

# Ring-fencing Guideline Electricity Transmission Issues Paper

## Attachment 1 Stakeholder feedback template

The template below has been developed to enable stakeholders to provide their feedback on the questions posed in the Ring-fencing Guideline Electricity Transmission Issues Paper and any other issues that they would like to provide feedback on. The AER encourages stakeholders to use this template and to provide reasons for stakeholders' views to assist the AER in considering the views expressed by stakeholders on each issue. Stakeholders should not feel obliged to answer each question, but rather address those issues of particular interest or concern. Further context for the questions can be found in the issues paper.

### Submitter details

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### Section 2.1 – Preventing cross-subsidies – Activities versus services

| AER Question  | Stakeholder feedback  |
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| <p>1. What are the potential harms and benefits of the guideline referring to services, rather than activities?</p> | <p>ENA supports the AER's proposal that the ring-fencing arrangements should not limit TNSPs approach to delivering the services they are required to provide under the Rules. This is achieved by applying the categories of service as already clearly defined in the Rules when considering ring-fencing measures, such as prescribed transmission services, and not focusing on the specific technologies or activities undertaken to deliver those services. The approach is technology neutral and so permits TNSPs to identify and implement the most efficient solutions to address a network need. Moreover, the AER's proposal means that TNSPs retain the build versus buy option to meet a network need with respect to all relevant technologies.</p> <p>In the context of focusing on services, it is necessary that the AER's overall approach to the review of transmission ring-fencing is focused on the specific potential harms that arise for each service, namely: (i) cross-subsidisation of unregulated activities and (ii) performing the TNSPs monopoly functions in a way that advantages it in an unregulated market, such as through discrimination or the misuse of confidential information from a competitor when performing the monopoly function. Each service can be seen as having its own unique ring-fencing issues, including in some circumstances (such as for contestable connections) specific arrangements in the Rules that address competition concerns. Therefore, it is not appropriate to adopt the same</p> |

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|  | <p>approach to ring-fencing across all services as a precaution as if every future service provided by TNSPs will have the same ring-fencing issues. Doing so creates a real risk that ring-fencing will adversely impact consumers by creating barriers to efficient market structures (which does not promote the NEO).</p> |
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### Section 2.2.2 – Legal separation – Scope of services

| AER Question   | Stakeholder feedback  |
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| <p>2. What are the potential harms and benefits for consumers, the market and TNSPs of requiring TNSPs to legally separate transmission and non-transmission services?</p> | <p>The principal benefit the AER identifies with a requirement to have activities undertaken via separate legal entities is that it may reduce the risk of cross-subsidisation.</p> <p>The existing cost allocation arrangements as applied by TNSPs, which in practice are aligned with the distribution approach, which is consistent with the approach adopted in distribution, are working well and address the issues that legal separation is seeking to address without the additional associated costs. Therefore, it is necessary for the AER to identify the additional benefits that legal separation offers that outweigh the obvious costs that it creates. The AER also suggests that requiring activities to be undertaken from separate legal entities may in turn require businesses to put in place internal transfer pricing arrangements, and so provide additional transparency. However, we note that regulators in the past have been resistant to placing weight on related party charges (and instead have sought to look-through entities to the actual, allocated costs), and so this benefit would appear illusory.</p> <p>While the ENA considers the proposed change is unnecessary and would not be in the interests of consumers, if the AER is able to demonstrate a clear benefit from proceeding with separation of legal entities, it would be reasonable for transitional arrangements to apply given the potential need to transfer an asset or activity between legal entities, which may generate material contractual and/or licencing issues and potentially create material tax obligations. Specifically, any change to the requirements should be applied on a prospective basis only. If the AER does not adopt legal separation on a prospective basis only, a sufficiently long transition period is necessary.</p> |
| <p>3. How would the definitions for transmission services set out in Chapter 10 of the NER cover these new and emerging electricity services?</p>                          | <p>As discussed earlier, the different categories of transmission services are highly prescribed in the Rules. As such, the introduction of new contestable or non-contestable transmission services, such as through a change to the boundary of contestability for existing services, would be expected to require – and so occur through – a change to the Rules. The definition of transmission services in the Rules would be updated at this time as required. The fact that changes to the nature of services necessitates – and so is done through – a change to the Rules is consistent with the recent changes to the boundary of contestability for connections. Prior to this rule change there was no definition of an Identified User Shared Asset, because there was no need for such a definition. However, this service was defined as part of the process by which the boundary of contestability was changed. Similarly, the provision of system strength services as a prescribed transmission service is the result of a recent Rule change.</p> <p>The approach by which the definition of transmission services – and scope for contestability – is codified in the Rules is a fundamental difference between transmission and distribution. In distribution the regulatory determination is used to define the scope of services and associated form of</p>   |

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|  | <p>regulation through the Framework and Approach process. In transmission this is done in the Rules, not by the AER. We also note that the AER has no role in regulating services beyond prescribed transmission services. For this reason, as with connection services, it is appropriate to consider the unique issues associated with protecting contestable markets on a service-by-service basis at the time that the Rules are updated.</p>  |
| <p>4. What is the appropriate range of services TNSPs should be able to provide without legal separation? For example:</p> <ul style="list-style-type: none"> <li>a) Distribution services;</li> <li>b) Contestable electricity services; and</li> <li>c) Non-electricity services.</li> </ul> <p>What are the possible harms and benefits to consumers and the market from TNSPs offering these services?</p> | <p>As noted above, the principal benefit the AER identifies with a requirement to have activities undertaken via separate legal entities is that it may reduce the risk of cross-subsidisation.</p> <p>As also indicated above, the existing cost allocation arrangements as applied by the TNSPs, and approved by the AER, have proven successful in ensuring that any harms from cross-subsidisation do not occur. For this reason, it is not clear that the added cost burden associated with legal separation would deliver additional benefits to customers to justify its cost. It was also noted that the additional transparency from requiring internal transfer pricing arrangements would appear illusory.</p> <p>With respect to the provision of distribution services by TNSPs, it is necessary to ensure the transmission arrangements are aligned with the distribution arrangements given that inconsistency would only require continued waivers in transmission. Further, the AER needs to ensure that those TNSPs that have a distribution entity are able to operate in the same way as a stand-alone TNSP. The corollary of this is that the arrangements for joint TNSP and DNSP entities should also not hinder the way that stand-alone TNSPs are able to operate.</p> <p>Within the context of the objectives for legal separation, given the existence of robust cost allocation arrangements, the possible harms from the TNSP legal entities providing the services identified here are very low.</p>   |
| <p>5. In the case of TNSP-owned batteries, should TNSPs be able to lease excess capacity to third parties? What are the potential harms and benefits to consumers, the market and TNSPs of this?</p>   | <p>The long-term interests of consumers will be promoted by permitting TNSPs to lease access to TNSP-owned batteries to third parties. This is because it will reduce the costs to customers for the provision of regulated services. This access is not necessarily to excess capacity per se as multiple services and value streams can be provided by batteries simultaneously without material increases in the cost of the primary asset. Clearly, it is also the case that economic efficiency in general, and as a consequence the NEO, is promoted by maximising the efficient use of the assets and expanding the range of solutions available to address network service needs.</p> <p>In relation to storage, the efficiency and prudence of these projects is guided by efficiency incentives and the RIT-T with competition law placing a further discipline on TNSP behaviour. Under this framework TNSPs have actively sought to ensure arms-length arrangements for any market facing services provided by TNSP-owned batteries. Nevertheless, it is acknowledged that there are currently limited arrangements in the Rules regarding the use of TNSP-owned storage for market facing services</p> <p>It is important, however, that any new arrangements imposed are transparent and not overly onerous. Importantly, the arrangements should not go beyond ensuring an arms-length basis for the arrangements. That is, it is not appropriate for the AER to become a decision maker on the efficiency of projects, which is separately determined.</p> |

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|  | <p>ENA recommends that the Guideline set out the requirements in relation to ring-fencing of market-facing battery services, and to implement a reporting framework to provide transparency and confidence to market participants that arrangements are at arms-length. A reporting framework could potentially sit in or alongside the RIT-T process. ENA would be happy to engage further on appropriate reporting arrangements. The existing examples of TNSP-owned batteries provide a good template for appropriate operating models for these services.</p> |
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### Section 2.2.4 – Legal separation – Exceptions to legal separation

| AER Question  | Stakeholder feedback   |
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| <p>6. In relation to non-transmission services, what would be the harms and benefits to consumers, the market and TNSPs of moving to a waiver approach rather than a revenue cap?</p> | <p>As noted above it is not obvious that there are any potential benefits of imposing additional legal separation obligations on TNSPs. However, removing the revenue cap and imposing a waiver approach will impose costs. These would arise through the direct costs of imposing legal separation as well as regulatory costs associated with implementing and applying the waiver framework. Therefore, it is necessary for the AER to identify how the benefits of additional legal separation and a waiver approach outweigh the costs that would have an adverse impact on consumers, noting also that robust cost-allocation provisions already exist and there is no evidence of a problem with the existing arrangements.</p> <p>The evidence presented in this submission indicates that such a change is unnecessary and would not be in the interests of consumers. See response to Q2.</p>                      |
| <p>7. If a revenue cap approach was maintained, what would be the appropriate form and magnitude of that cap?</p>   | <p>There is no evidence that the revenue cap in its current form has led to ring-fencing issues that need to be addressed. A revenue cap would allow for some pragmatic solutions to be pursued where appropriate, such as edge of grid solutions analogous to approaches adopted in distribution networks.</p> <p>A reduction in the revenue cap may create transitional issues, such as those identified in the response to Q2. Further, it is relevant to note that not all TNSPs are expected to have substantial capital expenditure programs, such that a reduction in the cap would have a materially different impact on those TNSPs with smaller capital programs.</p> <p>It is worth noting, however, that to date TNSPs have avoided using the revenue cap to provide a service such as generation. This will not necessarily be the case in the future as the system undergoes rapid and fundamental change.</p> |

### Section 2.2.5 – Legal separation – Grandfathering arrangements

| AER Question   | Stakeholder feedback  |
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| <p>8. If legal separation is applied, how should existing services be treated?</p> | <p>As indicated above, further legal separation obligations are unnecessary and likely to impose additional costs with limited benefit. See response to Q2.</p> |

### Section 3.1 – Preventing discrimination – Obligation not to discriminate

| AER Question   | Stakeholder feedback  |
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| <p>9. What are the key potential harms and risks that an obligation not to discriminate should target?</p> | <p>Having regard to competition law TNSPs actively operate their businesses to avoid discrimination or the perception of discrimination. However, it is important all parties have confidence that a TNSP will not discriminate in favour of itself or its own affiliate. Therefore, it is reasonable for the formal arrangements to be extended to reflect this.</p> |

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|  | <p>It is important to note, however, that if broader non-discrimination provisions are imposed then there needs to be appropriate recognition that third-party access to transmission infrastructure, or access to sensitive information, may raise legitimate transmission reliability issues or potentially even national security concerns, which should not be treated as prohibited discrimination. One appropriate means of recognising these issues would be via an explicit statement in the definition of discrimination in the Guideline. This would be akin to the approach the AEMC has taken for network connections where TNSPs are required to maintain responsibility for parts of the shared network for security and reliability reasons, notwithstanding the prospect this may provide an advantage (albeit small) in relation to contestable transmission services.</p> |
| <p>10. What are the potential harms and benefits to consumers, the market and TNSPs of strengthening the obligation not to discriminate?</p> | <p>As identified in the previous response, it is important that any non-discrimination provisions do not prevent TNSPs from adequately responding in an emergency or to protect the security and reliability of the network.</p> <p>It is also noteworthy that should the obligation not to discriminate be broadened this would further avoid the need for functional separation for other contestable services. This is because the obligation to not discriminate would mean that TNSPs would be explicitly precluded from favouring their own entity such that there would be limited additional benefits from functional separation. This is particularly the case for contestable connections given there are already robust requirements to protect confidential information for that service.</p>   |

### Section 3.2 – Preventing discrimination – Functional separation

| AER Question   | Stakeholder feedback  |
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| <p>11. What are the potential harms and benefits to consumers, the market and TNSPs of introducing additional functional separation obligations for:</p> <ul style="list-style-type: none"> <li>a) staff sharing;</li> <li>b) office sharing; and</li> <li>c) branding and cross-promotion?</li> </ul> | <p>Imposing functional separation would impose significant harm on consumers and TNSPs and would not promote the NEO.</p> <p>For connections, a carefully designed framework for contestable transmission connections was created by the AEMC to protect competition while also enabling the efficiency benefits and expertise of TNSPs to be harnessed for the benefit of customers. The key feature that achieves this outcome is the inclusion of protections for competition in the Rules that do not require TNSPs to functionally separate the provision of prescribed transmission services from contestable connection services. ENA has provided detailed information on this framework in the attachment to the main body of our submission. It is also noted that concerns about misuse of confidential information or discrimination can only arise where a TNSP is competing in relation to connections in the area where it controls the transmission network - it is only in this situation that a TNSP has a monopoly position that could be leveraged to depress competition in a related market. As such there is no justification for imposing ring-fencing measures on a TNSP in relation to its activities in other areas where it may seek to compete (for example, in relation to distribution connections). Such measures in this context would only depress competition to the detriment of consumers.</p> <p>For other contestable transmission services (such as potentially some consulting services and micro-grids), it is unlikely that the sharing of resources would generate any material harm to competition. These services arise infrequently, tend to be closely related to the core network services function, and are provided to large and</p> |

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|   | <p>sophisticated customers. These factors mean that incumbent TNSPs tend to be an important supplier of services to customers in the market, although the value of the services is comparatively low. If the capacity to share resources across these services and regulated transmission services were to be removed, then continued provision of these services by TNSPs may become unviable, which would be counter-productive for customers.</p> <p>Sharing of a "brand" provides no advantage in a transmission context given that customers are large, well-resourced, and well-informed and so have the capacity to 'see through' any branding. Obligations for separate branding would only unnecessarily increase costs.</p> |
| <p>12. Should any new functional separation obligations apply to all contestable services? Should any exceptions apply, and if so, why?</p> | <p>See the response to Q11. Specifically, as is highlighted in this submission, functional separation of connection services would be severely detrimental to the efficiency of transmission connections. For most other non-regulated services TNSPs provide, the benefits of functional separation do not outweigh the costs. The exception to this is functional separation may be required with respect to energy storage facilities in circumstances where the market facing service is not delivered through a structurally separate entity. Finally, with respect to any new services, the decision should be made having regard to the specific features of the service.</p>  |

### Section 3.3 – Preventing discrimination – Information access and disclosure

| AER Question   | Stakeholder feedback  |
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| <p>13. What are the potential harms and benefits to consumers, the market and TNSPs of aligning the transmission and <a href="#">distribution guidelines</a> in relation to information access and disclosure?</p> | <p>Robust information protection arrangements already exist in all jurisdictions with respect to the contestable and non-contestable aspects of transmission services offered by TNSPs.</p> <p>The existing information provisions in the current guideline have proven effective in ensuring that relevant information is not used to provide an advantage to the Primary TNSP. This is combined with obligations for TNSPs to publish extensive information so that it is available to all market participants.</p> <p>The information access arrangements that currently exist for TNSPs are better suited to transmission businesses than the distribution arrangements. The transmission arrangements permit the use of information by an associate of the TNSP where this information is available to any other party. This approach is appropriate for transmission where the related services are expected to be more closely related to the delivery of the core transmission service. Conversely, the distribution arrangements are more restrictive and burdensome given they require certain actions or events to have occurred before information can be shared. This likely reflects the broader uses of distribution information for contestable services. The ENA recommends that the current transmission arrangements be maintained, noting that as specified in the current guideline, it is still designed to restrict access to information that may give an associated entity an unfair advantage over other participants in the NEM, such that the intended outcomes are still achieved with the current construction.</p> |
| <p>14. Are there any potential inconsistencies with the <a href="#">Transmission Connections and Planning Arrangements</a> rule change we need to consider?</p>  | <p>There are already robust information protection arrangements in the Rules in place for transmission connections. Attempting to duplicate and add on to these arrangements only increases the prospects of introducing unintended consequences that do not promote the NEO. The most fundamental inconsistency with the AEMC's intended framework would emerge if functional separation was</p>   |

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|  | imposed for contestable connections. This would undo the intended benefits associated with permitting the Primary TNSP to provide both contestable connection services in addition to those services it is obliged under the Rules to provide. We also consider this would be going beyond the scope of the AER's role in regulating prescribed transmission services. |
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### Section 3.4 – Preventing discrimination – Requirement for service providers to comply

| AER Question  | Stakeholder feedback                    |
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| 15. What are the potential harms and benefits to consumers, the market and TNSPs of aligning the transmission and distribution guidelines in relation to obligations on third party service providers that support the provision of prescribed transmission services? | ENA has no concerns with this proposal. |

### Section 4 – Compliance

| AER Question   | Stakeholder feedback   |
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| 16. What are the potential harms and benefits to consumers, the market and TNSPs of expanding the scope of compliance reporting? | <p>The current distribution reporting arrangements reflect that DNSPs have large operating expenditure requirements based on more staff undertaking a greater volume and wider range of activities. A larger and more complicated operating model provides a justification for a more significant reporting framework for compliance. Conversely, TNSPs have much smaller proportion of operating expenditure compared to DNSPs for a narrower and more clearly defined set of services.</p> <p>For instance, in NSW Ausgrid's operating expenditure allowance in the current regulatory period is 2.3 times larger than the allowance for TransGrid (\$2,305 million for Ausgrid versus \$976 million for TransGrid). There is a wide range of operating expenditure allowances across TNSPs. The material difference in operating expense is the consequence of the material difference in staffing requirements and complexity. The implication is that distribution reporting requirements would not be fit-for-purpose for the scale and functions associated with the operating environment in transmission. Further to this, the work program in transmission requires much longer lead times which can make certain reporting obligations impractical given circumstances can evolve throughout a single project.</p> <p>The current approach where the AER can request a compliance report has been working well and there is no evidence that more regulation would deliver additional benefit relative to the cost.</p> |
| 17. Should the timeframe for reporting all breaches be extended to 15 days?  | Requiring breaches to be reported within 15 days provides more certainty and transparency over the reporting timeframe relative to the current approach. ENA suggests clarifying the trigger that begins the 15-day reporting period, and that the trigger could be defined as the date on which the TNSP establishes that a breach has occurred.  |

### Section 5.1 – Other issues - Waivers

| AER Question  | Stakeholder feedback  |
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| <p>18. Would there be benefit in the AER providing more clarity on the application and assessment process for waivers?</p>  | <p>It is not appropriate to rely on waivers as a means of addressing excessive regulatory intervention. Doing so would be counter to the principle that the cost of regulation should be kept to a minimum. Imposing overly onerous regulation would serve only to embed inefficiencies.</p> <p>With the exception of batteries, the AER's proposed reliance on waivers, appears to be materially different to how they are used in distribution. Aside from batteries, in distribution waivers appear to have only been used by the AER to provide distributors with additional time to comply with new obligations, rather than to change the obligation itself. Therefore, it is not clear that they should be seen as a way to address a failure in the regulatory approach for transmission.</p> <p>In relation to batteries, as noted in response to question 5, ENA considers that a preferable framework would be for the Guideline to set out the ring-fencing requirements in relation to the market-facing battery services, and to require the TNSPs to report against these requirements. The existing arrangements in relation to batteries provide a good template for developing these requirements.</p> <p>ENA would be happy to engage further on this issue.</p> |
| <p>19. Do you agree with the AER's initial views that certain clauses should not be subject to waivers (e.g. the obligation not to discriminate and information access and sharing)? Please explain your reasons.</p> | <p>As noted above (response to question 9), there is a need for recognition that third-party access to transmission infrastructure may raise legitimate transmission reliability issues or potentially even national security concerns, which should not be treated as prohibited discrimination. While a waiver approach may be appropriate in some circumstances for this purpose, the ENA's preference is for explicit recognition of these issues in the guideline. This would be akin to the approach the AEMC has taken for network connections where TNSPs are required to maintain responsibility for parts of the shared network for security and reliability reasons, notwithstanding that this may provide an advantage (albeit small) in relation to contestable transmission services.</p>   |
| <p>20. Which elements of the assessment criteria used to assess waiver applications by DNSPs would be appropriate for transmission?</p>   | <p>As indicated in the response to question 18 above, there should not be a reliance on waivers as a mechanism for making the distribution ring-fencing arrangements appropriate for transmission. Such an approach will impose high costs and create barriers to investment. The transmission ring-fencing arrangements should be fit-for-purpose for transmission, in view of the nature, operating environment and regulatory environment of transmission.</p> <p>However, should waivers be required even where fit-for-purpose transmission ring-fencing requirements are in place, ENA would support the same assessment criteria for waivers between transmission and distribution.</p>  |
| <p>21. What factors should we take into account in considering the duration of waivers?</p>   | <p>Implicit in the current guideline is an evergreen waiver option. This is appropriate given transmission services are clearly defined and stable over time.</p> <p>Time limited waivers may be appropriate in limited circumstances, for example by linking the waiver period to the life of an asset or the duration of an agreement, provided that a new waiver would be granted if any new arrangements entered into met the required principles.</p>  |
| <p>22. Are there any circumstances where class waivers may be appropriate for transmission?</p>   | <p>The nature of the businesses and the services offered across TNSPs is very similar and stable across businesses. Therefore, if there was a case for a class waiver to apply it is likely that it is a matter that should not be regulated in the</p>   |



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|  | <p>first place. Therefore, ENA recommends that the AER only impose ring-fencing obligations where there is a clear benefit having regard to expected costs. Doing so should mean that class waivers are not required given the ring-fencing guideline will be properly formed.</p> <p>Nevertheless, ENA supports the inclusion of class waivers for those industry-wide issues that emerge where immediate action is required and a change to the guideline would be too slow.</p> |
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### Section 5.3 – Other issues – Additional ring-fencing obligations

| AER Question   | Stakeholder feedback   |
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| <p>23. What are the potential harms and benefits to consumers, the market and TNSPs of removing the ability of the AER to impose additional obligations on a TNSP (clauses 9 and 10 of the guideline)?</p> | <p>The AER has not yet identified a need to impose additional obligations on TNSPs under the current guideline. This should be seen as evidence of the current guideline, in combination with requirements in the Rules, as being effective at protecting against material ring-fencing harms.</p> <p>While the ability to impose new requirements increases the uncertainty of the regulatory framework, this is preferable to imposing additional regulation in the first place without clear evidence of the benefits to consumers of that regulation, in particular with respect to potential new services. This is because the unique circumstances associated with the need for ring-fencing measures can be considered at the time.</p> |
| <p>24. Are there any other issues in relation to this review that you would like the AER to consider?</p>  | <p>The AER needs to carefully consider the analytical approach that is taken to assessing the need for new ring-fencing arrangements. In particular, any material change to the ring-fencing arrangements needs to be driven by evidence that the current arrangements, including the Rules framework and broader competition law protections, are inadequate to meet the relevant policy objectives and that the benefit of any arrangements imposed outweigh the costs it imposes.</p> <p>The significant differences between transmission and distribution networks mean that the distribution ring-fencing arrangements are not the appropriate starting point for the AER's analysis.</p>   |