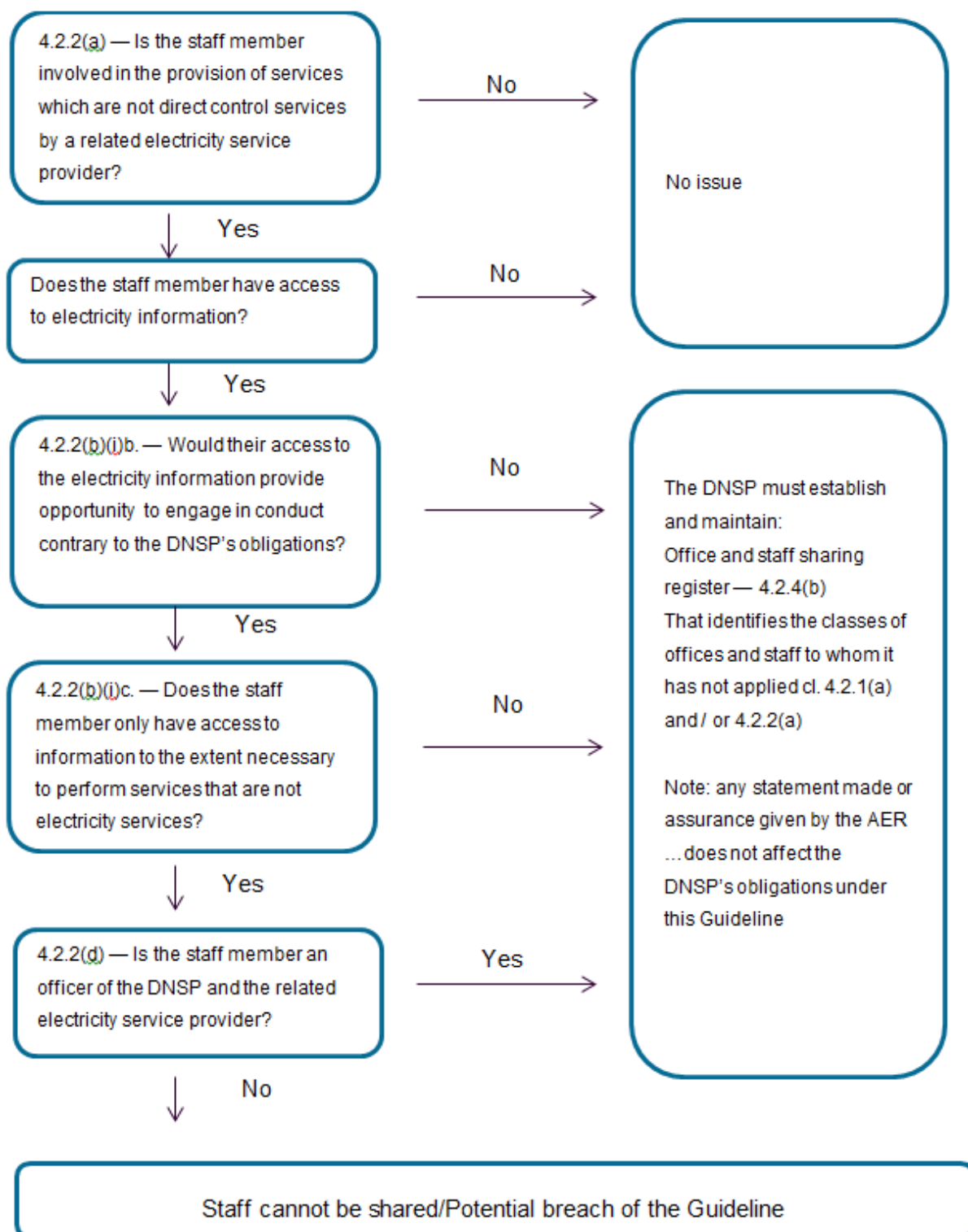
We assume for this example that the staff member could use the electricity information he or she obtains through its planning role to advantage the DNSP in the contestable market for connection services. This is because the staff member has knowledge relevant to, for example, the location, timing and configuration of future connections that is not freely available to the DNSP's competitors in the market for connection services. The staff member would therefore not satisfy either cl. 4.2.1(b)i a. – c. or cl. 4.2.2i a. – c. of the Guideline. As a result, the DNSP could not permit the staff member to perform both:

- the planning role that contributes to the provision of direct control services and
- a role in marketing or promoting connection services, which are contestable electricity services.

In this example, the DNSP would need to choose which role it wanted the staff member to perform. If he or she continued performing the planning role, then he or she would need to:

- perform this role from an office that is physically separated from any office from which contestable electricity services are provided and
- not be involved in any way in providing or marketing contestable electricity services, whether for a DNSP or an affiliated entity.

Figure 3 Staff separation flow chart



Appendix C — Our consultation approach

We have undertaken a significant public consultation process to develop the Guideline.

Major steps in our consultation process include publication of discussion papers and draft guideline materials.

We published:

- a preliminary discussion paper on 20 April 2016
- a Draft Guideline and accompanying Explanatory Statement 15 August 2016
- an information paper on 5 October 2016
- an exposure draft of the Guideline on 9 November 2016.

The materials described above were published on our website with stakeholders alerted to them via subscriber email and notices on the opening page of our website.²²⁶ We have also established and maintained specific project pages of our website for our ring-fencing guideline development project.

Supplementing our release of papers as described above, are the forums we have held for stakeholders to discuss issues directly with us. We held:

- a workshop with all DNSPs on 8 October 2016 in Melbourne
- a public forum involving all DNSPs, other network service providers, retailers, third party providers, consumer groups and other stakeholders on 27 October 2016 in Sydney.

In addition to the forums described above we have held a large number of bilateral discussions with stakeholders, either at their request or on our initiation.

We have also regularly briefed representatives of the COAG Energy Council and the AEMC on our progress.

Key dates in our process for developing the Guideline are listed in Table 2 below.

Table 2 Ring-fencing guideline timeline (indicative)

Step	Date
AER published preliminary position	April 2016
Submissions due	30 Ma
Meetings with key stakeholders	May/June
Published Draft Guideline and Explanatory Statement	August
Submissions on Guideline due	28 September

²²⁶ Please see our website www.aer.gov.au to subscribe for email alerts and other notifications about our work.

Meetings with key stakeholders	September
DNSP workshop (Melbourne)	8 October
Public forum (Sydney)	27 October
Exposure draft of Guideline published	9 November
Submissions on exposure draft due	16 November
Final Guideline (must be within 80 business days of Draft Guideline*)	1 December 2016**

* NER requirement

** Guideline published 30 November 2016

Appendix D — Lists of submissions

Submissions on our Electricity Ring-Fencing Preliminary Positions Paper were received from:

	Author	Date received
1	Energy and Water Ombudsman SA	25 May 2016
2	United Energy	27 May
3	ERM Power Ltd	27 May
4	Regional Electricity Micro-Grids Pty Ltd	30 May
5	Small Business Commissioner SA	30 May
6	Endeavour Energy	30 May
7	Ergon Energy	30 May
8	TasNetworks	30 May
9	CitiPower/Powercor/SA Power Networks	30 May
10	ENGIE and Simply Energy	30 May
11	Ausgrid	30 May
12	ActewAGL	30 May
13	Essential Energy	30 May
14	Ergon Energy Qld (Retail)	30 May
15	Metropolis	30 May
16	Clean Energy Council	30 May
17	AGL	30 May
18	Origin Energy	30 May
19	Energex	30 May
20	EnergyAustralia	30 May
21	ENA	30 May
22	AusNet Services	30 May
23	Jemena	30 May

	Author	Date received
24	University of Sydney	31 May
25	Red Energy and Lumo Energy	30 May
26	Total Environment Centre (jointly with others)	1 Jun
27	Stanwell	3 Jun
28	Australian Energy Council	3 Jun
29	Energy Consumers Australia	7 Jun

Submissions on our Draft Guideline were received from:

	Author	Date received
1	ActewAGL Distribution	28 September 2016
2	AGL	28 September
3	ATCO	28 September
4	Ausgrid	28 September
5	AusNet Services	28 September
6	Australian Energy Council	28 September
7	Clean Energy Council	29 September
8	Climate Works	28 September
9	Endeavour Energy	28 September
10	Energex	28 September
11	Energy Consumers Australia	4 October
12	Energy Networks Association	28 September
13	Energy Queensland	28 September
14	EnergyAustralia	28 September
15	Ergon Energy	28 September
16	Ergon Energy Retail	28 September

	Author	Date received
17	ERM Power	27 September
18	Essential Energy	28 September
19	Jemena	28 September
20	Metropolis	28 September
21	National Electrical and Communications Association	29 September
22	Origin Energy	28 September
23	PIAC	27 September
24	Power and Water Corp	28 September
25	Red & Lumo Energy	28 September
26	SAPN, Citipower and Powercor	28 September
27	Simply Energy	3 October
28	Spark Infrastructure	28 September
29	TasNetworks	28 September
30	Total Environment Centre	28 September
31	Transgrid	28 September
32	United Energy	28 September

Submissions on our Guideline Exposure Draft were received from:

	Author	Date received
1	ActewAGL	16 November 2016
2	AGL	16 November
3	Ausgrid	16 November
4	AusNet Services	16 November
5	Australian Energy Council	16 November
6	CitiPower, Powercor & SA Power Networks	16 November

	Author	Date received
7	Endeavour Energy	16 November
8	Energex	16 November
9	Energy Networks Australia	16 November
10	Ergon Energy	16 November
11	ERM	16 November
12	Essential Energy	16 November
13	Jemena	16 November
14	Marcus Steel	16 November
15	Metropolis	16 November
16	Power & Water Corporation	18 November
17	Red / Lumo Energy	16 November
18	TasNetworks	16 November

Appendix E — Rule requirements

The NER provides a framework for implementing a national approach to electricity ring-fencing. The guideline is legally binding, meaning DNSPs must comply with the guideline.

The NER sets out mechanisms through which we can establish a 'ring-fence' around a DNSP from its other business activities. The mechanisms referred to in the NER are legal, accounting and functional separation to limit information flows. However, we are not limited to these mechanisms.

The NER also states the ring-fencing guideline must be consistent, so far as practicable, with the transmission services ring-fencing guideline. The transmission guideline has not been revised since 2003. As a result, the need for consistency may highlight the need for revisions to the transmission guideline rather than limiting the development of the distribution guideline.

The relevant provisions of the NER relating to the AER ring-fencing guideline are paraphrased in table 3 below. The NER requirements are not prescriptive and do not identify the intended harm the guideline might seek to avoid.

NER ring-fencing provisions

NER clause	Description
6.17.1	All DNSPs must comply with the Guideline.
6.17.2(a)	The AER may develop Guidelines that provide for accounting and functional separation between direct control services and other service provided by a DNSP. The application of the guideline may vary between jurisdictions.
6.17.2(b)	The Guideline may include provisions for: Legal separation Separate financial accounts for standard control services (SCS), alternative control services (ACS) and other services Allocation of costs between SCS, ACS and other services Limitations on information flows Provisions for ring-fencing waivers.
6.17(c)	In developing the Guideline the AER must consider consistency between distribution and transmission.
6.17.2(d)	The Guideline must be developed in accordance with the distribution consultation procedures.

Appendix F — Exposure draft stakeholder proposals

We released an Exposure Draft of the Guideline on 9 November 2016. This step in our consultation was additional to our primary consultation process. We asked that stakeholder comments be restricted to critical issues that would affect the Guideline's operability. We asked for written submissions to be provided by COB Wednesday 16 November 2016.

Below, we set out issues raised in submissions provided in response to the Exposure Draft. We have also set out our response to each issue raised. We hope this Appendix will assist stakeholders to understand our approach on issues raised in submissions.

Time did not allow us to substantively address, in the body of this Explanatory Statement, issues raised in submissions on the Exposure Draft. However, many of the issues raised in submissions on the Exposure Draft have previously been canvassed, meaning most, if not all, issues raised in this final step of our consultation process are at least touched on in the body of this Explanatory Statement.

Guideline Exposure Draft — Non-DNSP proposals & our responses

	Stakeholder	Key points
1	AGL	<div> <div> <ol style="list-style-type: none"> Do not support recent changes. Delayed publication of an explanatory statement means we are unable to consider the AER's rationale for making them. Expanding scope for waivers makes transparent waiver process more critical. Without transparency and confidence in waiver process, confidence in guideline risks being seriously undermined. </div> <div> <ol style="list-style-type: none"> We understand it has been difficult for stakeholders to interpret the Guideline without an explanatory statement. The Exposure Draft was an additional consultation step, undertaken in response to stakeholder requests. We intend to undertake public consultation processes to assess waiver applications. Agree. The Explanatory Statement provides additional transparency around the waiver process. </div> </div>
2	ERM Power	<div> <div> <ol style="list-style-type: none"> Concerned with recent changes to the guideline. Exposure draft has eroded protections for emerging markets. Without a decision statement to accompany exposure draft we speculate on AER's reasoning. 6 day consultation insufficient. Allowing waivers from legal separation will undermine markets. Most concerning is that the guideline does not limit legal separation waivers to extraordinary circumstances, such as where DNSPs have conflicting legal obligation. Should detail the narrow situations where waivers will be granted. Waiver application process must be public. No interim waivers for legal separation. Interim waivers undermine due process. Ring-fencing obligations should apply as default position. Recommend interim waivers be removed. </div> <div> <ol style="list-style-type: none"> We understand it has been difficult for stakeholders to interpret the Guideline without an explanatory statement. The Exposure Draft was an additional consultation step, undertaken in response to stakeholder requests. We consider having the ability to grant waivers from legal separation is necessary flexibility. This Explanatory Statement discusses the circumstances when we are likely to grant waivers. As above. This Explanatory Statement discusses when we are likely to grant waivers and when we are not. As above. We consider interim waivers may be necessary, at least in some circumstances, to avoid DNSPs being automatically in breach of the Guideline while we assess a waiver application. </div> </div>

		<ol style="list-style-type: none"> 6. Concerned by lack of transparency for waiver process. Consultation is imperative. 7. Waiver conditions should be monitored as part of information submitted in DNSP annual compliance reports. 8. AER should not underestimate harm in competitive markets from participants unable to compete against DNSPs seeking to exploit waiver provisions. 	<ol style="list-style-type: none"> 6. We intend to undertake public consultation processes to assess waiver applications. 7. Annual reports will cover waivers. 8. We will assess waiver applications with respect to potential impacts in contestable markets.
3	Metropolis	<ol style="list-style-type: none"> 1. Exposure draft not accompanied by explanatory note, so difficult to understand AER's reasoning for changes from the draft guideline. Not clear why previous feedback not adopted. Metropolis unable to provide fully informed review. 2. Do not support changes to exposure draft. Risk of guideline being ineffective. 3. Do not support allowing waivers for most elements. Reduces confidence. 4. Unclear when it will be appropriate for DNSP to cross promote or co-brand. 5. Unclear when it will be appropriate for DNSP to share offices/staff. Appears a waiver is not required, just a register of it being done. 6. Support the concept of interim waivers but, with potentially large volume of waiver applications, interim waivers could become long term—detrimental to markets. Interim waivers could also lead to DNSPs investing, with investment write-off costs then influencing waiver decisions. 7. Concerned that two proposals not addressed: <ul style="list-style-type: none"> • Guideline allows sharing of aggregated strategic information 	<ol style="list-style-type: none"> 1. We understand it has been difficult for stakeholders to interpret the Guideline without an explanatory statement. The Exposure Draft was an additional consultation step, undertaken in response to stakeholder requests. 2. We consider having the ability to grant waivers from legal separation is necessary flexibility. This Explanatory Statement discusses the circumstances when we are likely to grant waivers. 3. As above. 4. This Explanatory Statement should clarify. 5. This Explanatory Statement should clarify. The key is to prevent misuse of sensitive information generated through provision of direct control services to advantage a DNSP's related electricity service provider or affiliated entity. Where DNSP staff or offices are shared, public registers will provide transparency. 6. We consider interim waivers are necessary. We note this concern. 7. For normal functioning we accept the necessity of a DNSP being able to communicate aggregated information to its broader corporate group. We do not have power to apply

		with affiliates but not with broader market. Extraordinary allowance and no reasons provided.	pecuniary penalties.
		<ul style="list-style-type: none"> Penalties for minor non-compliance do not exist. 	
		8. DNSP annual reports should be published. Guideline says AER 'may' publish. Should change to 'will' publish.	8. We intend to publish DNSP annual reports.
		9. Guideline may result in conflicted incentives, additional bureaucracy and not achieve objectives.	9. We consider the Guideline balances a range of priorities.
4	Red / Lumo Energy	1. Disappointed the AER made significant changes to the Guideline late in the process without giving stakeholders reasonable chance to respond. 2. Do not have opportunity to review the explanatory statement. Resorted to discussing exposure draft rationale with AER staff. 3. Accept the AER needs additional flexibility to practically administer the guideline in future but AER must ensure the changes do not threaten core principles of cross subsidisation and non-discrimination. 4. Do not support: <ul style="list-style-type: none"> permitting waivers for core ring-fencing obligations—legal separation, cross promotion and branding allowing DNSPs to share staff/offices where doing so would not compromise compliance with the guideline—scrutiny will be almost impossible interim waivers. 5. Support removal of \$500,000 threshold. 6. Final guideline and explanatory statement should restrict the circumstances in which waivers will be granted and articulate the principles under which waivers will be granted.	1. We understand it has been difficult for stakeholders to interpret the Guideline without an explanatory statement. The Exposure Draft was an additional consultation step, undertaken in response to stakeholder requests. 2. As above. 3. We consider having the ability to grant waivers from legal separation is necessary flexibility. This Explanatory Statement discusses the circumstances when we are likely to grant waivers. 4. As above. We consider interim waivers are necessary, at least in some circumstances, to avoid DNSPs being automatically in breach of the Guideline while we assess a waiver application. 5. We consider the \$500,000 threshold is no longer required as waivers are available. 6. This Explanatory Statement discusses the circumstances when we are likely to grant waivers.

		<ul style="list-style-type: none"> 7. Guideline allows sharing of senior executives. This impacts competitive neutrality in behind the meter contestable services. We urge the AER to reverse this position. 8. Compliance framework should include financial penalties. 	<ul style="list-style-type: none"> 7. Outside full structural separation, which we do not have power to impose on the sector, it is unrealistic to mandate separate executive management structures on DNSPs and their affiliated entities. 8. We do not have power to impose pecuniary (financial) penalties.
5	Mr Marcus Steel	<ul style="list-style-type: none"> 1. Change definition of regional office to 100,000 customers within a route line length of 50 kilometres diameter. 2. Allow until 1 July 2017 for DNSPs to comply with cl. 3.1 and 4.2 of the Guideline. 3. Allow 6 months for compliance after a change in service classification. 4. Do not permit waivers from legal separation obligation. 5. Allow waivers from cl. 4.1 general obligations to not discriminate. 	<ul style="list-style-type: none"> 1. 'Regional office' definition amended to 25,000 customer connection points within 100km radius. 2. Guideline requires compliance as soon as reasonably practicable for all obligations, but by no longer than 1 January 2018. 3. Where a change in classification puts a DNSP in breach of the Guideline, the Guideline requires the DNSP to become compliant with 12 months of the commencement date of the distribution determination. 4. The Guideline permits applications for waivers from legal separation. 5. The Guideline does not permit waivers from cl. 4.1 general obligations to not discriminate.

Guideline Exposure Draft — DNSP proposals & our responses

	Stakeholder	Key points	AER considerations of issues raised
1	ActewAGL	<ul style="list-style-type: none"> 1. Waivers for gas distribution business insufficient. Prefer permanent exemption in guideline itself. Waiver applications time consuming, costly and uncertain. 2. DNSPs can't control contracted third party providers. Amend cl. 4.4 to refer to DNSP taking reasonable steps to ensure other providers 	<ul style="list-style-type: none"> 1. Expect limited number of waiver applications. Prefer having opportunity to consider the circumstances of a waiver application, rather than automatic exemptions. 2. Cl. 4.4 has been amended to require that new contracts between the DNSP and third party providers

comply with Guideline.

include provisions that mirror the key obligations of clause 4 of the Guideline in relation to services provided to the DNSP, and that the DNSP must not encourage or incentivise conduct by third party providers that would be contrary to clause 4 of the Guideline if done by the DNSP.

2	Ausgrid	<ol style="list-style-type: none"> 1. For clarity, amend definition of affiliated entity to refer to only separate legal entities. Establish a new term 'separate business unit' to refer to parts of a DNSP providing other distribution services. 2. Transitional timeline for legal separation and non-discrimination obligations should be expanded to more of the guideline. 3. Amend definition of 'other services' to exclude 'other electricity services'. 4. Clarify that staff separation obligations do not apply to officers of a DNSP and a separate business unit in addition to a DNSP and an affiliated entity. 	<ol style="list-style-type: none"> 1. Agree. The Guideline incorporates a new term, 'related electricity service provider', to describe a DNSP's business units providing other distribution services. 2. Agree. DNSPs must comply with all of the Guideline's obligations as soon as reasonably practicable, but by no longer than 1 January 2018. 3. Disagree. Legal separation needs to apply to all services that are not distribution services (or transmission services). 4. Non-discrimination obligations are applicable to related electricity service providers in addition to affiliated entities.
3	AusNet Services	<ol style="list-style-type: none"> 1. Include worked examples in explanatory statement for final guideline. 2. Definition of 'other distribution services' does not work and must be amended to ensure that distribution services only a DNSP can provide will remain integrated with DNSP's provision of direct control services. 3. It is a misnomer that all 'other distribution services' are contestable. 4. 'Affiliated entity' includes parts of DNSP providing 'other electricity services'. 5. Provision of network assets for third party uses (Shared Assets) 	<ol style="list-style-type: none"> 1. Agree. See Appendix B of this Explanatory Statement. 2. Disagree. To the extent that 'other distribution services' includes monopolistic services, we will consider reclassifying these at the next opportunity. Temporal issues may be managed with waivers. 3. As above. 4. The Guideline now uses the term 'related electricity service provider' to include DNSP business units providing other distribution services. 5. A separate unit of the DNSP can provide these

can only be undertaken by DNSPs. But as 'other distribution services' the DNSP cannot provide these services.

6. Should not obstruct DNSPs competing with each other. e.g. embedded generators. Should not restrict DNSP bidding to provide such services.
7. Definition of 'other distribution services' should be amended to carve out the above.
8. Separate branding obligations for 'other distribution services' will result in costs to be paid by consumers. Unintended consequences arise from this obligation.
9. Exposure Draft allows delayed compliance with some provisions but not all. Unreasonable to expect DNSPs to comply immediately. Commencement should be 30 April 2017.
10. Victorian DNSPs would also be required to report on their compliance from 1 January 2017. Should be able to report on 30 April 2018, a year after implementation.
11. Victorian DNSP licence condition that DNSPs assist other DNSPs, not only during emergencies. Cl. 3.1(d)(v) should be amended to allow for services required to be provided by jurisdiction law or regulation.
12. Cl. 4.1 ambiguous. In (b)(i) unsure of meaning of "...whether to itself". In (b)(i) and (ii) replace 'other party' with 'other legal person' or similar.
13. Amend cl. 4.1(c) to clarify that non-discrimination provisions apply to 'other legal persons' who provide other distribution services or other electricity services.
14. Propose amendment to cl. 4.4 because DNSP cannot guarantee that a contracted third party will abide by non-discrimination

services. The Guideline permits staff/office sharing where no concerns about 'electricity information' are present. This would apply to shared asset services.

6. Contestable services are provided into markets where there are potentially many providers. An affiliated entity of the DNSP can provide these services.
7. Disagree.
8. DNSPs may submit waiver applications for separate branding obligations, as appropriate.
9. Agree immediate compliance with Guideline not practicable. Guideline requires compliance as soon as reasonably practicable for all obligations, but by no longer than 1 January 2018.
10. Disagree. Reporting obligation is not onerous. Report is not required until 2018. We understand DNSPs will not be compliant with all obligations immediately.
11. Disagree. Other services or other distribution services required to be provided by law will be managed via waivers.
12. The Guideline uses the term 'related electricity service provider' to include DNSP business units providing other distribution services.
13. 'Other legal persons' is insufficient. 'Other distribution services' may be contestable but part of the DNSP legal entity — as they are contestable they should be functionally separated from provision of direct control services.
14. Cl. 4.4 has been amended to require that new contracts between the DNSP and third party providers

obligations.

include provisions that mirror the key obligations of clause 4 of the Guideline in relation to services provided to the DNSP, and that the DNSP must not encourage or incentivise conduct by third party providers that would be contrary to clause 4 of the Guideline if done by the DNSP.

15. Where a waiver application expires the presumption should be that the waiver is granted. Waiver decisions must be accompanied by reasons. Timeframe for compliance following waiver revocation should be 90 days, not 40 days.

15. Disagree.

4	CitiPower, Powercor and SAPN	1. Functional separation will affect wide range of services where no harm occurs.	1. To the extent that 'other distribution services' includes monopolistic services, we will consider reclassifying these at the next opportunity. Temporal issues may be managed with waivers.
		2. SAPN has many negotiated services – will have to apply for waivers.	2. We expect SAPN to seek waivers for its negotiated services.
		3. CitiPower and Powercor expect to provide smart city services to councils and government agencies with benefits for electricity consumers via shared asset guideline. Waivers required.	3. We will assess waiver applications on their merits.
		4. Leasing of ducts etc via shared asset guideline will also require waivers.	4. Leasing assets for shared asset services will not be restricted because there are no electricity information concerns. Leasing of a duct (or other asset) is permitted as an exception to the legal separation obligations, as long as the DNSP's ability to continue to use the asset to provide direct control services is not materially prejudiced.
		5. CitiPower and Powercor provide unregulated call centre services to SAPN. Waivers required.	5. We will assess waiver applications on their merits.
		6. Waivers are uncertain and public consultation would alert competitors to DNSP intentions in contestable markets.	6. DNSPs hold significant potential market advantages. Waiver consultation processes would have limited impact on competition.
		7. Should have at least 6 months to transition to guideline obligations, other than legal separation and functional separation which have	7. Guideline requires compliance as soon as reasonably practicable for all obligations, but by no longer than 1

		12 months.	January 2018.
		8. Regional office definition would mean only 1 of Powercor's Victorian depots would be exempt from functional separation obligations. Only around 8 of SAPN's depots would be exempt. AER's explanatory statement should justify this approach.	8. Geographic delineation reflects potential for contestability. DNSPs and third party providers may apply to us for specific offices to be exempted from, or captured by, functional separation obligations.
5	Endeavour Energy	<p>1. Definition of 'electricity information' is ambiguous. Propose alternative definition.</p> <p>2. Cl. 4.3.3 requires 'or' to be inserted in list of circumstances where confidential information may be disclosed. Cross referencing issues between 4.3.3 and 4.3.4 (for details see p. 3 of submission).</p> <p>Cl. 1.4 – definition of 'staff position', works 'in relation' should be deleted.</p> <p>Cl 4.1(c) – cross reference to cl. 4.1(a) should be to 4.1(b).</p> <p>Cl. 4.1(c)(i) – delete 'rather than being an affiliated entity of the DNSP'.</p> <p>Cl. 4.2.2(c) – capitalise 'guideline'.</p> <p>Cl. 4.2.3 – Bold 'DNSP'.</p> <p>Cl. 5.2 – unclear meaning of 'for itself or for one or more other DNSPs who are affiliated entities of the DNSP'.</p> <p>Cl. 6.2.1(b)(iii) – 'Error! Reference source not found'.</p>	<p>1. We consider the definition of 'electricity information' is workable and targets the potential harms that ring-fencing is intended to address.</p> <p>2. Minor drafting issues.</p>
6	Energex	<p>1. Request 3 months transition period for all obligations, other than 3.1 and 4.2 which have 12 months.</p> <p>2. Cl. 4.4 captures service providers to the DNSP. This should only relate to treatment of confidential information. Contractor staff issue is already covered by staff definition. Branding of a contractor is beyond scope. Obligations for public register obligations should be DNSP only. Proposed amended drafting for cl. 4.4.</p>	<p>1. Guideline requires compliance as soon as reasonably practicable for all obligations, but by no longer than 1 January 2018.</p> <p>2. Cl. 4.4 has been amended to require that new contracts between the DNSP and third party providers include provisions that mirror the key obligations of clause 4 of the Guideline in relation to services provided to the DNSP, and that the DNSP must not encourage or incentivise conduct by third party providers that would be contrary to clause 4 of the Guideline if done by the DNSP.</p>

		3. Branding of a contractor is beyond scope.	3. The Guideline has been amended to allow a contractor to continue to use its own brand.
7	Energy Networks Association	<ol style="list-style-type: none"> 1. Amend definition of 'other distribution services' to exclude network services and connection services in addition to direct control services. 2. Support defining regional offices but proposed definition is difficult to interpret. Suggest using customer numbers linked to a regional office without reference to location or distance. 3. Explicitly exclude gas and water services from legal separation requirement. Define regulated gas services and regulated water services. 4. Amend cl. 4.2.3 with new definition of distribution services so a DNSP may continue to have same branding for services that only it can provide. 5. Amend cl. 4.4 by adding "best endeavour" for DNSP to control behaviour of third party providers. DNSPs have no legal authority in this regard. 6. Waivers should be granted if AER does not make decision in time, not other way around. 7. AER should provide reasons for waiver decisions. If refusing to grant waivers, DNSPs should have opportunity to engage with AER before decision is made. 8. Variation/revocation of waivers with only 40 days notice is insufficient. 	<ol style="list-style-type: none"> 1. Disagree. Other distribution services may include contestable services which should be functionally separated from provision of direct control services. 2. Disagree. 'Regional office' definition amended to 25,000 customer connection points within 100km radius. 3. Waivers will be available for gas and water services. 4. Waivers will be available in these circumstances. 5. Cl. 4.4 has been amended to require that new contracts between the DNSP and third party providers include provisions that mirror the key obligations of clause 4 of the Guideline in relation to services provided to the DNSP, and that the DNSP must not encourage or incentivise conduct by third party providers that would be contrary to clause 4 of the Guideline if done by the DNSP. 6. Disagree. 7. We intend to publish reasons for our waiver decisions and to consult as part of our waiver application assessment process. 8. We will consider granting an interim waiver for a transitional period.
8	Ergon Energy	<ol style="list-style-type: none"> 1. Definition of 'regional office' is extremely difficult. Arbitrary demarcation based on population/location will inadvertently 	<ol style="list-style-type: none"> 1. 'Regional office' definition amended to 25,000 customer connection points within 100km radius.

		capture depots with little prospect of competition. Recommend instead basing definition on offices servicing under 50,000 customers.	
9	Essential Energy	<ol style="list-style-type: none"> 1. A diagram would alleviate confusion around definitions of 'other services' and 'other electricity services'. 2. 'Affiliated entity' includes part of the DNSP providing 'other distribution services' and/or 'other electricity services'. This is confusing. 3. Guideline requires direct control services to be separately branded from other distribution services. Should be able to provide distribution services under a single brand. 4. Definition of regional office lacks clarity. Problems with population data. Definition would exclude many depots. Suggest using instead the number of customer premises linked to a depot—30,000 is equivalent to population of 50,000. 5. Potential waivers from legal separation for other regulated business activities (e.g. water network business) is insufficient. Should be automatic exemption. 6. Separate branding unworkable for regional offices where other office/staff separation obligations don't apply. Separate branding should be exempted too. 7. Waivers: <ul style="list-style-type: none"> ○ AER should have 40 business days for waiver assessment ○ require DNSPs to submit waiver renewal applications at least 8 months before end of existing reg period ○ define interim waivers; if no waiver decision made when interim waivers expires, waiver should be granted automatically ○ Guideline should allow 6 months for DNSP compliance following unsuccessful waiver application. ○ 40 days for compliance following variation or revocation of waiver is unreasonable. 	<ol style="list-style-type: none"> 1. Diagram provided in this Explanatory Statement. 2. Agree. The Guideline uses a new term, 'related electricity service provider', to include a DNSP's business units providing other distribution services. 3. Distribution services that are not direct control services may be contestable. These should be functionally separated from provision of direct control services. 4. 'Regional office' definition amended to 25,000 customer connection points within 100km radius. 5. Expect limited number of waiver applications. Prefer having opportunity to consider the circumstances of a waiver application, rather than automatic exemptions. 6. Agree. Separate branding is not required for regional offices. 7. Waivers: Largely no change from Draft Guideline. This Explanatory Statement provides further guidance about our waiver processes. It is up to DNSPs to assess their circumstances and apply for waivers with appropriate lead time to manage their own compliance with the Guideline's obligations.

		8. Guideline should include circumstances in which regional office status could be revoked.	8. The relevant considerations for potential revocations of regional office status will be similar to the relevant considerations for granting waivers.
10	Jemena	<p>1. Large customer should be able to opt out of ring-fencing restrictions.</p> <p>2. Cl. 4.1 non-discrimination is broad. Could be read to require DNSP to control customers, contractors and unrelated third parties. Should focus on monopoly network input. Propose amended drafting for cl. 4.1.</p> <p>3. Not all other distribution services are contestable. Guideline should distinguish between other distribution services that are contestable and those that are not. Proposed amended drafting for cl. 4.2.</p> <p>4. DNSPs rely on large independent contractors. Guideline's broad definition of 'staff' may prevent these contractors from tendering for arm's length services to different parts of same DNSP group. Separate contractor panels for direct control services and other distribution/electricity services reduces competition and increases costs. Suggest narrowing staff definition to individual contractors performing roles usually performed by DNSP staff and only for duration of their engagement with DNSP.</p> <p>5. DNSPs will rely on waivers. Waivers can be varied or revoked. Not reasonable for AER to be able to vary or revoke waivers—no detail in guideline about AER process. Proposed amendments to waiver variation and revocation provisions: minimum consultation with the DNSP; variation or revocation only where material change in circumstances; 12 month implementation period for changes.</p> <p>6. Immediate implementation of parts of Guideline not realistic. Compliance risk for DNSPs. Should be 1 July 2017 for all obligations.</p>	<p>1. Disagree. Ring-fencing is about mitigating specific risks. Customers opting in or out of ring-fencing obligations does not in itself mitigate those risks.</p> <p>2. Disagree. 'Direct or indirect' refers to the type of discrimination, not to control.</p> <p>3. To the extent that 'other distribution services' includes monopolistic services, we will consider reclassifying these at the next opportunity. Temporal issues may be managed with waivers.</p> <p>4. Disagree that the issue described is a material problem. We will take a sensible approach to enforcing the Guideline's obligations in respect of contractors.</p> <p>5. The relevant considerations for potential amendments or revocations of waivers will be similar to the relevant considerations for granting waivers. Ditto for process issues, though we retain flexibility to respond to particular circumstances.</p> <p>6. Agree. DNSPs must comply with all of the Guideline's obligations as soon as reasonably practicable, but by no longer than 1 January 2016.</p>
11	Power & Water Corporation	1. No evidence of market failure in the Northern Territory. The proposed guideline will result in inefficient outcomes.	1. Guideline implementation is not premised on observations of market failure.

2. Current transition to the AER complicates guideline application. NT Government yet to decide on adoption of remainder of the NER including chapter 7.
3. Northern Territory should be exempted from the Guideline, at least until 1 July 2019.
2. We understand that Power and Water Corporation is undergoing a significant transition. Also, that aspects of its service categories and organisational structure do not align the NER, nor with Guideline requirements.
3. As discussed in chapter 7 of this Explanatory Statement, we consider waivers may be an appropriate means of transitioning Power and Water Corporation to become Guideline compliant. We are prepared to work with Power and Water Corporation to assist it in understanding its ring-fencing obligations and to develop a pathway to compliance.

12	TasNetworks	<ol style="list-style-type: none"> 1. Definition of regional office should be changed to mean less than 150,000 connection points within 100km radius. 2. Also, Tasmania is treated as regional for telco access decisions. Guideline should adopt similar approach given current state of Tasmanian market. 3. Concerned about branding and cross promotion. Could be problematic for integrated DNSP-TNSP like TasNetworks. ENA submission provides detailed drafting suggestions. 4. Query reference to 'indirect contractors' – DNSPs won't have direct relationship with these, or even know about them. 5. Contractors and indirect contractors should be removed from 'staff' definition. 6. Cl. 4.4 should allow DNSPs to take 'reasonable steps' in respect of service providers. 	<ol style="list-style-type: none"> 1. 'Regional office' definition amended to 25,000 customer connection points within 100km radius. 2. We intend to apply the regional office definition equally across jurisdictions. DNSPs and third party providers may apply to us for specific offices to be exempted from, or captured by, functional separation obligations. 3. We consider that the cross-branding restrictions are workable. 4. Agree that a 'best endeavours' approach for compliance by contractors is appropriate. Cl. 4.4 has been amended. 5. Disagree. 'Staff' includes contractors 5.1. . 6. Cl. 4.4 has been amended to require that new contracts between the DNSP and third party providers include provisions that mirror the key obligations of clause 4 of the Guideline in relation to services provided to the DNSP, and that the DNSP must not encourage or incentivise conduct by third party providers that would be contrary to clause 4 of the Guideline if done by the DNSP.
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7. Amend definition of 'staff' to only include DNSP employees and individuals otherwise made available to DNSP by another party.

7. Disagree. Staff includes contractors.