

22 September 2016



Chris Pattas
General Manager
Network Pricing, Policy and Compliance Branch
Australian Energy Regulator

By email: Ringfencingguideline2016@aer.gov.au

Dear Mr Pattas

AER Draft Electricity Ring-fencing Guideline 2016

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to comment on the Australian Energy Regulator's (AER) *Draft Electricity Ring-Fencing Guideline 2016*.¹ PIAC contributed to a joint submission from consumer organisations² in response to the AER's initial Issues Paper. . As stated in our previous submission, PIAC considers it critical that the overriding objective and outcome of ring-fencing or related reform in the NEM should be to expand the reach of competitive markets for contestable services and to restrict the reach of monopoly regulated businesses. The challenge, as recognised by the AER, is to do this in a way that does not overly restrict networks from investing in or facilitating the rollout of energy storage on either side of the meter, especially where, such as at the edge of the grid where a competitive market may never develop, the network may be best placed to invest in storage.

PIAC remains concerned that there is no evidence that ring-fencing arrangements provide new entrants with an adequate level of protection from the damaging market power of an incumbent, without the supplementary actions needed to create a level playing field. In such a context, including where structural separation cannot currently be enacted, PIAC is of the view that ring-fencing needs to be as robust as possible, and in particular should contain strong measures around monitoring, transparency and compliance, so that consumers can have confidence that the guideline is being strongly enforced.

PIAC's recommendations to strengthen the guideline are set out below.

Waivers

PIAC recommends that section 5.2.3 be strengthened. The Explanatory Statement states that waivers will not be available for legal separation, cost allocation and information protection.³ The draft guideline limits scope for waivers to functional separation of either accommodation and/or employees. When a waiver application has potentially significant implications for the provision of competitive services, the draft guideline specifies that the AER will undertake formal consultation and publish the reasons for its decision.

¹ AER, *Draft Ring-fencing Guideline*, August 2016, available online at <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/electricity-ringfencing-guideline-2016>

² Total Environment Centre et al, *AER Electricity Ring-Fencing Guideline Preliminary positions paper Small consumer groups' submission*, 30 May 2016

³ AER, *Draft Ring Fencing Guidelines Explanatory Paper*, August 2016, available online: <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/electricity-ringfencing-guideline-2016>, p 46

PIAC welcomes the clarification and simplification of the elements that can be subject to a ring-fencing waiver. However, we are concerned that section 5.2.3 appears to give the AER broad discretion not to consult on waiver applications, or even publicise that they have been received. The Explanatory Statement states that, for minor matters, the AER 'is likely to adopt a simple approval process with no or limited public consultation'. It explains that 'matters it considers likely to attract stakeholder interest, or with potentially significant impacts on the provision of contestable or competitive energy services, we will conduct formal consultation and publish the reasons for our decision'.⁴

It is unclear on what basis the AER will make its assessment of what is a minor matter and what is likely to attract stakeholder interest. There needs to be greater transparency in setting and publicising any such criteria. The AER should be required to publicise the fact that applications have been received, as well as publicising that they have been granted and the reasons for the grant.

While we understand that the AER's approach is aimed at allowing itself the flexibility to consider and decide minor matters efficiently, this should not undermine transparency. Transparency in the process is key to consumers having confidence that the guideline is being strongly enforced.

Staff sharing

Section 4.2.2 allows for the sharing of senior staff between a distributed network service provider and a related body corporate. The AER explains that it may be appropriate for a chief executive and a small number of other senior executives to work for both a DNSP and a related body corporate, but that this does not excuse these senior executives from complying with the rest of the non-discrimination obligations in the draft guideline, or from the competitive advantage restrictions.⁵ While PIAC understands that it may be practicality that is guiding this decision, neither the rationale nor the benefit to consumers arising out of this exception is made explicit by the AER.

We agree with the AER's distinction between those performing exclusively corporate roles, and those with day-to-day access to information acquired in directly providing regulated network services. However, its exception regarding senior executives does not appear to fit clearly within this distinction.

The AER considers that its exceptions are warranted, given the likely low risk of (and incentives for) assisting a related body corporate or a service provider to gain an inappropriate competitive advantage in the market for competitive or contestable energy-related services. However, it seems reasonable to assume that senior staff may have an incentive to use information from their work with the DNSP to advantage a related body corporate, and that they would be privy to the information in question.

We seek clarification from the AER on this point and an explanation of the evidence on which it relies in claiming that the risk and incentives for senior executive staff assisting a related body corporate are low.

⁴ AER, *Draft Ring Fencing Guidelines Explanatory Paper*, August 2016, available online: <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/electricity-ringfencing-guideline-2016>, p 48

⁵ Ibid at 37

Recommendations

PIAC recommends that the AER:

- Clarify the basis on which it will decide what is a minor matter and what is a matter appropriate for consultation, and strengthen section 5.2.3 to reflect this.
- Clarify the basis of its decision to exclude senior executives from staff sharing provisions.

If you would like to discuss PIAC's submission further, please contact Tina Jelenic, Senior Policy Officer, Energy + Water Consumers' Advocacy Program, on (02) 8898 6522 or by email at tjelenic@piac.asn.au.

Yours sincerely



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