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Dear Mr Pattas

Submission on Draft Electricity Ring Fencing Guideline

I refer to the AER's draft ring fencing guideline, published on 15 Aug 16 (**Draft Guideline**).

Jemena welcomes this opportunity to make a submission in response to the Draft Guideline. We are also grateful for the opportunities provided to date to discuss and engage with the AER in relation to aspects of the Draft Guideline, and to raise some of our key concerns.

Our submission

Our submission comprises this letter, together with:

- Attachment 1 – mark up of Draft Guideline, with suggested amendments and commentary; and
- Attachment 2 – a commentary on the case studies provided in the Explanatory Statement that accompanied the Draft Guideline.

In particular, we wish to highlight for the AER's attention the following key points:

We support the objective of ring fencing

Jemena supports the objective of ring fencing, which we understand is to promote participation in markets and the development of a vibrant and competitive environment for the development of electricity-related products and services. This is intended to be promoted by ensuring that DNSPs (and any related entities) are not given an unfair competitive advantage when competing in downstream markets solely because of their status as a DNSP or an entity related to a DNSP.

This objective is well-established in regimes across energy and other network sectors, including state jurisdictional ring fencing guidelines, the ring fencing rules in Part 6 of the National Gas Rules and 'best practice' ring fencing of "monopoly" network activities in other sectors – such as telecommunications and rail. I would add that there is likely to be benefit in learning from, and aligning the approach adopted by the AER with, 'best practice' from these longstanding frameworks.

In each case, "functional separation" has not principally been focussed on preventing a network owner from competing in another market (often this was acknowledged as being a good thing). Rather, they have been aimed at ensuring that a level playing field is protected in contestable downstream markets, by ensuring that a network owner makes available network services and information that are needed in order to compete in those markets on a non-discriminatory basis to both competitors and any of its own related entities.

A number of our suggested amendments to clauses 3 and 4 of the Draft Guideline (see Attachment 1) are therefore aimed at focusing on this key objective of non-discrimination, whilst providing sufficient flexibility in the Draft Guideline to ensure that:

- the boundary of any ring fence does not prevent DNSPs undertaking a range of "distribution services" which the Rules require or contemplate that DNSPs will undertake (we have suggested using the term "distribution services" instead of "network services" in the Draft Guideline, to define the boundary of DNSP activities, to address this issue)

- DNSPs continue to be able to use the services provided within their corporate group to support the supply of distribution services. The AER in its case studies rightly recognises that where a DNSP and other related bodies use a common internal service provider (including services provided by the related body corporate to the DNSP) – this can provide a valuable means of transparently demonstrating that there is no discrimination occurring

- DNSPs are not inadvertently excluded from involvement in activities where large, sophisticated and commercially capable customers choose to engage DNSPs directly to provide services (or support the provision of services by related entities) that are otherwise provided in competitive markets

- Staff sharing, physical security and information rules are focused and proportionate – so that DNSPs are not prevented from undertaking a range of normal corporate activities, such as obtaining corporate support from "head office" staff at a group level, sharing standard metrics and information required for internal reporting (thereby avoiding potentially costly and complex internal restructuring)

- DNSPs are able to continue to use group-wide branding – which in many cases has not developed customer recognition through involvement in DNSP activities (which in Jemena's case are limited to a relatively small electricity network in a limited part of Melbourne) but because of other activities undertaken by group companies on a national basis.

Implementation timing

The AER's indicative timetable contemplates a final version of the Guideline will be published during November 2016, with the arrangements to commence from 1 December 2016, subject only to limited transitional arrangements.

Jemena is concerned that this implementation timetable is unrealistic and gives rise to a significant compliance risk for DNSPs. DNSPs will have less than one month after publication of the final Guideline before they are required to have implemented – and be operationally compliant with - the bulk of the requirements.

This is in the context of very substantial new or modified regulatory obligations, which are likely to result in significant work in advance of the commencement of the Guideline, including to:

- comprehensively audit and potentially redesign information flows, reporting and IT systems and processes;
- review physical buildings and offices, which may lead to the need to relocate some staff or groups, sub-let premises and/or install additional physical security systems;
- undertake a comprehensive re-brand of either the DNSP and/or other group entities (including potentially field staff and vehicles as well as corporate branding);
- develop and roll out compliance training for all affected staff;
- assess and potentially modify remuneration and incentive structures (including considering impacts on remuneration as set out in applicable industrial agreements), some of which are long-standing and determined at a group level and may only be updated on a financial year basis;
- audit and consider changes required to intra-group supply arrangements, including potentially the contractual instruments governing those arrangements and measures of equivalence in supply; and
- review and develop revised the customer scripts and other business protocols for staff.

We understand that the experience with ring fencing in other sectors has shown that the task of implementation is formidable and complex. In both the UK and NZ, the task of implementation took several years and ultimately involved a need for some flexibility by the regulator – through the use of various waivers and variation processes. To illustrate the potential scale of the implementation exercise (currently required to complete by 1 December) the cost of implementing functional separation of British Telecom in the United Kingdom in 2005-08 was reported to be GBP153m and the cost of functional separation of Telecom NZ in New Zealand has been estimated at NZ$200m.[1] In Australia, we understand that Telstra estimated that the costs of implementing UK-style functional separation to its systems and processes would have been $800-$1 billion.

[1] Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, Explanatory Memorandum, at pages 31-32.

Even if DNSPs sought to address the tight implementation process through applying for transitional waivers – as presently drafted, the Draft Guideline would not permit waivers for many of the requirements and, if waivers were available, there would be insufficient time following the final publication of the Guideline for DNSPs to apply for and obtain waivers by 1 December 2016.

Jemena submits that the process of implementing ring fencing for each DNSP needs to be done properly. Consistent with the experience in other regimes where functional separation has been imposed, the commencement of the Draft Guideline should be extended by 12 months to 1 December 2017, to permit time for DNSPs to work collaboratively with the AER to develop and implement their respective ring fencing arrangements (including consideration of appropriate waivers).

Scope of the services that are 'ring fenced'

The Draft Guideline - as currently drafted – operates to prevent a DNSP from supplying any services other than "network services" (except for a very minimal amount of non-network services[2]). There is also currently no waiver available from this strict limitation.

As the AER is aware, the term "network services" is a relatively narrow one – and does not cover the full range of "distribution services" which a DNSP is required to undertake under the NER. For example, the current drafting would arguably not permit a DNSP to rent space on poles to telecommunications providers for fibre services, despite this being the type of non-network, distribution service that reduces consumer costs (for both telecom and DNSP services) and one that is explicitly endorsed by the shared asset guidelines.[3]

We have therefore suggested that:

- the term "distribution services" be used instead of "network services" in the Guideline; and

- a revenue cap of 1% of ARR is adopted by the Guideline, instead of a cost cap, for the exception for ancillary non-distribution activities undertaken by a DNSP, and that revenue earned through the shared asset guideline is not included in this cap (given that we understand it is intended for ancillary revenues/activities, not shared asset services).

Ability to provide network input to support large customers

Jemena submits that the Guideline needs to specifically address the position of large customers, which often have highly sophisticated network requirements. For example, these customers often require high voltage or specialised infrastructure and equipment to be constructed on their premises, on both sides of the connection.

These customers have a range of choices and a high degree of bargaining power when dealing with potential suppliers, including DNSPs. This is reflected already, for example, in the Network Exemption Guidelines, which (in both the current and draft replacement Guidelines) have automatic deemed exceptions for "large corporate customers". The 2013 Guideline (at page 10) explains that the *"[AER] have*

[2] The Draft Guideline proposes a cap of $500,000 of costs. We have proposed that this be reframed as a revenue based test – such as 1% of ARR. In either case, the volume involved is trivial.

[3] AER Shared Asset Guidelines, page 6.

recognised that large sophisticated firms may want flexibility when applying for a network exemption. We have added a deemed class for large corporate entities."

We consider that similar flexibility is required in the Ring Fencing Guideline and have proposed an additional carve out be introduced for large customers that choose to deal directly with a DNSP and have elected in writing to waive the requirements in clause 4 of this Guideline.

This approach reflects the size and bargaining position of large customers. It also enables DNSPs to continue to develop these solutions efficiently, and to ensure network reliability and safety is maintained. This is clearly consistent with the national electricity objective.

The Guidelines should allow for a range of 'intra-group' structures

It is notable that ring fencing regimes in other sectors have typically been developed on an individualised basis for each network owner (through undertakings). This reflects that each firm and asset is structured differently and rigid, 'one size fits all' approaches can potentially lead to significant and unnecessary cost, delay and poor consumer and network outcomes.

Given that the Guideline is developed by the AER (and not proposed by the network owner), and will then apply to all DNSPs, it is even more important that the Guideline leaves sufficient flexibility for DNSPs and their corporate groups to organise themselves efficiently.

For example, in its set of case studies included with the Explanatory Statement, the AER highlighted that a DNSP will often be able to ensure appropriate cost allocation and non-discrimination by acquiring services from other entities in the corporate group. Jemena is certainly structured in this way, with:

- a large number of the network-related services undertaken by Jemena Electricity Networks (**JEN**) being provided to it by a centralised services entity, Jemena Asset Management (**JAM**), and

- group corporate services being provided through other entities, including Jemena Ltd.

However, the Draft Guideline may inadvertently restrict this kind of efficient design because in a number of places the Draft Guideline assumes that the relationship between a DNSP and related corporate entities only flows one direction (i.e. with the DNSP providing information and support to a related entity).

Examples include:

- the physical separation rule in clause 4.2.1, which might at present be seen to require staff of JAM (the employing entity) to be physically separated from JEN (which has no staff), rendering the requirement redundant and not meeting the intent of the Draft Guideline; and

- the information security rules in clause 4.3, which as currently drafted would be likely to prevent a DNSP from providing information – including aggregate network data – to enable the preparation of internal accounting and financial reports for the board and senior management, provide information to obtain legal

or regulatory advice, prepare regulatory proposals, share information with other DNSPs during emergencies, and to order or manage network services from a contractor, including JAM.

We have suggested a number of amendments to ensure that intra-group arrangements designed to support a DNSP (in providing distribution services) are not inadvertently impacted by the rules designed to prevent services flowing the other direction, i.e. a DNSP assisting its related entities in contestable markets.

Waivers will be important

As noted above, the task of implementing ring fencing is complex and cannot be imposed in a rigid or 'one size fits all' manner, without seriously and adversely affecting efficiency and consumer outcomes, as well as potentially network safety and reliability.

Experience under state jurisdictional guidelines as well as in other sectors have highlighted the very important role that flexibility through waivers offers. Regulatory flexibility in relation to ring fencing is an important sign that a regulator acknowledges the complexity that is involved and the importance of tailoring the rules to each individual DNSP's structure and circumstances as well as acknowledging the effects of dynamic and evolving markets and the need to adapt to their changing requirements.

As well as energy, regulatory waivers and variations have commonly been required when implementing ring fencing (and similar) obligations in telecommunications, both in Australia and overseas.[4]

Components of the draft Guideline already covered by the Rules

Finally, we note that in several respects the Guideline appears to duplicate existing regulatory arrangements under the NEL and Rules. This is particularly the case in relation to:

- clause 3.2, which largely duplicates the comprehensive regulatory accounting and RIN framework under the Rules; and

- clause 4.3, which provides a very broad set of information security rules that appear to largely duplicate the confidentiality requirements in Part C of Chapter 8 of the Rules.

Jemena submits that to the extent existing regulatory arrangements already address an issue, it would be preferable not to duplicate those requirements.

However, we have nonetheless suggested a number of drafting alternatives in both sections, in the event that the AER wishes to proceed with addressing both in the Guideline.

[4] There is a variety of waivers available under telco regimes in relation to non-discrimination and equivalence rules (see, for e.g., class exemptions under 152ASA and the ability to authorise discriminatory conduct by NBN Co under section 152AXC(12)). A number of variations have been made to Telstra's Migration Plan since it was put in place in 2012 (see https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan).

Similarly, variations were available under the 'functional separation' regime accepted by BT in the United Kingdom and were extensively utilised, and accepted by the regulator OFCOM, during the period of implementation.

We note that given the complexity and importance of the issues raised by the draft Guideline, Jemena supports the release of a further draft Guideline for comment, before the AER proceeds to a final version.

We look forward to continuing to engage with you in this important process, and would be happy to meet with AER staff to further discuss our submission, if needed.

If you have any queries in relation to this submission, please contact me on 02 9867 7166 or by email Cameron.Herbert@jemena.com.au.

Yours sincerely

CAMERON HERBERT
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ATTACHMENT 1

ANNOTATION OF CLAUSE 3 AND 4 OF DRAFT GUIDELINE

3 Prevention of cross subsidies

3.1 Legal separation

(a) A **DNSP** must be a legal entity and, subject to clause 3.1(b), must only provide **distribution services.**

Generally, "functional separation" regimes are not focused on preventing a network operator from undertaking contestable activities, but are focused at ensuring that key network inputs are provided on a non-discriminatory basis to downstream competitors, so that downstream competition is not distorted (i.e. the related entities of a network operator do not have any kind of unfair advantage).[5] Indeed, preventing a particular category of persons from engaging in certain markets may, in itself, lead to distortion of those markets and be anti-competitive.

While we query the approach of framing the guidelines around limiting participation by DNSPs in other non-distribution activities – if this approach is ultimately adopted by the AER, we consider the following changes are needed:

(a) The term "distribution services" should be used instead of "network services". "Network services" is a narrower term that does not pick up the full scope of services which a DNSP is required to undertake (and which are contemplated by the NER) and is also likely to lead to confusion, given the term "electricity network services" in the NEL which is subtly, but materially, different. This terminology change would also need to be picked up in a number of other parts of the Guideline.

(b) If the term "distribution services" is used to identify the appropriate scope of activities undertaken by a DNSP entity, then it will also be important for the Guideline to clearly specify the scope of "non-distribution services". As noted in section 4 below, this would then be likely to enable the current, undefined term "competitive or contestable energy-related services" to be replaced with "non-distribution services", which would greatly clarify the scope of the ring fencing constraint thus providing clarity to the DNSPs as to where the ring-fence applies and thus what they need to do operationally to comply with the Guideline.

(c) An explicit carve out from the ring fencing rules is required for large and sophisticated customers that choose to engage the services provided by DNSPs – consistent with the AER's desire to promote customer choice, and the acceptance of an exemption for large customers in the Network Exemption Guidelines[6] (see our proposed new clause 5 below, and the comments made in our covering letter).

(b) A **DNSP** may undertake, and earn revenues from, the ~~incur costs of up to $500,000~~supply of non-distribution services (identified ~~and allocated~~ in accordance with clause 3.2.2) in any regulatory year up to a maximum amount equivalent to 1% of the DNSP's **annual revenue requirement** for that year. ~~for providing **non-network services.**~~ A **DNSP** must not ~~provide~~ supply non-~~network~~ distribution services where doing so would involve the **DNSP** ~~incurring~~ earning revenue~~such costs~~ in excess of ~~$500,000~~1% of the DNSP's **annual revenue requirement** in any regulatory year. Revenues under this clause 3.1(b) do not include any revenue earned or accounted for by a DNSP under the Shared Asset Guideline.

[5] See, for example, the functional separation principles in Schedule 1, section 74 of the Telecommunications Act.

[6] As the AER is aware, the 2013 Network Exemption Guidelines note "we have recognised that large sophisticated firms may want flexibility when applying for a network exemption." The AER therefore permitted a deemed exemption class for this category of corporate entity.

The use of 'costs' as the test in this clause is difficult to apply. What 'costs' are to be included in this calculation? Costs may also not bear a direct relationship to the revenues derived from these activities. JEN therefore proposes that a revenue-based test is likely to be easier to operationalise and is more consistent with the regulatory framework.

(c) For the avoidance of doubt, clauses 3.1(a) and 3.1(b) do not prevent a **related body corporate** of a **DNSP** from providing:

(i) distribution services on behalf of, and/or as a service provider to, the DNSP;

While the AER's case studies acknowledge the way in which other group entities may act as service providers for the DNSP, this should be made explicit in the Guideline. Specifically, it should be recognised that other members of a DNSP's corporate group may be involved in the provision of distribution services where they are doing so as a contractor of the DNSP.

(ii) **non-~~network~~ distribution services**.

The term 'non-distribution services' is not currently defined, although this term is evidently critical to identifying those activities that fall outside the permitted activities of a DNSP entity (and therefore where the ring fence should be located). Jemena submits that, if possible, those relevant activities are defined with a degree of precision (and not in a catch all manner as all services that are "not distribution services") – so that the Guideline can be effectively implemented and compliance can be assured.

~~(b)~~(d) For the avoidance of doubt, clauses 3.1(a) and 3.1(b) do not prevent a **DNSP** and a **TNSP** being the same legal entity.

~~(c)~~(e) A **DNSP** cannot apply for a waiver of the obligations set out in clauses 3.1(a) and 3.1(b).

3.2 Establish and maintain accounts

3.2.1 Separate accounts

JEN does not object to the obligation to maintain separate regulatory accounts – although we note that this largely duplicates the existing accounting separation and RIN process framework under the NER / NEL.

There is already a workable framework addressing cost allocation under the NER, including:

- detailed cost allocation principles governing the allocation of costs to distribution services (NER cl 6.15.2), and a requirement for the AER to publish binding cost allocation guidelines (cl 6.15.3)
- a requirement for DNSPs to submit a cost allocation method to the AER for approval, and a requirement to comply with the approved method (6.15.4)
- shared asset principles and guidelines (6.4.4)
- broad AER powers to issue compulsory regulatory information notices (RINs). The information that may be collected under a RIN includes information to enable the AER to verify compliance with any requirements for the allocation of costs under the NER or an AER determination (NEL, s 28L).

Given the likely duplication, there may be benefit in removing section 3.2 and leaving these issues to be dealt with under the existing NER/NEL provisions.

(a) A **DNSP** must establish and maintain appropriate internal accounting procedures to ensure that it can demonstrate the extent and nature of transactions between the **DNSP** and its **related bodies corporate**.

(b) The **AER** may include a requirement in a **regulatory information instrument** for a **DNSP** to:

(i) provide its internal accounting procedures to the **AER**;

(ii) report on transactions between it and its **related bodies corporate**.

(c) A **DNSP** cannot apply for a waiver of the obligations set out in clauses 3.2.1(a).

3.2.2 Cost allocation and attribution

(a) A **DNSP** must not allocate or attribute to **distribution services** any costs that properly relate to **non-distribution services**.

> This prohibition on allocating costs to distribution services that properly relate to non-distribution services appears redundant, because:
>
> (a) under clause 3.1, a DNSP is prevented from undertaking non-distribution services, in any event (other than to a very limited extent – i.e. $500,000 costs, or as proposed in this annotation, 1% of ARR); and
>
> (b) the CAP and CAM deal with allocation of costs to particular categories of distribution service (e.g. clause 6.15.2(3)). This will necessarily cover allocation both between categories of distribution service, and between distribution and non-distribution services, to the extent there are any. Compliance with the CAM is mandatory under the NER (clause 6.15.1).
>
> There is therefore no need to impose any further obligation to comply with the CAM through this Guideline.

(b) A **DNSP** must allocate or attribute costs to **distribution services** in a manner that is consistent with the **cost allocation principles** and its approved **CAM**, as if those cost allocation principles and **CAM** otherwise applied to the allocation and attribution of costs between **distribution services** and **non-distribution services**.

(c) If required by a regulatory information instrument, ~~A~~a **DNSP** must demonstrate to the **AER** whenever it provides financial information to the **AER** in accordance with **a regulatory information instrument** how it meets the obligation in clauses 3.2.2(a) and 3.2.2(b).

> Jemena notes that this requirement largely duplicates the existing RIN processes. However, this clause would, when read strictly, require a DNSP to certify compliance every time that it submits a RIN response, regardless of the subject matter. We assume this is not the AER's intention. In this regard, Jemena notes that compliance with clause 3.2.2(a) and (b) are reviewed independently by an auditor, in any event.

~~(c)~~(d) A **DNSP** cannot apply for a waiver of the obligations set out in this clause 3.2.2.

4 Non-discrimination

4.1 General obligations to not discriminate

~~(a) A **DNSP** must not discriminate (either directly or indirectly) between its **related body corporate** (including customers of its **related body corporate**) and competitors of its related body corporate (including customers of a competitor~~

~~of its **related body corporate**) in connection with the supply of **distribution services** or **non-distribution services**.~~

(a) A **DNSP** must not unfairly discriminate in the supply of a **distribution service** as between:

(i) a **related body corporate**, where the **distribution service** is used in the subsequent provision by that **related body corporate** of a **non-distribution service**; and

(ii) any other person engaged in the provision of that **non-distribution service**.

(the "**Non Discrimination Principle**").

In any ring fencing regime, it is important that the non-discrimination requirements are appropriately framed, and limited to the supply of those 'monopoly' inputs required in the downstream, competitive market (i.e. where the risk of unfair discrimination could have an impact on competition). However, the words *"in connection with the supply of distribution services or non-distribution services"* in the draft Guideline are extremely broad. It is unclear what this general obligation is intended to cover, but it certainly does not appear limited to the supply of network inputs into downstream contestable markets.

Compare this with the non-discrimination rules which have been included in the access undertaking applicable to Aurizon Network (which is vertically integrated) by the QCA – in its recent 2014 Final Decision which precisely define the nature of the "unfair discrimination" which is to be avoided.[7]

The term "unfair" has been included in our proposed revised clause because not all 'discrimination' or differentiation between customers is either unfair or anti-competitive. There are many forms of discrimination which are welfare-enhancing, such as price discrimination between different classes of customer or simple volume discounts. Indeed, the CCA explicitly recognises that this is the case. Section 44ZZCA of the CCA provides for the following pricing principles:

… access price structures should:

i. allow multi-part pricing and price discrimination when it aids efficiency; and

ii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher;

Similar examples exist in other regimes.[8] This recognises that some forms of differentiation between customers or services are efficient and pro-competitive, even in vertically integrated markets.

(b) A DNSP will satisfy the Non Discrimination Principle provided that it~~this provision requires a **DNSP** to~~:

(i) deals or offer to deal with ~~its~~any **related body corporate** that is engaged in the provision of a **non-distribution service**, on an independent and arm's length basis ~~as if its related body corporate was not a related body corporate of the **DNSP**~~;

[7] See: http://www.qca.org.au/getattachment/5ef60944-589b-4520-a7d0-2b3465e9062f/Appendix-B-(Mark-up-to-CDD)-UT4-Final-Decisi.aspx

[8] See, for example, section 168A of the Queensland Competition Authority Act 1997 (Qld).

It is unclear what paragraph (i) adds to the more specific equivalence obligations in (ii) and (iii) below. Consideration might be given to removing it and leaving the equivalence obligation as set out in those other provisions.

The original phrase "*as if … not a related body corporate*" is also unclear. We have suggested alternative drafting referring to "independent" and "arm's length" relationships between a DNSP and any downstream entity involved in a contestable market. This drafting, which is consistent with other regulatory practice, aligns to the approach taken to "arm's length" principles in the Telecom NZ Separation Undertaking[9] as well as, for example, the rules governing access to rail infrastructure in the Queensland rail sector (see section 438H of the Transport Infrastructure Act 1994 (Qld)).

~~(i)~~(ii) ~~deal or offer to deal with~~provides **distribution services** to competitors of ~~its~~ any **related body corporate** (including customers of those competitors) on substantially the same terms and conditions~~,~~ as ~~those~~ the terms and conditions on which the DNSP supplies **distribution services** to ~~for its~~a **related body corporate** (including customers of its **related body corporate**) in an equivalent position;

(iii) provides substantially the same quality, reliability and timeliness in the provision of **distribution services** to competitors of its **related body corporate** (including customers of its **related body corporate**), as ~~it~~ the DNSP provides to its **related body corporate** (including customers of those competitors) in an equivalent position;

The amendments proposed to paragraphs (ii) and (iii) are intended to properly reflect what Jemena understands is the AER's intent. It is clearly not the case that a DNSP must treat all related entities the same as all customers and other third parties (which is both impossible and inconsistent with the point that different customers will justify different terms and conditions due to legitimate issues such as creditworthiness, scale, geographic location etc).

The amendments therefore ensure that distribution services used to support a related entity in a contestable market are also made available on a non-discriminatory basis to other competitors, in equivalent circumstances. This ensures that the DNSP is not able to use its position as controlling a network to provide an unfair advantage to downstream, related entities that provide services in contestable markets.

~~(ii)~~(iv) not provide information to its **related body corporate** that the **DNSP** has obtained through its dealings with a competitor of the **related body corporate** that may unfairly advantage the **related body corporate** in the provision of ~~competitive or contestable **energy-related**~~non-distribution services;

Jemena submits that this restriction is better placed in clause 4.3 as part of the information security rules.

If it is retained in this clause, we note that it should refer to 'unfair' advantage, to ensure that a DNSP is able to share information with related entities in the same circumstances as other parties. For example, if a DNSP publishes information to support all customers (and which may assist them in the provision of energy-related services), this would currently contravene this clause, to the extent it was also provided to related entities.

[9] See: http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/previous-reviews-and-consultations/telecom-separation/documents-image-library/telecom-separation/telecom-separation-undertakings.pdf

(v) not advertise or directly promote ~~the~~ any **non-distribution services** provided by its **related body corporate** over **non-distribution services** supplied by a competitor of that **related body corporate**; and

The issue that is being addressed, rightly, here is that a DNSP may seek to "promote" the services of a related body corporate over a competing service. To give effect to this, JEN suggests clarifying that the DNSP is not to promote the services of a related body over those of a competitor. This would then allow a DNSP to still inform a customer of a range of relevant options for particular services such as contestable metering (which may include the services of a related body corporate) while preventing it from specifically promoting any related services over those of competitors.

~~(iii)~~(vi) ~~have independent and separate branding for its **distribution services** from a **related body corporate** that provides **services non-distribution services**.~~[deleted]

Jemena submits that in the circumstances there is very little benefit to be derived from a restraint on the use of group branding by DNSPs – and potentially significant cost.

The electricity industry is different in significant respects from other sectors (such as telecommunications) where regulators have sought to address a concern that a network provider may be able to "leverage" the benefit of its network brand into contestable markets.

Jemena is a good example. We do not have a large electricity network and our "network monopoly" as a DNSP is limited to approximately 320,000 homes and businesses in north-west Melbourne. Our brand is not built on our electricity network – but is more broadly the result of our involvement in other activities, including gas pipelines, water , utilities asset management and gas distribution networks. It is both counterproductive and costly to require Jemena to rebrand its DNSP business, in circumstances where any brand capital did not primarily result from our ownership of the DNSP assets.

This is very different to other sectors, such as Telstra in telecommunications, where brand capital is associated with a large, national network with over 10m retail customers. Yet, even in that market, the ACCC did not require Telstra to remove branding from its field workforce. Indeed, mobile providers that use the Telstra network commonly include a reference to the network over which they operate.

Similarly, the rail network operator, Aurizon Network, is permitted to use the group "Aurizon" branding for both above and below rail activities under its ring fencing arrangements.

Secondary branding is a standard feature of functional separation and other ring fencing models – e.g. In the UK, the ring fencing network entity 'Openreach' includes "a BT Group business". Secondary branding is also allowed in New Zealand and, indeed, the drafting amendments here have been taken directly from clause 37.1 of the Telecom NZ Separation Undertakings. Secondary branding is also a common feature of other network markets in Australia.

Finally, there is also no competitive justification for taking a stronger approach in relation to DNSPs. The 'contestable' markets which are currently developing in the energy sector are predominantly targeted by very significant energy retailers with stronger brands than DNSPs. In most cases, these strong retail brands were developed during periods of statutory monopoly and regulation of energy retailing. It would be perverse, in this context, for DNSPs to be prevented from referring to their group identities, where retailers are permitted to do so.

(c) A **DNSP** ~~cannot~~ may apply for a waiver of the obligations set out in clause 4.1.

All other non-discrimination regimes provide some mechanism for regulatory authorisation, exemption or waiver from non-discrimination principles in appropriate cases.

At a minimum, there needs to be scope for waivers to be granted by the AER, to allow for interactions between a DNSP and its related bodies corporate which promote efficient investment in new technology / services, or otherwise promote the long-term interests of consumers/NEO.

See examples from the CCA above in relation to both Part IIIA and Part XIC.

4.2 Specific obligations for functional separation

4.2.1 Physical separation/co-location

(a) A **DNSP** must operate independent and separate offices for the provision of ~~**direct control services**~~**distribution services** and regulated **transmission services** from the offices from which any of its ~~separate service providers or~~ **related bodies corporate** ~~provides~~promote or provide **non-distribution** ~~**other** energy related~~ **services** to customers. For example, a **DNSP** ~~must~~ may operate in a different building or on a separate floor of the same building (with security measures to prevent unauthorised access)~~, and~~in order to prevent staff from mixing in the normal course of undertaking work activities.

> The proposed requirement to operate using separate physical buildings would make the Guideline the most severe of any regulated industry in Australia – in circumstances where the "contestable" element of business activities, for network businesses, is minor. This compares with ring fencing of vertical integrated providers in telecommunications (Telstra) and rail (Aurizon) which do not require this and despite these companies undertaking significantly more unregulated activities and therefore facing greater incentives to discriminate. This is also likely to impose considerable cost and delay to implementation.
>
> A requirement therefore for "physical separation", should be sufficient. This could include both separate buildings or access-controlled restrictions on access to separate floors of buildings, as for these other regimes – see, for example, the reference to 'physically separate' in relation to Telstra's wholesale business unit in clause 8.3(c) of Telstra's SSU.

(b) The obligation set out in clause 4.2.1(a) is subject to the following exceptions:

(i) Office accommodation for staff of its ~~separate service providers or~~ **related bodies corporate** that do not provide **non-distribution** ~~energy-related~~ **services**; or

> To the extent that physical restrictions need to be applied, they should be limited to separating DNSP activities from those of related bodies corporate involved in the promotion or supply of contestable activities.
>
> For example, some entities (such as JEN) may acquire network-related services from a related entity that also supplies other unregulated energy services that are not contestable to other parts of its group – these should not be required to be physically separated. This approach to using 'shared services' has been accepted in most ring-fencing arrangements, including functional separation regimes in telecommunications (see, for example, clause 98 of the NZ functional separation model – under the Telecom NZ Separation Undertaking[10]).

(ii) Office accommodation for staff who are not directly involved in the provision of **direct control services** and regulated **transmission services** ~~and who therefore do not have access to information about electricity customers and services,~~ such as staff who ~~exclusively~~ perform corporate or similar support services, for example in payroll, insurance advisory, legal and regulatory advisory services, information technology and human resources; or

[10] See http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/previous-reviews-and-consultations/telecom-separation/documents-image-library/telecom-separation/telecom-separation-undertakings.pdf

All ring fencing regimes recognise that constraints should not limit shared or 'corporate head office' functions – which do not involve a risk of unfairly advantaging a contestable business, for example legal, finance, HR etc. This is evident in the ring fencing arrangements in the National Gas Law, which do not apply to the extent that a role is limited to only providing "technical, administrative, legal and accounting services". (Section 138(2) of the NGL).

In the telecoms context, see also Telstra's Structural Separation Undertaking[11] and the QCA final decision in relation to Aurizon Network's UT4 Access Undertaking[12] (at clause 3.1(e) and 3.6).

This recognition that staff separation should not extend to shared "head office" functions is appropriate because the concern which is intended to be addressed by staff separation is to ensure that staff involved in network or sales activities that could directly preference a related entity of a competitor (such as connection times, fault rectification or service quality) are separated from staff of those related entities. This is not the case with shared, corporate roles that only provide advice or support across the business and are not involved in day to day service delivery.

This means that any staff separation should be based on the nature of the role and not merely access to information. For example, an in-house lawyer may have access to a system containing confidential DNSP information and, at the same time, may advise other group entities (which may be involved on contestable activities) on a range of unrelated issues. In this case, provided that confidentiality rules are maintained (clause 4.3), the corporate function needs to be able to be performed across the group, without hiring a new lawyer to work specifically on matters related to the DNSP only.

(iii) Any arrangements agreed through the waiver process set out in Section [6] of this **Guideline**.

4.2.2 Staff sharing

(a) A **DNSP** must ensure that its staff directly involved in the provision of a **direct control service** or a regulated **transmission service** are not also directly involved in the provision or marketing of a ~~competitive or contestable~~ ~~**energy-related**~~ **non-distribution service** by a **related body corporate**.

DNSP staff will commonly provide network design and other advice to providers of related (contestable) services. It would be a perverse, and inconsistent with clause 6.17 of the NER, if the Guidelines permitted a DNSP to provide network operational support to unrelated suppliers and customers, but the DNSP was not able to provide equivalent support to its own related entities (because doing so was seen as becoming involved in the 'provision' of a contestable service).

To address uncertainty in this important area, JEN suggests alternative drafting to prevent DNSP staff becoming "directly involved" in the "promotion or supply" of contestable services. This change has been flowed through to other clauses below where the term 'provision of' had been used.

(b) The restriction set out in clause 4.2.2(a) does not apply to:

(i) A member of staff who is not directly involved in the ~~provision~~ promotion or supply of competitive or contestable ~~**energy**~~**electricity-related** services; or

This clause needs to apply to contestable or competitive electricity-related services, so as not to inadvertently capture participation of other group entities in supporting a DNSP in undertaking its regulated activities (as contemplated elsewhere in the Guidelines, and the AER's case studies).

[11] See: https://www.accc.gov.au/system/files/Telstra%E2%80%99s%20Structural%20Separation%20Undertaking%20%E2%80%93%20mark%20up%20of%20variations.pdf

[12] See http://www.qca.org.au/getattachment/443de6da-5f47-4bd5-acd2-5ddf5337e367/Appendix-A-(CLEAN)-UT4-Final-Decision-The.aspx

(ii) A member of staff who is a senior executive of both a **DNSP** and a **related body corporate**; or

(iii) A member of staff who is not directly involved in the provision of any **direct control services** or regulated **transmission services**~~, and who therefore do not have access to information about electricity customers and services,~~ such as staff who ~~exclusively~~ perform corporate or similar support services, for example in payroll, insurance advisory, legal and regulatory advisory services, information technology and human resources; or

See comment above in relation to clause 4.2.1(b)(ii).

(iv) A member of staff who is involved in the provision of ~~a **DNSP's**~~ **negotiated distribution services** and **unregulated distribution services**; or

(v) Any arrangements authorised through the waiver process set out in Section [6] of this **Guideline**.

(c) A **DNSP** must not remunerate or otherwise incentivise ~~its~~ staff directly involved in the provision of direct control services (other than a staff member who is a senior executive of ~~both~~ the **DNSP** ~~and a **related body corporate**~~) based on the financial performance of a **related body corporate** in a market for **non-distribution services**.

~~(c)~~(d) A **DNSP** may apply for a waiver of the obligation set out in clause 4.2.2 (c).

JEN accepts the need to ensure remuneration structures do not create incentives to discriminate in favour of related entities in contestable markets, but submits that this is achieved where the restriction is limited to staff directly involved in the provision of *direct control services* (who, by virtue of (a) above, will not also be involved in provision of contestable services). This change also aligns (c) with the drafting in clause 4.2.2(b)(iii).

This is preferable to the current drafting, which applies the restriction to all employees of the DNSP generally, with a limited carve-out for senior executives only. The limited carve-out would not pick up employees who are not senior executives but who may service the DNSP and other parts of the group (e.g. legal and HR staff).

There are also likely to be a range of group-wide performance incentives that are appropriate – such as those linked to customer outcomes.

4.3 Information access and disclosure

JEN queries whether most of clause 4.3 of the draft Guideline is necessary, given that at least 4.3.1 and 4.3.3 substantially duplicate existing confidentiality obligations – both contractual and under the NER.

If those provisions are retained, we suggest redrafting them to more closely align with standard confidentiality requirements. For example, we have modelled the suggested approach below on a combination of Telstra's SSU (for the definition of 'relevant confidential information[13]) and rule 136 of the National Gas Rules, for the use and disclosure restriction.

[13] See clause 10.1 for the definition of "Protected Information", as used in the context of the telecommunications ring fencing provisions applicable to Telstra.

4.3.1 Meaning of 'relevant confidential information'

In this clause 4.3, 'relevant confidential information' means:

(a) confidential information identifying a customer of the **DNSP** that was supplied by that customer and obtained by the **DNSP** for the purpose of, or in the course of, supplying **distribution services** to that customer;

(b) information that is commercially sensitive to a customer of the **DNSP** and which was supplied by that customer and obtained by the **DNSP** for the purpose of, or in the course of, supplying **distribution services** to that customer;

(c) confidential information and commercially sensitive information which is derived from information of the kind described in clauses 4.3.1(a) and 4.3.1(b), whether or not in an aggregate form, that would enable the identity of that customer to be ascertained; or

~~(a)~~(d) confidential information and commercially sensitive information of the kind described in clauses 4.3.1(a) and 4.3.1(b) which relates to a customer but which does not enable the identity of the customer to be ascertained only by reason of the name of the customer not being identified.

As noted in the explanatory note above, this clause has been adapted from the definition used for "Protected Information" under Telstra's SSU (at clause 10.1). This approach has been adopted so that it is clear up front what information is protected. An alternative model, used in the NGL, would be to have the AER specify types of information to be treated as confidential for the purposes of the Guidelines (see the NGR definition of 'confidential information' at rule 136).

This clause recognises that not all information "derived" by a DNSP from the supply of distribution services will have the necessary characteristics of confidentiality. It is important that the scope of information provisions are appropriately targeted, so that DNSPs are not prevented from undertaking standard corporate activities such as obtaining support services from related bodies corporate, or providing standard financial reporting.

4.3.2 Protection of information

~~A **DNSP** must keep information provided by a customer, prospective customer or service provider for **direct control services** and/or regulated **transmission services** confidential. The DNSP must only use this information for the purpose for which that information was provided.~~

(a) A **DNSP** must not:

(i) disclose **relevant confidential information**; or

(ii) use **relevant confidential information** for a purpose other than the purpose for which the information was given to the service provider.

(b) This clause does not, however, prevent:

(i) disclosure or use of **relevant confidential information** by the DNSP or its **related body corporate** for internal reporting purposes associated with the management of the DNSP or its related body corporate;

(ii) disclosure or use of **relevant confidential information** with the consent of the person to whom the information relates; or

(iii) disclosure or use of information that is in the public domain; or

(iv) disclosure or use of relevant confidential information:

(A) as required or authorised by or under the NEL, the NERL, or any related rules or procedures; or

(B) as required or authorised by law; or

(C) in order to comply with an order of a court or tribunal; or

~~(A)~~(D) as required by the listing rules of a recognised stock exchange.

This clause is modelled on rule 136 of the NGR.

4.3.3 Sharing of information

Where a **DNSP** ~~acquires information in providing **direct control services** and/or regulated **transmission services**, and~~ shares ~~**that**~~**relevant confidential information** (including information derived from that information) with a **related body corporate** in connection with the provision by it of **non-distribution services**, ~~it~~ the DNSP must (subject to any obligations of confidentiality owed to the customer) make ~~provide~~ access to that information (including the derived information) available on an equal basis with third parties competing with the **related body corporate**, in equivalent circumstances**.**

This clause, as it currently appears in the draft Guideline, creates significant practical difficulties.

We accept and agree that where a DNSP provides network or other information to a related entity which is operating in a contestable market, and which would have the effect of giving the related entity an unfair advantage in that market – equivalent information should be made available to other competitors in the same position.

However, as drafted, this clause prohibits any sharing of information at all with any related body corporate – unless equivalent information is made available to third parties. This includes de-identified information and highly aggregated information. The consequence of this is that it may make a range of interactions within corporate groups difficult. For example:

- A DNSP providing financial and other reporting on its performance to a parent entity – which would typically involve data 'derived' from other DNSP data.
- A DNSP making available information to a related entity so that it can supply it with (non-contestable) network services.

~~**4.3.4 Disclosure of information**~~

~~A **DNSP** must not disclose information acquired in providing **direct control services** or regulated **transmission services** (including information derived from that information) to any party, including a **related body corporate,** without obtaining the explicit informed consent of the relevant customers or prospective customers to whom the information relates.~~

As an alternative approach, the issue of consent has now been incorporated explicitly into the "use and disclosure" rules in 4.3.1 (now 4.3.2) above.

For the same reason as set out above in relation to clause 4.3.3, this clause as currently proposed would be unworkable and would duplicate~~s~~ existing confidentiality constraints. As drafted, it would be likely to prevent a DNSP from using information – including aggregate network data – to prepare internal accounting and financial reports for senior management; (b) provide information to obtain legal or regulatory advice; (c) prepare regulatory proposals; (c) share information during emergencies; and (d) order network services from a contractor, in each case without the '*explicit informed consent*' of the customer. To require 'explicit consent' for every type of potential intra-group and other disclosure is likely to require pages of consents to be included with every customer agreement.

~~4.3.5~~4.3.4 No waiver

A **DNSP** ~~cannot~~ may apply for a waiver of the obligations set out in this clause 4.3.

As noted above – waivers will be critical in relation to information security issues, given the complexity associated with implementation.

We note that this has been a key area where regulators have been required to provide flexibility in the telecommunications ring fencing arrangements in both Australia and the UK. For example, remediation processes by Telstra during 2015-16 associated with IT system fixes took 9-12 months to implement.

Implementation of IT and system implementation in the UK took several years and led to multiple exemptions and variations (including to extend the time for implementation).[14]

5 Application to large customers

Section 4 of the Guidelines does not apply to any **distribution service** or other service provided by a **DNSP** or a related body corporate to any of the following:

(a) a large customer;[15]

(b) a strata body corporate[16];

(c) a government agency;

(d) a private network operator; or

(e) any other customer that requests specialised network, connection or technical requirements,

where the relevant customer has chosen to deal directly with the DNSP and/or any related body corporate in respect of the relevant service(s) and has elected in writing to waive the requirements of section 4 of this Guideline.

This clause has been introduced to ensure that the Guideline is flexible enough to address a number of areas where, for a variety of reasons, including, cost, safety and network reliability, a large or sophisticated customer (such as a large body corporate) may request that a DNSP provide a range of services, either itself or in collaboration with other service providers (including related entities).

This is consistent with the AER's focus on customer choice. It is also consistent with the approach adopted to "large customers" under the draft Network Exemption Guideline, published in August 2016 (and the current exemption for large corporates under the 2013 Network Exemption Guideline (and the

[14] See http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/bt/var15.pdf

[15] This term has been used consistently with the current and draft Network Exemption Guidelines.

[16] This term could be defined in the same manner as the term "Body Corporate" under the draft Network Exemption Guidelines.

new draft Exemption Guideline). Indeed, we would suggest that consistent definitions are used for each of the categories in this clause with the terms as defined in the draft Guideline.

ATTACHMENT 2

REVIEW OF AER RING FENCING CASE STUDIES

Jemena supports the intent of the AER including practical case studies as part of the Draft Ring-Fencing Guideline Explanatory Statement (August 2016), to test and explain the intended operation of the Guideline.

However, we consider the case studies included in the Explanatory Statement reveal a number of deficiencies with the Guideline and are inconsistent in a number of respects, which highlight the need for further refinement and consultation before the Guidelines are finalised.

We set out a number of examples below:

Case Study 1 **DNSP regional depot** *Use of a single truck and crew (from a common regional depot) to undertake both regulated connection activities and unregulated metering activities.*	Jemena agrees that the logical operating model here would be for the DNSP to use a separate group entity to provide both the regulated network services as well as unregulated metering activities. Jemena also assumes, if this operating model is adopted (based on this case study), the AER would accept that staff of the separate corporate entity would not be subject to the 'staff sharing' rules in clause 4.2.2 of the draft Guideline – because they would not be DNSP staff, as appears to be the conclusion in this case study. While it may be possible to obtain a waiver for separate physical sites, this appears awkward and is likely to lead to considerable cost and administrative burden for DNSPs and the AER in such circumstances. Critically, waivers are also not available for the kind of information sharing that would be necessary to support this arrangement (under clause 4.3.2 and 4.3.3). For example: • The DNSP would need to share details of the customer with the related/contracted entity so that it could undertake the regulated connection work – does it also need to be prepared to share that customer information with third parties? • Is it necessary to get "explicit" informed consent to all of the intra-group arrangements that are put in place to support basic network services? What does explicit mean in this context? Why should this be needed, if it does not involve a DNSP providing information to entities engaged in competitive or contestable activities? JEN and (we understand) other DNSPs routinely use other group entities today to undertake these activities. ***What does this case study highlight?*** • This case study highlights how the draft Guideline, at present, is likely to produce practical outcomes that result in significant consumer frustration and detriment, as well as increased costs.

	• More clarity is needed around intra-group arrangements used to support DNSP regulated activities and how these are treated under the Guideline – and particularly the need for information sharing to support these service activities. • In other sectors, the focus has been on ensuring that contracts (or 'notional' contracts[17]) are in place between other group entities and the DNSP so that equivalence can be assessed. • We have proposed a number of amendments in our annotation of the Guideline (including waivers of some requirements) to avoid the ring fencing provisions inadvertently preventing these "business as usual" intra-group solutions from continuing to be undertaken, as contemplated (and encouraged) by the case study itself.
Case Study 2 **Outsourced, third party call centre** *A number of DNSPs use a common third party contractor to provide call centre support for regulated activities as well as providing support to other entities for non-regulated energy matters.*	Jemena agrees that it would not be appropriate for DNSP staff to be co-located (or otherwise shared) with the call centre. It would also be important to ensure that any confidentiality obligations were sufficient to ensure that there was not provision of customer information (or other DNSP confidential information) to third parties. However, we are not sure what the AER means by saying, "*The DNSP will need to make sure the call centre, as its representative, does not breach any of the ring-fencing obligations around discrimination …*"? It is not clear what incentive a third party contractor would have to breach the discrimination obligations – or which of those obligations are intended to apply in this case through contractual arrangements with the DNSP (as proposed by the AER). ***What does this case study highlight?*** • It is not clear how contractor relationships (either within a group or with third parties) are intended to be addressed in relation to the discrimination rules. This means it is not possible, at present, for a DNSP to understand how its service provision model needs to be amended (and/or contracts amended) to reflect the Guideline.
Case study 3 **Corporate services** *Sharing of corporate services across DNSP and other*	Jemena agrees that it is important, and consistent with standard practice in regulatory ring fencing regimes, for internal 'head office' corporate functions to be able to be shared – subject to appropriate confidentiality protections.[18] The concern with the current draft Guideline is the wide drafting of the information protection provisions in clause

[17] See this concept as used in relation to functional separation at section 72 of Schedule 1, Telecommunications Act 1997.

[18] See, for example, Telstra's Structural Separation Undertaking at clause 8 which does not include these kind of functions as any of the three types of 'boxed' activities (retail, wholesale and network). See also clause 3.6(c) of the QCA's final decision in relation to Aurizon Network's access undertaking (http://www.qca.org.au/getattachment/443de6da-5f47-4bd5-acd2-5ddf5337e367/Appendix-A-(CLEAN)-UT4-Final-Decision-The.aspx). See the concept of "Shared Services" in Schedule 2, Part 1 of the Telecom NZ Separation Undertakings.

group entities.	4.3.2 and 4.3.3. For example, would the prohibition on the sharing of information 'derived' from DNSP information prevent a DNSP from preparing standard internal accounts and reports for consideration at its corporate/head office level (i.e. by a parent entity)? Does the requirement for "explicit, informed consent" mean that end customers have to individually approve disclosure and use of information by corporate functions internally? ***What does this case study highlight?*** • Again, we think the current drafting of the information provisions undermines and is inconsistent with the potential solutions offered by this and other case studies.
Case study 4 **Isolated networks** *Unregulated work by a DNSP on high voltage network equipment not connected to the NEM*	This case study highlights potential consumer, network and public safety risks raised by the current draft Guideline – and the need to ensure that there is flexibility to enable customers to elect to deal with a DNSP outside of the strict requirements of the Guideline, if they choose to do so. However, as currently framed, the draft Guideline prevents this work being undertaken by a DNSP even where this is requested by a large corporate customer (or other customer with sophisticated requirements, such as a strata body corporate or government agency): • Under clause 3.1, the DNSP itself could not undertake the activity (which is not a 'network service').[19] There is currently no scope for seeking a waiver of this requirement. Even if a related entity undertook the work rather than the DNSP itself: • The related entity could not use shared staff or equipment of the kind necessary to deliver the service safely. • Query whether the DNSP could refer a customer requiring this kind of service to its related entity, given the restriction on 'promoting' the services provided by a related body corporate (in clause 4.1(v)). • Under clause 4.3, the DNSP could also not share the information required for the related entity to provide the service, unless the customer's information was made available to others. ***What does this case study highlight?*** • The draft Guideline as currently framed has the potential to give rise to customer and safety risks – and also does not adequately contemplate the position of large and sophisticated customers, which are in a position to choose who they deal with for high voltage and network solutions. We recommend (in our annotated Guideline

[19] While this is subject to a materiality exception ($500,000) there is a strong likelihood that in most cases this would not apply, because if any material volume of this work is undertaken this amount would be exceeded.

	extract in Attachment 1) that an explicit carve out be included for large and sophisticated customers, that elect to waive the requirements of the Guideline in order to deal directly with a DNSP.
Cast study 5 **IT infrastructure** *Shared IT systems*	Jemena recognises the importance of IT system security as part of the process of implementing any ring fencing arrangements. While Jemena does not raise any particular objections to the approach in the case study, the following observations are made: • The implementation timeline proposed is unrealistic where complex IT builds or modifications are required (1 December 2016). • The costs of implementation around IT and system modifications can also be very substantial – we understand that the costs of implementing functional separation (most of which were system and IT costs) was reported to be GBP153m and the cost in New Zealand was estimated at NZ$200m. Telstra has estimated that the costs of implementing UK-style functional separation in Australia would have been $800-$1 billion.[20]
Case studies 6 and 7 **High load escorts and Watchman lights** *The unregulated tasks undertaken by DNSPs which may be asked to plan and escort a vehicle along a street where dangerous contact with wiring is possible.*	This case study concludes, "*As a result, a DNSP providing this service is not affected by the Draft Guideline*." We consider this is incorrect for the same reasons set out above in relation to isolated network activities. ***What does this case study highlight?*** • The Guideline as currently framed would not allow a DNSP to undertake these kind of important network-related distribution activities. This could give rise to network reliability and safety risks. • The restriction in clause 3.1 (which is limited to "network services") is too narrow and simplistic. In the annotated Guideline, Jemena submits that this restriction should be replaced by a reference to "distribution services", which is likely to capture these kind of activities. • The information provisions also need to contemplate these kind of unregulated arrangements being undertaken by DNSPs, or by related entities retained by DNSPs.
Case studies 8 and 15 **Smart meters and contestable**	The better alternative is to ensure that where a DNSP provides network-related support to a related entity or assists it with the supply (and or installation and servicing) of smart meters, the DNSP is prepared to offer network support to other players. The risk is that otherwise there will

[20] Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, Explanatory Memorandum, at pages 31-32.

connections *DNSP staff may not be involved in the supply of smart meters or contestable connections*	be no incentive for DNSPs to support the development of this new and exciting market. ***What does this case study highlight?*** • The draft Guideline currently seeks to exclude DNSPs from participating – or even supporting – their related entities in other markets. This will hinder the development of competition, to the detriment of consumers. • We think that key elements of the draft Guideline, and particularly the non-discrimination provisions in 4.1, should be reframed around ensuring that DNSPs provide non-discriminatory network support to all downstream market participants, rather than being focused on preventing (or incentivising) DNSP's from participating at all.
Case study 9 **Connection and metering** *Supply of regulated metering and connections should be unaffected.*	Jemena notes that there remains some uncertainty due to differences used in terminology (i.e. the draft Guideline appears to have been prepared on the assumption that standard connection services and alternative control services would always fall within the scope of 'network services' as defined under the NER – but this is not necessarily the case). This case study does not recognise the potential for the provision of these kind of regulated activities to be undertaken by other related entities for the DNSP. Currently, the breadth of the information provisions in the draft Guideline is likely to limit the continued use of these kind of structures, which the AER has indicated it supports (see our comments above in relation to case study 1). As such, networks businesses could be faced with potentially significant costs to restructure operations.
Case study 10 **Supply of both type 4 and type 6 meters** *Supply of both types of meters by a single entity*	Jemena agrees that it is evidently impractical and inefficient to require a DNSP to establish two entirely separate businesses in order to simply be able to supply two different meter types. This is also likely to give rise to a terrible customer experience. Jemena also agrees that the logical and efficient way to deal with this is to allow a common network services entity to support both the DNSP (regulated meter) business as well as the contestable (smart meter) business, as proposed by the AER in the case study. For this to be feasible, however, it would need to be clear in the draft Guideline that the 'staff sharing' rules in clause 4.2.2 do not apply to staff in a shared 'services entity' in these circumstances. Under clause 4.3, as currently drafted, the DNSP could not share the customer information required for the other entity to provide the service, unless the customer's information was made available to others.

	What does this case study highlight? • While the case study appears to accept the benefit of shared services being supplied by a related entity – this is not made clear in the drafting of the staff sharing or information access and disclosure provisions of the draft Guideline, which appear to place considerable limitations on this structure.
Case study 11 **Operational support** *DNSP provides operational support to a related entity (e.g. a generator)*	It must be the case that a DNSP can provide operational support to related entities – in the same way as a DNSP provides support to third parties. This case study highlights the problem caused by the wide drafting in clause 4.2.2. DNSP staff that help users, generators and other stakeholders with network planning and design support may all be said (in a general sense) to be '*involved in the provision … of a competitive or contestable energy-related service*' (which is not a network service). It would be perverse if DNSP staff were permitted to provide this kind of advice and operational support to third parties, but could not provide equivalent support to its own related entities, if requested. Jemena submits that the competition risk that is being targeted here requires a reframing of the staff sharing principle in clause 4.2.2. Rather than preventing staff of a DNSP from being involved in providing support for <u>any</u> activities undertaken by a related entity in related markets – it should be focused on ensuring that any services supplied by DNSP staff to support downstream markets are made available to all others on a non-discriminatory basis. ***What does this case study highlight?*** • Both clauses 4.1 and 4.2.2 are drafted broadly and risk preventing DNSPs and their staff from providing important operational and network support for participants in downstream markets. Both should be reframed around an 'equivalence of input' approach.
Case study 12 **Emergency response** *Sharing of staff between DNSP to respond to emergency circumstances*	It has already been noted that the term 'distribution services' in this case study is not consistent with the term used in clause 3.1 ('network services'). Even the term 'network services' has different meanings across the NER and NEL. We have suggested that "distribution services" be used in the Guideline to make clear that this kind of important collaboration between DNSPs can continue. There is a question of whether the sharing of information which would inevitably form part of these kind of arrangements also requires "explicit informed consent" – under clause 4.3.3?
Case study 13 **Training of staff** *Use of DNSP staff to*	We note, again, that this case study assumes that the limitation on DNSP activities applies to 'distribution services' – when it applies under clause 3.1 to the substantially

train others (e.g. accreditation)	narrower concept of a 'network service'. This case study highlights the extent to which removal of DNSPs entirely from non-regulated activities may well have unintended consequences, including potentially unsafe outcomes. It is in the public and consumer interest for DNSP staff to be able to train other parties about matters that relate to safe work around the network. Requiring training courses to be provided through a related body corporate, in this regard, imposes potential additional costs for it would seem little benefit. The focus of the Guideline should not be on preventing DNSPs from undertaking <u>any</u> non-network activities. Rather, the Guidelines should ensure that services are supplied on a non-discriminatory basis to all third parties (whether or not related to the DNSP). In this case, if a DNSP provides training courses or accreditation to staff in related entities, it should make that training and accreditation available on a non-discriminatory basis to third parties – including competitors of its related entities. ***What does this case study highlight?*** • The draft Guideline, as currently framed, provides a potentially costly outcome where staff involved in training others about safe working in the network must be employed by a separate entity. These "training activities" are not contestable services – they are simply unregulated ones. There is a clear public benefit in ensuring appropriate and safe accreditation and the DNSP is the obvious and appropriate entity to do so. • Clauses 4.1 and 4.2 need to be reframed around ensuring that DNSPs provide <u>non-discriminatory and equivalent</u> support for all downstream participants – rather than excluding them in a blanket way from all unregulated activities.
Case study 14 **Pole and duct rental** *Rental of space on poles to third parties (e.g. fibre owners)*	This case study highlights the risk that the draft Guideline may cut across the role that is intended to be played by the Shared Asset Guidelines. It is clearly preferable for DNSPs to seek to maximise the use of, and revenues associated with, the utilisation of their regulated distribution network assets. Doing so can then reduce network costs for consumers – as occurs through the discount applied to reflect revenues derived from shared assets. However, the draft Guideline cuts across and complicates this regime. To the extent that 'pole and duct rental' does not fall within the scope of "network services", it could not be undertaken by the DNSP at all. Does this mean that the DNSP would be required to let space on its poles/ducts to a related entity so that this could then be sublet to third parties? How would this then be treated under the Shared Asset Guidelines?

	Again, this case study highlights the problems caused when the Guideline attempts to prevent a DNSP from undertaking any unregulated activity. ***What does this case study highlight?*** • The draft Guideline tries to retrofit a 'structural' outcome – where DNSPs do not engage in any non-regulated network services, even where those services are not contestable (such as rental of poles and ducts) and where there are strong consumer benefits associated with the DNSP being incentivised to continue to supply those services (in this case, to lower network charges and reduce duplication of network assets). In most cases, such as pole rental, this is likely to be resolved through use of the term "distribution service" – however we suggest that it may also suggest that a waiver mechanism is required so that certainty can be obtained, if required.
Case study 16 **Solar PV** *DNSP having solar PV assets*	• Jemena agrees that it would be inappropriate for a DNSP to acquire large or substantial solar PV assets, given that these operate in a contestable downstream market. • If the assets are limited to a small PV rooftop solar installation on a depot roof – then this should be able to be dealt with through some form of *de minimis* exception. ***What does this case study highlight?*** • We suggest the AER consider an exception for "trivial" or "de minimis" departures from the Guidelines, consistent with other regimes.[21]

[21] See, for example, clause 1(b), Schedule 11 of Telstra's Structural Separation Undertaking: *"Telstra will not be in breach … in circumstances where Telstra fails to comply with a requirement … and the failure to do so is trivial"*.