national electrical and communications association

Electricity ring-fencing guideline 2016

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Mr. Chris Pattas
General Manager, Network Pricing, Policy and Compliance Branch
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Dear Chris,

Thank you for the opportunity to provide input into the formulation of the Electricity Distribution Ring-fencing Guideline.

The National Electrical and Communications Association (NECA) is the peak industry body for Australia's electrical and communications contracting industry that employs more than 145,000 workers with an annual turnover in excess of $23 billion.

We are a key component of the nation's economic fabric. Our 4,000 member businesses operate throughout Australia, across the building, infrastructure and commercial construction sectors.

NECA represents the electrical and communications contracting industry across all states and territories to federal and state governments, regulators and principle industry bodies such as the Australian Chamber of Commerce and Industry (ACCI) and Standards Australia.

Additionally, NECA maintains responsibility for the employment, training and skilling of more than 4,000 current and future electricians and contractors through our Group Training and Registered Training Organisations.

NECA is supportive of the approach outlined by the Australian Electricity Regulator (AER) in the draft Ring-Fencing Guideline, which we consider will enhance the rigour and transparency of the ring-fencing of DNSPs and their related service providers.

NECA believes that the AER should also consider the following issues.

For clarity, the following terms are used in the remainder of this document:

- *DNSP Monopoly Business* to describe that part of the DNSP business which owns the assets and provides regulated, monopoly services;
- *DNSP Commercial Business* to describe that part of the DNSP business that competes openly in the marketplace; which can include contestable works as an ASP or other private works; and
- *ASP* to describe a private Accredited Service Provider but can extend to any third party company that is competing against the DNSP Commercial Business in the marketplace.

Unfair access to procurement contracts and stock

NECA believes that the Ring-Fencing Guideline does not adequately address the issue of material purchasing and the unfair advantage it may bring to the DNSP Commercial Business.

The DNSP Monopoly Business has long, well established procurement departments that support its monopoly activities of capital, maintenance and breakdown works. As a result of significant volume and the low risk of such a contract, the DNSP Monopoly Business obtains very competitive pricing. Such pricing would provide an unfair advantage to the DNSP Commercial Business if it is allowed to purchase materials (and other services) off the back of these procurement contracts.

The DNSP Monopoly Business controls the approval process of materials and typically link product approval to success in the tendering process. In some cases, only one supplier is approved and previous suppliers are disapproved. This creates a monopoly

which restricts an ASP's ability to choose alternate manufacturers and can disrupt an ASP's existing supply chain. Such actions provide an unfair advantage to the DNSP Commercial Business and can be exploited to the detriment of ASPs.

The successful supplier favours the DNSP in order to maintain approvals and its preferred supplier status; and the supplier does not discriminate between the DNSP Monopoly Business and the DNS Commercial Business. Examples of favouritism include providing priority for manufacturing or material delivery to a DNSP at the expense of or delay to an ASP.

Where the DNSP Monopoly Business changes standards or removes the approval of an item, the DNSP is still able to use existing stock or have commercial arrangements in place to be reimbursed by the supplier for non-conforming stock. An ASP is not able to run down its stock but must treat such stock as obsolete, thus incurring financial penalty.

Further, as many DNSP approvals create a monopoly of supply, ASPs are in weakened bargaining position and are unable to negotiate as favourable commercial arrangements with suppliers. This provides an unfair advantage to the DNSP Commercial Business.

DNSPs hold significant stock to support their monopoly activities of capital, maintenance and breakdown works. The DNSP Commercial Business can take advantage of this "availability of stock" compared to an ASP who may have to wait up to 12 weeks for delivery of certain items. This immediate availability provides the DNSP Commercial Business with an unfair advantage.

NECA submits that the:

- DNSP Commercial Business should not be able to take advantage of the material supply or other service contracts negotiated by the DNSP Monopoly Business;
- DNSP Commercial Business should not have access to the stock held by the DNSP Monopoly Business; and
- DNSP Monopoly Business have a policy that more than one supplier of a product be approved.

Confusion and perceptions in the marketplace due to branding

NECA believes that the Ring-Fencing Guideline does not adequately address the issue of branding, which can create confusion in the marketplace and can fuel the perception that the DNSP Commercial Business has access to preferential knowledge and treatment; therefore providing an unfair advantage to the DNSP Commercial Business.

A customer for contestable services may approach a DNSP seeking advice and direction as the owner of the electrical network. In response, the contestable customer may think they are communicating with the DNSP Monopoly Business when they are in fact communicating with the DNSP Commercial Business. The use of the same DNSP brand name, the same premises and the same telephone switchboard adds confusion and is misleading. This provides an unfair advantage to the DNSP Commercial Business who is able to obtain project leads that they would not normally have; and the DNSP Commercial Business may provide misdirected advice to the contestable client for its own advantage.

A contestable customer (and supplier) will in all likelihood have the perception that the DNSP Commercial Business and the DNSP Monopoly Business are one and the same company. They would therefore assume that if they contract with a DNSP for contestable work, the DNSP will be able to do things better than an ASP. Examples of "better" includes being able to negotiate better outcomes, the ability to fast track a project; and the ability to source materials quicker.

NECA points out that when the DNSPs sold off their retail businesses, the DNSPs were forced to change their branding in order to avoid confusion. The same issue exists between the DNSP Monopoly Business and the DNSP Commercial Business. If the DNSP insists that it should be able to use the same or similar branding for its DNSP Commercial Business, then ASPs should also be provided with the same opportunity for branding of their business. Refusal by the DNSP would acknowledge that the branding would provide a competitive advantage.

NECA submits that the DNSP Commercial Business should:

- Have distinctly different branding compared to the DNSP Monopoly Business;

- Not be associated with the branding of the DNSP Monopoly Business and vice-versa; and
- Have a separate phone number and switchboard to avoid transfers between businesses.

Providing subsidies through uncompetitive tendering practices

NECA believes that the Ring-Fencing Guideline does not adequately address cross subsidies that can occur through uncompetitive tendering practices.

The DNSP Commercial Business may provide services to the DNSP Monopoly Business. Services may include the provision of labour, materials, plant, vehicles, design, construction or maintenance. Unless such services have been openly and transparently tendered in the marketplace, there is the very real perception that such work would be cross subsidising the DNSP Commercial Business. In fact, such work may make the DNSP Commercial Business viable regardless of its success in undertaking ASP or private works.

NECA submits that any works provided or payments made by the DNSP Monopoly Business to the DNSP Commercial Business:

- Be no more than $500,000 per annum as suggested in the Ring-Fencing Guideline;
- Must be in accordance with a written contract that has been openly and transparently tendered;
- Have the same contract conditions imposed and enforced as if an ASP provided such services;
- Be entered into a publicly available tender register; and
- Be subject to probity and third party audit with mandatory reporting to the AER.

Enforcement

NECA understands that the Ring-Fencing Guidelines proposes to use the court system as a mechanism of enforcement in the event of a breach. NECA seeks clarity on how this would work. Specifically:

- Are the Ring-Fencing Guidelines enforceable or are the National Electricity Rules enforceable? It is understood that the Guideline has greater detail on the mechanisms for ring-fencing, but it is only a guideline. Does the Guideline carry the same weight as the Rules?
- Who will bring the breach to court? Can this only be done by the AER or can anyone bring the breach to court?
- Will the AER have the resources and funding to proactively investigate and prosecute any breaches?
- The DNSP can damage an ASP and the market but there is no damage specifically to the AER. So how will damages be applied by the court and the AER? As an example, the DNSP may unfairly win a project for $10 million dollars that has deprived the market of such work, but damages cannot be attributable to any one ASP. Will the DNSP be allowed to complete the works? Will damages be applied to the DNSP?

Due the lack of clarity with enforcement and the difficulty in quantifying damages as a result of a breach through a civil court, NECA submits that the AER should investigate a penalty mechanism for breaches rather than simply relying on a court a judgment.

Asset Relocation Projects should be contestable

Although strictly speaking possibly beyond the scope of the Guideline, NECA is concerned that we should be able to provide certainty to our ASP members in relation to the contestability of asset relocation projects.

Asset relocation projects involve the relocation or undergrounding of electrical assets; this often includes the upgrading and improvement of public lighting.

Reasons why asset relocation projects are undertaken include:

- To accommodate road construction works;

- To improve the visual amenity of an area. The need for such projects is typically driven by local councils or other government authorities; and
- To remove obstructing assets from within or around a site.

Currently in NSW, DNSPs have some discretion in relation to the contestability of asset relocations, i.e. whether ASPs can offer to undertake this work.

As a result, there is inconsistency in each DNSP's approach to the contestability of planned recoverable work and this has led to DNSPs exercising this discretion in different ways.

This means that the recoverable work that is contestable is different across the networks in NSW, leading to confusion and complexity for customers and ASPs. It also means that there may be some recoverable work that ought to be contestable that customers cannot ask an ASP to undertake on a particular network. Where this is the case, it results in a lessening of competition, resulting in increased costs to consumers.

Section 5.3 Recoverable Work of the NSW Government document "Review of contestable services on the New South Wales electricity network – Final Report" of July 2010 describes the need to make more work contestable thus:

> *Recoverable work is contestable at a DNSP's discretion. During consultation, DNSPs said that where a customer pays for work it should be contestable, except if there is a risk to the network. The review supports this view as it ensures the maximum level of competition on the network, leading to lower costs for consumers and efficiency on the network, as well as making sure that the safety and reliability of the network is maintained. The review recognises that emergency recoverable work (for example, work to reinstate a power line after it has been damaged in a car accident) should remain a monopoly service provided by DNSPs.*
>
> *Currently, there is inconsistency in each DNSP's approach to the contestability of planned recoverable work and this has led to DNSPs exercising discretion in different ways. This means that the recoverable work that is contestable is different across the*

networks, leading to confusion and complexity for customers and ASPs. It also means that there may be some recoverable work that ought to be contestable that customers cannot ask an ASP to undertake on a particular network.

Options for resolving this problem include mandating contestability of planned recoverable work, prescribing contestability for certain types of work, or requiring transparent justification by DNSPs if they determine that recoverable work is a monopoly service.

Mandating contestability could risk safety and reliability of the network as it would limit a DNSP's control of their network. Prescribing the types of recoverable work that are contestable would require rigid definitions that would not be adaptable to changes in the marketplace or in work or work practices.

Requiring DNSPs to justify a decision that planned recoverable work is a monopoly service is a preferable approach as it would place pressure on DNSPs to classify recoverable work as contestable while preserving a DNSP's ability to do high risk work. It would redress some of the imbalance in the relationship between DNSPs who have all the relevant information and have the power to make a decision based on that information, and ASPs.

The Government should require that all planned user funded work on the network be contestable unless a DNSP justifies a decision that the work be a monopoly service provided by the DNSP. This approach recognises there may be times when safety and reliability considerations preclude the work being undertaken by a third party. It also introduces transparency and means that an ASP has access to information about a DNSP's decision where recoverable work is not considered contestable. This, in turn, reduces the likelihood that a DNSP applies its discretion inappropriately.

The review considered whether it was appropriate to include an appeal mechanism to allow customers to challenge a DNSP's decision that particular work was a monopoly service. However, as the asset owner, the DNSP should have ultimate control over what is built on the network and how that work is undertaken. An

appeal mechanism would pass network decisions to another body, which would undermine the DNSP's role as owner and manager of the asset. Increasing transparency around DNSP decision making is a more effective way to ensure decisions are reasonable while protecting network safety and integrity.

If asset relocations were made non-contestable at the discretion of a DNSP:

- The DNSPs would have an unregulated, monopolised source of revenue that could be exploited to the detriment of the NSW government, private developers, home owners and the community; and
- Many developments require the relocation of assets along with sub-division work and the connection of street lighting. Part of the work would be non-contestable (asset relocation) whilst other parts are contestable (sub-division work and street lighting). It is often impractical to split the design and construction works between non-contestable and contestable, hence the DNSPs have the natural advantage in undertaking this work; even where asset relocation works is as low as 10 per cent of the total project cost. Further, because non-contestable asset relocations are often associated with a larger project, it allows the DNSP to understand the entire project, build relationships with the client and structure their pricing to ensure they win all project stages on the back of them undertaking the non-contestable asset relocation stage.

NECA therefore advocates that all connection services and planned recoverable works should be contestable. If a DNSP considers work that a customer pays for is non-contestable, it should be required to justify this decision on request, including any determination of cost.

This would have the effect of enhancing the predictability and promoting confidence in the market for asset relocations, which aligns with the COAG Best Practice Regulation guide cited on page three of the Guideline's explanatory statement.

The AER should give consideration to how this might be achieved.

I would be happy to discuss further and can be contacted on telephone: 02 9439 8523 or email: suresh.manickam@neca.asn.au

Yours faithfully

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