

16 November 2016



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Cc: Moston Neck (moston.neck@aer.gov.au)

Dear Mr Pattas,

RE: Electricity Distribution Ring-fencing Guideline – Exposure Draft

Ausgrid welcomes the opportunity to provide feedback on the Australian Energy Regulator's (AER) Exposure Draft of the national ring-fencing guideline for electricity distribution (the "Guideline").

Ausgrid notes that the AER has made a number of changes to the drafting of the Guideline to address stakeholder concerns. While this has resulted in significant drafting differences between the Exposure Draft and the Draft Guideline, Ausgrid is generally supportive of the changes as they considerably improve the workability of the Guideline.

While Ausgrid supports the revised drafting of the Guideline, we have identified elements which require additional amendment and/or clarification to:

- 1) further improve the workability of the Guideline by removing ambiguity and confusion surrounding the intended application of certain key terms and clauses; and
- 2) ensure that appropriate transitional arrangements are provided for DNSPs to reasonably and practically implement obligations under the Guideline, particularly new obligations which have been introduced under the revised drafting of the Guideline.

These issues are discussed in further detail in our attached submission. We have also provided suggested drafting changes in Attachment 1, which are aimed at addressing the issues we have identified with the revised drafting of the Guideline.

Ausgrid would like to thank the AER for the constructive and transparent manner in which it has engaged with stakeholders to date on developing the Guideline. We appreciate the significant effort the AER has undertaken in seeking to develop obligations which are 'fit for purpose', balanced, provide appropriate guidance, and are capable of being practically implemented.

Ausgrid looks forward to engaging further with the AER on the compliance program we are developing to implement our obligations under the Guideline, and would appreciate any input they are able to make in this process.

If you have any queries or wish to discuss our submission in further detail please contact Son Truong Vu, Acting Manager of Network Regulation, on (02) 9269 4360 or via email svu@ausgrid.com.au

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Joe Pizzinga", with a long horizontal flourish extending to the right.

JOE PIZZINGA
Chief Financial Officer

AUSGRID'S SUBMISSION

Ausgrid supports the drafting changes the AER has made to the national ring-fencing guideline for electricity distribution (the "Guideline").

We consider that the changes significantly improve the workability of the Guideline, as they:

- provide greater clarity on the scope and application of ring fencing obligations;
- better accommodate distribution network service providers' (DNSPs) individual circumstances by allowing the Guideline to be flexibly applied in a manner that minimises the risk of DNSPs incurring onerous compliance costs as a result of the characteristics of the DNSP's network or operating structure; and
- provide more appropriate timeframes for DNSPs to practically implement their obligations.

Overall, we consider the revised drafting largely addresses key concerns raised by stakeholders in response to consultation on the draft Guideline in a balanced and proportionate manner.

However, we have identified the need for further amendments and/or clarifications to the revised Guideline to improve the workability of the Guideline, and avoid DNSPs being found in breach of obligations purely as a result of not having an opportunity to implement new requirements introduced under the Guideline.

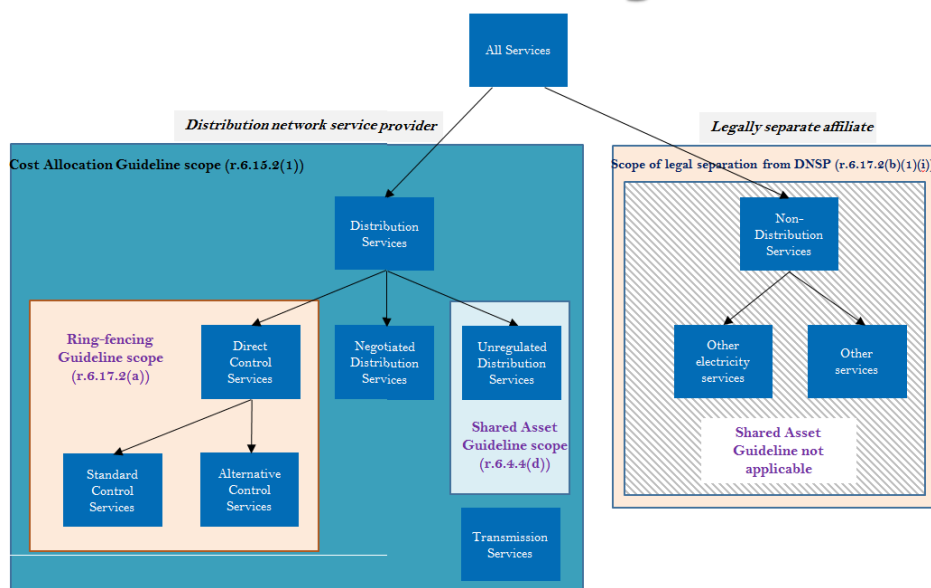
Giving the limited time left to finalise the Guideline, we have sought to limit our feedback to the key areas that are critical to improving the workability of the Guideline. These include:

- 1) the need for minor amendments to better reflect the policy intent for introducing the concept of an 'affiliated entity' under the Guideline;
- 2) the need for transitional arrangements for DNSPs to comply with clauses 4.3 and 4.4; and
- 3) other minor amendments aimed at clarifying the definition of 'other services' and the operation of clause 4.4.

Our reasoning for why further amendments and/or clarification are considered necessary to address the above issues is discussed in further detail below.

1) *Minor amendments to clarify the intended operation of 'affiliated entity'*

It is our understanding that the AER has made revisions to the drafting of the Guideline to reflect that the Guideline is intended to impose functional separation obligations on the legally separate affiliate of the DNSP and also within the DNSP, as depicted by the AER's 'All Services Diagram' below.



Based on the AER's explanation of the all services diagram at the ring-fencing forum, and from the changes to the drafting of the Guideline regarding the use of key terms, we understand that it is the AER's intention for the Guideline to distinguish between the following entities:

- the DNSP legal entity which provides direct control services;
- an affiliated entity within the DNSP legal entity which provides 'other distribution services and 'other electricity services that are not direct control services (i.e. a separate business unit within the DNSP); and
- an affiliated entity which is a separate legal entity providing 'other services.'

It is our understanding that the policy intent is for the affiliated entity within the DNSP not to be subject to the requirement for legal separation, but treated the same as an affiliated entity in relation to cost allocation and functional separation requirements.

However, we consider that the definition of 'affiliated entity' does not clearly reflect this policy intent and instead creates confusion around how each obligation under the revised Guideline applies to the DNSP, the affiliated entity (or separate business unit) within the DNSP, and the affiliated entity which is legally separate and provides 'other services'.

In our view, this confusion could be addressed by removing the last sentence from the definition of 'affiliated entity' and including a new defined term 'separate business unit' in the Guideline. While Attachment 1 to our submission sets out our suggested mark-ups aimed at addressing this issue, we have included an excerpt below of the key amendments.

Suggested amendments

Amend the definition of 'affiliated entity' in clause 1.4 to reflect the following:

- **affiliated entity**, in relation to a DNSP, means a **legal entity**:
 - (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**;
 - (b) in which the **DNSP** is a direct or indirect shareholder or otherwise has a direct or indirect legal or equitable interest;
 - (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.

~~and includes, in clauses 4.1 and 4.3 of this Guideline, the part of the DNSP that provides Other Distribution Services and / or Other Electricity Services.~~

Insert new defined term in clause 1.4 separate business unit.

- **separate business unit** means that part of the **DNSP** that provides other distribution services and / or **other electricity services**.

Consequential changes will be required to clauses 1.1, 3.1(c)(iii), 4.1, 4.2, and 4.3 to reflect the change in definition of 'affiliated entity' and introduction of new key term 'separate business unit' as set in Attachment 1.

It is important to note that the amendments that Ausgrid is proposing are minor in nature, and do not alter the AER's policy position but are aimed at ensuring that the AER's policy intent is more clearly reflected in the drafting of the Guideline.

2) *The need for transitional arrangements for all new obligations imposed under the Guideline*

Ausgrid assumes that the decision to only include transitional arrangements for clauses 3.1 and 4.2 is intentional. Therefore, it is our understanding that all other clauses commence on 1 December 2016, when the Guideline takes effect, as summarised by Table 1 below.

Table 1 – Summary of transitional arrangements for implementing Guideline obligations

Must be complied with by 1 December 2016 ¹	Must be complied with as soon as reasonably practicable but no later than 1 January 2018
Clause 3.2 – requirement to maintain and establish separate accounts	Clause 3.1 – legal separation
Clause 4.1 – obligation to not discriminate**	Clause 4.2.1- physical separation/co-location
Clause 4.3.2 – protection of confidential information**	Clause 4.2.2 – staff sharing
Clause 4.3.3 – disclosure of information**	Clause 4.2.3 – branding and cross promotion
Clause 4.3.4 – sharing of information**	Clause 4.2.4 – office and staff registers
Clause 4.3.5 – information register**	
Clause 4.4 – service providers**	

While Ausgrid considers it reasonable for DNSPs to comply with certain obligations on the day the Guideline commences,² it is neither practical nor reasonable for DNSPs to comply with new obligations without appropriate transitional arrangements.

It is our understanding based on discussions at an AER officer level that it is not the AER's intent to place DNSPs in a position where there would be in breach of any obligations under the Guideline, as a result of not having time to reasonably and practically implement its obligations.

Consequently, we are concerned that the AER may have made an oversight in not specifying that transitional arrangements apply for the clauses marked with an asterisk in Table 1.

To the extent this is not the case, we seek to highlight in this section why transitional arrangements in clause 7.1(a) should be expanded to allow DNSPs to comply with their obligations under 4.1, 4.3 and 4.4 as soon as reasonably practicable but no later than 1 January 2018, given that these clauses introduce new ring-fencing requirements.

Ausgrid considers that transitional arrangements are required for the specific information related obligations in clause 4 for the following reasons:

- ***DNSPs need time to understand the scope of information captured by information disclosure and access obligations*** – DNSPs need time to understand what information is captured by the terms 'electricity information' and 'confidential information' which are new definitions introduced by the Exposure Draft. DNSPs will need to undertake an assessment of the different types of information it produces across their operations to determine what information is captured by clause 4.3. Having determined this, DNSPs will then need to develop and implement appropriate systems and procedures to protect against inappropriate access/disclosure, and to provide training to staff on the circumstances where information sharing is appropriate and the need for information to be made equally available to third parties.
- ***DNSPs need time to develop and establish an information sharing protocol and information register*** – DNSPs will not be able to reasonably or practically comply with their

¹ ** denote clauses which Ausgrid considers cannot be reasonably or practicably complied with on 1 December 2016, and instead should be subject to transitional arrangements to avoid DNSPs being found non-compliant.

² For example, Ausgrid notes that there are elements of clauses 3.2 and 4.1 that DNSPs should in principle be able to comply with straight away, while other components will not be able to be readily complied with by 1 December 2016 as they are either new or represent a significant change from existing obligations.

information sharing obligations by 1 December 2016, as they will not be in a position to understand the scope of this obligation (for the reasons articulated above) nor have time to develop appropriate mechanisms that would allow them to comply with these requirements. Further, it is unreasonable to expect DNSPs to comply with these obligations on the day the Guideline commences, as these obligations introduce new requirements which are not contained in existing jurisdictional ring-fencing arrangements, and were not contemplated under the draft Guideline. DNSPs require sufficient time to develop systems and procedures that enable it to capture and disclose information which falls within in the scope of 'electricity information' in a streamline, consistent and efficient manner. Providing DNSPs with appropriate time to achieve this, in turn will promote market confidence and provide greater transparency on the nature of information that is made available to the DNSP's affiliated entity.

- **Time is required to notify service providers of new ring-obligations** – DNSPs will not be in a position to notify service providers of changes to its ring-fencing obligations until after the Guideline has been finalised and it has had time to understand how the obligations impact its obligations.

Ausgrid understands that transitional arrangements to comply with clause 4.1 may not have been included to ensure that information derived from monopoly activities is not misused by DNSPs to leverage commercial opportunities. However, we consider that clause 4.1 cannot be *fully* complied with by 1 December 2016. While we acknowledges that there are components of clause 4.1 that can in principle be complied with on the day the Guideline commences, we consider that the information related components of this obligation cannot be readily complied with for the reasons outlined above.

Ausgrid does not consider that allowing time for DNSPs to fully comply with their obligations under clause 4.1 as soon as reasonably practicable but no later than 1 January 2018 is unreasonable. The obligation not to discriminate is already in principle recognised as part our legislative compliance program, training and systems against anti-competitive conduct. However, additional time is required to review and enhance these systems in light of the specific definitions and restrictions in clause 4.1 if Ausgrid is to avoid being in breach of these specific obligations on 1 December 2016.

Suggested amendments

Amend clause 7 Transitional arrangements to reflect the following:

7.1. Despite clause 1.1.2:

(a) a DNSP must fully comply with clauses 3.1 ,4.1, 4.2, 4.3 and 4.4 in respect of their existing services as soon as reasonably practicable, having regard to the likely costs of having to fully comply with those clauses any sooner, but no later than 1 January 2018.

3) Other minor amendments

Ausgrid has identified the need for the following minor amendments to the definition of 'other services' and clauses 4.2.2(d) and 4.4 to improve the workability of the Guideline.

Suggested amendments

Amend the definition of 'other services' contained in clause 1.4 to reflect the following:

- **other services** means services other than:
 - (a) **transmission services;**
 - (b) **distribution services;** or
 - (c) **other electricity services.**

Amend clause 4.2.2 (d) to reflect the following:

- (a) Clause does not apply to a member of the **staff** of a **DNSP** where the member of **staff** is an **officer** of both:
- i. the **DNSP** and an **affiliated entity**; or
 - ii. the **DNSP** and a **separate business unit**; or
 - iii. the **DNSP**, a **separate business unit**, and an **affiliated entity**

Amend clause 4.4 Service providers to reflect the following:

A **DNSP** must **take reasonable steps** to ensure that any provider of services to the **DNSP** does not engage in conduct which, if the **DNSP** engaged in the conduct itself, would be contrary to the **DNSP's** obligations under clause 4 of this **Guideline**

The rationale for our proposed drafting amendments are as follows:

- **'other services'** – our proposed amendment to the definition of 'other services' is not intended to alter the meaning of the term but rather to improve the operation of this term by correcting a drafting oversight.
- **clause 4.2.2 (d)** – this is primarily a consequential amendment that arises as a result of our suggested change to the definition of 'affiliated entity' and introduction of the key term 'separate business unit.' We have highlighted this consequential change as without making this change the operation of this clause changes significantly and would not allow DNSPs to share executive management across its DNSP, separate business unit, and 'affiliated entity.'
- **clause 4.4** –our proposed amendment to clause 4.4 is required to reflect that while there are limitations on the ability of DNSPs to guarantee the conduct of service providers, DNSPs can take reasonable steps in this regard through contractual undertakings by service providers to meet ring-fencing and other legal obligations and by providing training, where appropriate.