

# Decision

## Distribution ring-fencing waiver for Power and Water Corporation

May 2022

© Commonwealth of Australia 2022

This work is copyright. In addition to any use permitted under the Copyright Act 1968 all material contained within this work is provided under a Creative Commons Attributions 3.0 Australia licence with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 3.0 AU licence.

Inquiries about this publication should be addressed to:

Australian Energy Regulator

GPO Box 520

Melbourne VIC 3001

Tel: 1300 585 165

AER Reference: 13654662.1

## Shortened forms

Shortened Form	Extended Form
AER	Australian Energy Regulator
DNSP	Distribution Network Service Provider
NEM	National Electricity Market
NER	National Electricity Rules
NEO	National Electricity Objective
NT	Northern Territory

# Contents

<b>1</b>	<b>Executive summary</b> .....	<b>1</b>
<b>2</b>	<b>Background</b> .....	<b>2</b>
2.1	What is ring-fencing?.....	2
2.2	Application of the Distribution Ring-Fencing Guideline in the NT .....	2
2.3	Power and Water Corporation’s application.....	2
<b>3</b>	<b>Assessment</b> .....	<b>4</b>
3.1	National Electricity Objective and the potential for cross subsidisation and discrimination.....	4
3.3	Public consultation .....	4
3.4	Conclusion .....	5
<b>4</b>	<b>Decision</b> .....	<b>6</b>

# 1 Executive summary

On 29 November 2021, Power and Water Corporation wrote to the Australian Energy Regulator requesting a waiver from three clauses of the Distribution Ring-Fencing Guideline (the Guideline):

- Clause 4.2.4: office and staff registers
- Clause 4.4.1(a): conduct of service providers (as far as it relates to Power and Water Corporation's existing contracts which may be renewed or varied)
- Clause 6.2.3: regulated stand-alone power systems reporting.

Power and Water Corporation identified these three clauses as being practically difficult to achieve full compliance. For clauses 4.2.4 and 6.2.3, this is largely because, while ring-fencing applies to Power and Water Corporation its application has been modified by clause 6.17.1B of the Northern Territory National Electricity Rules (NT NER). Specifically, under the NT modified Guideline, restrictions relating to legal separation, physical separation, staff sharing, and cross promotion do not apply (clauses 3.1, 4.2.1, 4.2.2 and 4.2.3 respectively). However, Power and Water currently still has to comply with the publication and reporting clauses 4.2.4 and 6.2.3.

The AER has the power to grant waivers in respect to clauses 4.2.4 and 4.4.1(a) of the Guideline. The Guideline does not provide the power to the AER to grant a waiver in respect to clause 6.2.3. For that reason, a waiver for clause 6.2.3 is not considered in this decision document.

Regarding clauses 4.2.4 and 4.4.1(a): on balance, we consider that if we do not waive Power and Water Corporation's obligation to comply with these clauses, the potential compliance costs outweigh any benefit to consumers from requiring compliance with these obligations.

Our decision is to grant a waiver to Power and Water Corporation for clauses 4.2.4 and 4.4.1(a).

## 2 Background

### 2.1 What is ring-fencing?

Ring-fencing, in relation to distribution, refers to the separation of direct control services provided by a Distribution Network Service Provider (DNSP) from the provision of unregulated or contestable services by DNSPs, or an affiliated entity. The Distribution Ring-Fencing Guideline—made under rule 6.17 of the National Electricity Rules (NER)—sets out obligations that apply to a DNSP should it wish to provide unregulated or contestable services. These obligations aim to benefit electricity consumers by addressing the potential risk of:

- consumers paying more than they should for regulated network direct control services because a DNSP cross-subsidises the cost of its unregulated services by attributing those costs to its direct control services; and
- DNSPs discriminating in contestable markets in favour of their affiliated entities. This may diminish the benefits created by a competitive market, such as downward pressure on prices in the long-term, and greater consumer choice.

Ring-fencing aims to drive effective competition where feasible, open new markets to competition, and support effective regulation where competition is not feasible.

The Guideline recognises that strict adherence to ring-fencing obligations might, in some circumstances, result in outcomes that are not in the long-term interest of consumers. Therefore, clause 5 makes provision for the AER to grant waivers for specific obligations under the Guideline. We consider that waivers are not to form part of a business-as-usual approach but may be considered where alternatives are unsuitable.

### 2.2 Application of the Distribution Ring-Fencing Guideline in the NT

The application of the National Electricity Rules (the NER) is modified for the Northern Territory. This is done through the Northern Territory's adoption of the NER under its own legislation, the [Northern Territory National Electricity Rules \(NT NER\)](#), which amend some parts of the national rules for the NT.

The application of the AER's ring-fencing Guideline to Power and Water Corporation is modified by clause 6.17.1B of the NT NER. Some areas modified include legal separation, office sharing, staff sharing, and branding and cross promotion (clauses 3.1, 4.2.1, 4.2.2 and 4.2.3 respectively) and as a result Power and Water Corporation does not need to comply with these obligations.

However, while clause 6.17.1B of the NT NER removes the requirements relating to office and staff sharing it does not remove the requirements relating to publishing office and staff sharing registers (clause 4.2.4 of the Guideline).

### 2.3 Power and Water Corporation's application

Power and Water Corporation has applied for a waiver from the following clauses of the Guideline:

- Clause 4.2.4 – requirement to maintain office and staff sharing registers: Power and Water Corporation is not subject to office or staff sharing restrictions under the NT modified Guideline. Consequently, Power and Water Corporation is seeking a waiver for the current regulatory period (until 30 June 2024) from having to publish and maintain office and staff registers on its website. A waiver would address this inconsistency.
- Clause 4.4.1(a) – conduct of service providers: additional time is sought to allow Power and Water Corporation to modify existing contracts with service providers so that all contracts are compliant with the Guideline. A waiver is sought until 31 December 2022.
- Clause 6.2.3 – regulated Stand-Alone Power Systems (SAPS) reporting requirements: this is a new requirement imposed under version 3 of the Guideline. Operating in the NT under the modified Guideline, Power and Water Corporation is not subject to legal separation restrictions around SAPS ownership and consider that it would be onerous to report detailed information where no restrictions apply and where there is unlikely to be any benefits to consumers and the market from the reporting.

- **Note:** while the AER has the power to grant waivers in respect to clauses 4.2.4 and 4.4.1(a) the Guideline does not provide the power to grant a waiver in respect to clause 6.2.3. For that reason, the waiver for clause 6.2.3 is not considered in this decision document.

## 3 Assessment

In assessing whether to grant a ring-fencing class waiver, the AER must have regard to (clause 5.3.2(a) of the Guideline):

- i. The National Electricity Objective (NEO);
- ii. The potential for cross-subsidisation and discrimination if the waiver is granted or refused; and
- iii. Whether the benefit, or likely benefit, to electricity consumers of the DNSP complying with the obligations (including any benefit, or likely benefit, from increased competition) would be outweighed by the cost to the DNSP of complying with that obligation.<sup>1</sup>

The AER may also (clause 5.3.2(b)):

- i. have regard to any other matter it considers relevant;
- ii. request from the DNSP any further information the AER considers appropriate;
- iii. invite public submissions on the application; and
- iv. otherwise conduct such consultation as it considers appropriate with any person.

We have considered each factor listed above in assessing the merits of a waiver for Power and Water Corporation.

### 3.1 National Electricity Objective and the potential for cross subsidisation and discrimination

The NEO requires us to promote efficient investment in, and efficient operation and use of, electricity services for the long-term interests of consumers of electricity with respect to price, quality, safety and reliability and security of supply of electricity. The NEO is the guiding principle that underpins all decision-making in the NEM framework and is a requirement we must consider in deciding whether to grant a waiver.

We consider that a waiver for Power and Water Corporation for clauses 4.2.4 and 4.4.1(a):

- is likely to be consistent with the National Electricity Objective; and
- is unlikely to give rise to the potential for cross-subsidisation and discrimination

Without a waiver for both clauses 4.2.4 and 4.4.1(a) the Power and Water Corporation would incur costs to establish suitable processes to become compliant with these clauses.

**For clause 4.2.4**, there is an inconsistency in requiring compliance with 4.2.4 (publication of office and staff registers) while not requiring compliance with clauses 4.2.1, 4.2.2 and 4.2.3 (relating to staff sharing and office sharing) due to the NT specific derogations. This creates a compliance burden for seemingly no benefit to consumers as the primary clauses targeting the possible harms are not applicable. We consider that waiving compliance with this clause would not change the current potential for cross-subsidisation or discrimination.

**For clause 4.4.1(a)**, Power and Water Corporation is seeking a waiver only for existing contracts that may be subject to renewal or variation before 31 December 2022. Power and Water Corporation have committed to implementing compliant arrangements for these existing contracts (i.e. inserting Guideline-compliant clauses into the contracts) following the waiver period. Power and Water Corporation consider they will use the additional time to develop a pragmatic approach for managing the legacy issues and avoid and/or mitigate the need for legal advice on individual contracts. This aims to minimise overall cost. The AER considers the cost of requiring compliance for a short timeframe would exceed any potential benefit.

### 3.3 Public consultation

<sup>1</sup> AER, *Ring-fencing Electricity Distribution Guideline (Version 3)*, October 2021, cl. 5.3.2.



Under clause 5.3.2(b)(iii) of the Guideline the AER may invite public submissions on a waiver application, but it is not required to do so in all cases. As the waiver of 4.2.4 is largely for administrative efficiency purposes given Power and Water is not subject to compliance with clauses 4.2.1, 4.2.2 and 4.2.3 (relating to staff sharing and office sharing), and the waiver for clause 4.4.1 (a) is only for existing contracts to allow for additional time to comply, in this instance we do not consider public consultation is required.

### **3.4 Conclusion**

We consider that if we do not waive Power and Water Corporation's obligation to comply with clauses 4.2.4 and 4.4.1(a), the potential compliance costs to Power and Water Corporation outweigh any benefit to consumers from requiring compliance with these obligations. We consider that granting a waiver for these two clauses promotes the NEO by creating efficient investment in, and efficient operation and use of, electricity services for the long-term interests of consumers.

## 4 Decision

Our decision is to grant a waiver to Power and Water Corporation of ring-fencing obligations in respect of the following clauses of the Guideline:

- 4.2.4 (office and staff sharing registers)
- 4.4.1(a) (conduct of service providers).

The duration for these waivers are:

- Clause 4.2.4: until 30 June 2024
- Clause 4.4.1(a): until 31 December 2022.