

Non-disclosure Guideline

Electricity Infrastructure Investment Act 2020
(NSW) DRAFT

February 2026

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1 Introduction

1.1 Purpose of this Guideline

This Guideline aims to set out a clear and consistent approach to how network operators and entities assisting with the delivery of the [NSW Electricity Infrastructure Roadmap](#) are to make a claim of non-disclosure over information provided to the AER in connection with our functions under the *Electricity Infrastructure Investment Act 2020 (NSW)* (EII Act) and *Electricity Infrastructure Investment Regulation 2021 (NSW)* (EII Regulation). It sets out our approach to assessing non-disclosure claims, having regard to the framework set out in the EII Act and EII Regulation, and our approach to consulting with entities where we consider a claim is not substantiated.

As an independent regulator, we are committed to making well-informed and accountable decisions that are in the long-term interests of energy consumers. We consider transparency and meaningful consultation with affected stakeholders are essential to achieving good regulatory decisions. Stakeholders should have access to sufficient information to be able to understand and assess the substance of issues affecting their interests. We acknowledge that there are circumstances in which it is appropriate for information provided to us to not be disclosed publicly, especially where publishing the information is likely to harm the long-term interests of consumers. However, we seek to balance protecting such information with disclosing information for an open and transparent decision-making process that allows consumers to be informed of the costs and benefits of the projects they ultimately pay for. For these reasons, the approach we have developed aims to provide greater transparency around non-disclosure claims, act as an incentive for network operators to only make claims that are specific, well-reasoned and fully justified and minimise the risk of inadvertent disclosure.

This Guideline is intended to apply to parties who provide us with information under the EII Act, including network operators and other NSW Roadmap entities assisting with the delivery of the NSW Electricity Infrastructure Roadmap. While we expect this Guideline to primarily assist the undertaking of revenue determinations and adjustment decisions, where appropriate, we may apply the approach to assessing non-disclosure claims set out in this Guideline to other functions we perform under the EII Act and EII Regulation.

1.2 Who we are

The AER exists to ensure energy consumers are better off, now and in the future. We are the economic regulator for electricity and gas networks in every state and territory in Australia except Western Australia. We regulate electricity networks under the National Electricity Law (NEL) and National Electricity Rules (NER) and natural gas pipelines under the National Gas Law (NGL) and the National Gas Rules (NGR).

The EII Act underpins the NSW Roadmap which is a 20-year plan to transition the NSW electricity grid from its reliance on coal-fired generation to renewable energy generation. The NSW Roadmap coordinates and promotes investment in electricity transmission, generation, and storage infrastructure.

The AER has been appointed as Regulator under the EII Act and is responsible for undertaking certain functions under the EII Act, primarily making revenue determinations for

network operators. In relation to this function, we scrutinise the costs of projects proposed by the Infrastructure Planner and authorised by the Consumer Trustee (and occasionally the Minister), so energy consumers pay no more than necessary now and in the future.

1.3 Scope of this guideline

This Guideline primarily focuses on information we receive in relation to our role in making revenue determinations under the EII Act and EII Regulations. This includes:

- non-contestable revenue determinations (including hybrid revenue determinations)
- contestable revenue determinations and contestable augmentation revenue determinations
- revenue adjustment decisions.

Where appropriate we may also apply this Guideline to other functions we may perform under the EII Act and EII Regulation, including approving risk management frameworks developed by the Consumer Trustee and consultation on tender rules for long-term energy service agreements. We note that this Guideline does not apply to our role in making contribution determinations under the EII Act. The Contribution Determination Guideline is scheduled for review in 2026, and that review will address how confidentiality claims are assessed in relation to our function to make annual contribution determinations. As such, this Guideline does not address confidentiality claims relating to annual contribution determinations.

When submitting information to the AER, this Guideline should be read in conjunction with the other Guidelines we have published under the EII Act and EII Regulation. We also note that we have previously published a [Confidentiality Guideline](#) that applies to transmission and distribution revenue determinations we make under the NEL and NER (referred to as our NER Confidentiality Guideline). Given the differences between the EII Act and the NEL/NER regulatory frameworks, our NER Confidentiality Guideline does not apply to our function to make revenue determinations under the EII Act.

1.4 Authority for this Guideline

Under clause 64(4) of the EII Act, our functions include issuing guidelines about the exercise of functions we perform under the EII Act and EII Regulation.

Under clause 47(1) of the EII Regulation, we are required to prepare guidelines setting out how we will exercise our functions under Part 5 of the EII Act, which includes the making and publication of revenue determinations and related information.

We may amend this Guideline from time to time. Should we amend this Guideline, we will publish the proposed amendment on our website for a period of at least 20 business days and consider any submissions received within that period.¹ We are not required to consult on any amendments we consider to be minor or administrative.²

¹ EII Regulation, cl. 47C(1).

² EII Regulation, cl. 47C(2)(b).

1.5 Replacement of draft Confidentiality Guideline

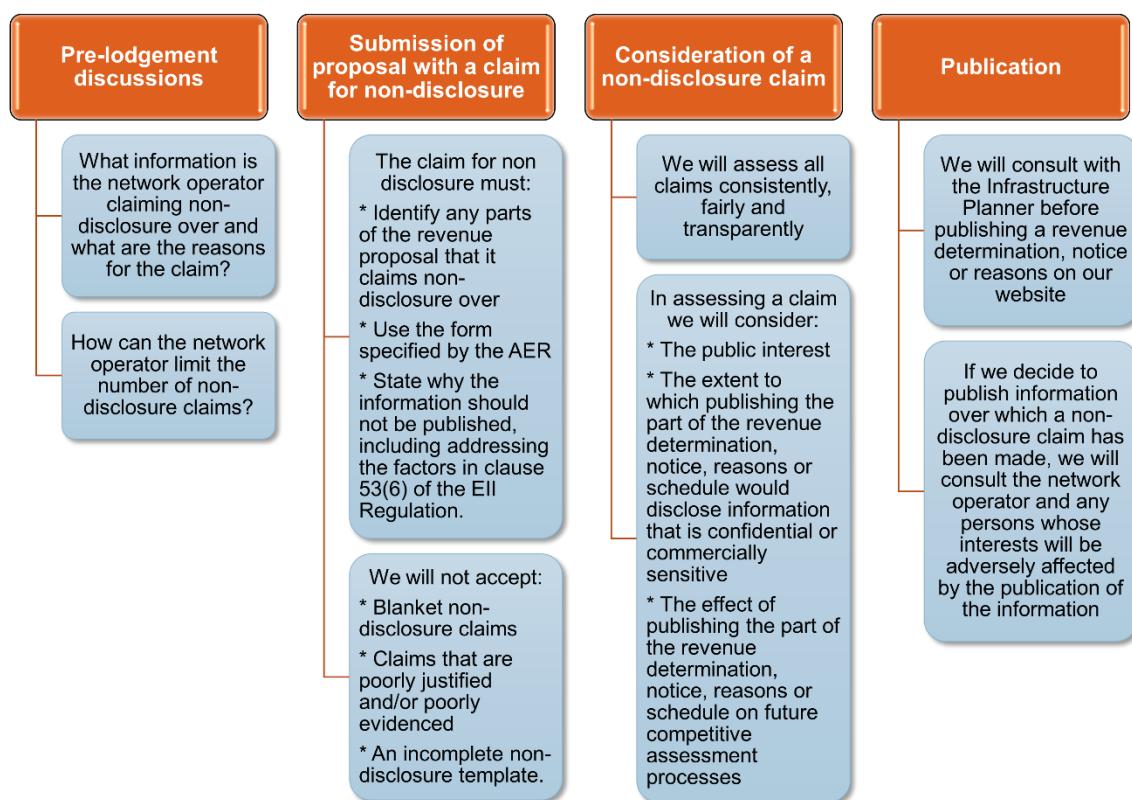
This Guideline replaces our Confidentiality Guideline – Electricity Investment Act – Draft, published on 3 August 2023 (2023 draft Guideline). Once we finalise our Non-disclosure Guideline, all references to the 2023 draft Guideline in other Guidelines we have published under the EII Act and EII Regulation, should be read as a reference to this Guideline.

2 Non-disclosure claims: non-contestable revenue determination

2.1 Overview of process

Our key role as Regulator is to make revenue determinations for network operators who are subject to an authorisation under the EII Act to carry out a network infrastructure project.³ A revenue determination for a non-contestable process involves an assessment of the network operator's forecast costs so that only the prudent, efficient, and reasonable costs of delivering the project are recovered. Figure 1 provides an overview of the non-disclosure process for non-contestable revenue determinations.

Figure 1 Overview of the non-disclosure process for non-contestable revenue determinations.



2.2 Pre-lodgement discussions

We expect network operators to engage in pre-lodgement discussions with us regarding any anticipated non-disclosure claims in their revenue proposal. We will work with network operators to understand the nature and scope of the information to be submitted, including any information over which non-disclosure will be claimed. The discussions will focus on:

- what information the network operator is claiming non-disclosure over and the reasons for these claims; and

³ EII Act, s. 36A and s. 38.

- how the network operator can limit the number of non-disclosure claims.

We expect that as part of its pre-lodgement discussions, network operators will engage with stakeholders about the type of information they need access to in order to understand and assess the substance of issues that affect their interests. We would also expect a network operator to have regard to this when making any non-disclosure claims.

We also expect that as part of these pre-lodgement discussions, network operators will consult any third parties who provide information to the network operator that may be included in the network operator's revenue proposal. These discussions should focus on avoiding the use of blanket claims of confidentiality and ensuring that any non-disclosure claims are specific, well-reasoned and fully justified, having regard to this Guideline.

We expect network operators to consider ways in which they can present information so as to address specific sensitivities while providing stakeholders with sufficient information to understand and assess the substance of issues affecting their interests. This could be achieved through any of the following:

- limiting non-disclosure claims to the specific information that is sensitive
- providing detailed information with amendments to protect sensitive elements
- aggregating data to protect commercially sensitive data
- providing specific confidential information to certain stakeholders under certain circumstances, for example after they have completed a confidentiality undertaking.

Failure to engage meaningfully and/or constructively with us, any relevant third parties, and stakeholders during the pre-lodgement stage, may lead to an outcome where a non-disclosure claim is not accepted. Network operators are therefore strongly encouraged to treat the pre-lodgement stage as a key step in the non-disclosure process for a non-contestable revenue determination.

2.3 Submission of revenue proposal

Prior to receiving a revenue proposal, we will issue a written notice to a network operator under section 38(7) of the EII Act, requiring the provision of information to be included in a revenue proposal to enable us to make a revenue determination. The information notice will, at a minimum, include the matters set out in section 4.1.1 of our [Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects](#) (Non-contestable Guideline), but may also include additional expenditure and supporting information to assist us with our assessment of the revenue proposal. A revenue proposal submitted to us by a network operator must contain or be accompanied by the information requested in an information notice.⁴

Clause 48(1) of the EII Regulation requires a network operator to provide us with information about the proposed amounts payable for carrying out the infrastructure project that we reasonably require to exercise our functions under Part 5 of the EII Act. For a non-contestable revenue determination, the network operator must prepare the information in

⁴ AER – [Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects](#) – December 2025, section 4.1.1; EII Chapter 6A, cl. 6A.4.1(b)(2).

accordance with our Non-contestable Guideline and any other requirements notified by us to the network operator.⁵

2.3.1 Manner in which non-disclosure claims must be made

Our Non-contestable Guideline provides that when submitting a revenue proposal, a network operator must identify specific information in the revenue proposal that it claims non-disclosure over.⁶

For each piece of information that a network operator claims non-disclosure over in its revenue proposal, it must make a claim in accordance with the non-disclosure template at Attachment A. The non-disclosure template, amongst other things, provides that in making a non-disclosure claim the network operator must include reasons supporting why the information should not be published, including addressing the factors in clause 53(6) of the EII Regulation. At the revenue proposal stage, non-disclosure claims are assessed against clause 53(8) of the EII Regulation. Clause 53(8) of the EII Regulation provides that the regulator must not publish information given to it under clause 48 that relates to a non-contestable revenue determination or a contestable augmentation determination if satisfied that the information is confidential or commercially sensitive.

Where we determine that the information in the non-disclosure claim is not confidential or commercially sensitive under that clause, we may consider the factors in clause 53(6) of the EII Regulation, where appropriate, to determine whether the information should or should not be disclosed.

It is the responsibility of the network operator to make non-disclosure claims that are specific, well-reasoned and fully justified. Non-disclosure claims that do not meet this threshold will not be accepted. A revenue proposal that contains:

- blanket non-disclosure claims
- non-disclosure claims that are poorly justified and/or poorly evidenced
- an incomplete non-disclosure template

is likely to be assessed by us as non-compliant with the revenue proposal submission requirements set out in our Non-contestable Guideline.⁷ Where a network operator has not provided a compliant revenue proposal under the EII Regulation, the 126-business day timeframe for us making our non-contestable revenue determination does not commence.⁸

We will also publish the submitted non-disclosure template on our website alongside the network operator's revenue proposal. Therefore, network operators must ensure that their non-disclosure template does not contain information that cannot be published.

⁵ EII Regulation, cl. 48(3).

⁶ EII Chapter 6A, cl. 6A.10.1(f).

⁷ EII Chapter 6A, cl. 6A.11.1(a)(1) & (a)(8).

⁸ EII Regulation, cl. 50.

2.3.2 Proportion of material in revenue proposal with non-disclosure claims

The Non-contestable Guideline provides that if the network operator has identified any part of the revenue proposal that is subject to a non-disclosure claim, we must, as soon as reasonably practicable, make available on our website a notice that sets out:

- the fact that the revenue proposal contains information over which a claim for non-disclosure has been made; and
- the proportion of material in the revenue proposal that is subject to any claim for non-disclosure compared to that which is not.⁹

Noting the above requirements, network operators submitting a revenue proposal must complete the proportion of non-disclosure notice at Attachment B. We will also publish the proportion of non-disclosure notice on our website alongside the network operator's revenue proposal.

Where applicable we will undertake a comparison of the proportion of material in the network operator's revenue proposal that is subject to a non-disclosure claim compared to the proportion of non-disclosure claims submitted in revenue proposals of other network operators.¹⁰ We will publish this information on our website alongside the non-disclosure notice.

2.4 Publication of revenue proposal

Stakeholders and consumers should have access to sufficient information to enable them to understand and assess the substance of decisions that affect their interests. This leads to better regulatory outcomes, promotes transparency and allows stakeholders to meaningfully engage with the regulatory determination process. As a general principle, we expect that information provided to us, and which we rely on and assess in making our revenue determinations, will be made publicly available.

Subject to the EII Act and EII Regulation, we must publish a revenue proposal, as soon as practicable, after we determine the revenue proposal complies with the requirements of any information notice we issue to the network operator.¹¹ We may publish on our website information that is given to us under clause 48 of the EII Regulation that relates to a non-contestable revenue determination.¹² However, we must not publish this information if we are satisfied that the information is confidential or commercially sensitive.

Therefore, for non-disclosure claims at the revenue proposal stage, our starting point is to determine whether we are satisfied that the information over which non-disclosure is claimed is confidential or commercially sensitive. If we are satisfied that the information is confidential or commercially sensitive, we must not publish the information.

If we are not satisfied that the information is confidential or commercially sensitive, it is open to us to publish the information when publishing the network operator's revenue proposal. In

⁹ EII Chapter 6A, cl. 6A.11.2A (a) & (b).

¹⁰ EII Chapter 6A, cl. 6A.11.2A (c).

¹¹ EII Chapter 6A, cl. 6A.11.3(a).

¹² EII Regulation, cl. 53(7).

these circumstances, we may also consider other relevant factors when deciding whether it is appropriate to publish the information, which may include the factors set out in clause 53(6) of the EII Regulation where appropriate. Before we decide to publish information over which a non-disclosure claim has been made, we will consult the network operator¹³ and any persons whose interests might be adversely affected by the publication of the information. Section 5 of this Guideline sets out our approach to consulting on non-disclosure claims where we consider a claim is not substantiated.

Additionally, following a decision on whether information is confidential or commercially sensitive at the revenue proposal stage, non-disclosure claims that have previously been accepted may be reconsidered at future stages of the revenue determination process, such as the preliminary position paper stage or revenue determination stage. For example, while we may have been satisfied that certain information was confidential or commercially sensitive at the time of publishing the revenue proposal, the confidentiality or commercial sensitivity of that information may have diminished over time such that we consider it is no longer confidential or commercially sensitive at the time of publishing the preliminary position paper or the revenue determination.

2.5 Publication of preliminary position paper

We will publish a preliminary position paper approximately 55 business days after receiving the network operator's revenue proposal for a non-contestable revenue determination.¹⁴ The preliminary position paper sets out a summary of the areas of difference between our assessment and the network operator's revenue proposal, and an explanation of our position on any material and/or contentious matters.

The preliminary position paper is informed by information provided to us by the network operator in its revenue proposal, as well as responses to any information requests.¹⁵ Therefore, when publishing our preliminary position paper, we are guided by the same non-disclosure framework that applies to publication of a revenue proposal. Please refer to section 2.4 of this Guideline for our approach to publishing a revenue proposal.

Also, similar to a revenue proposal, following a decision on whether information is confidential or commercially sensitive at the preliminary position paper stage, non-disclosure claims that have previously been accepted may be reconsidered at future stage of the revenue determination process, such as the revenue determination stage.

2.6 Publication of revenue determination

We must publish a revenue determination and reasons on our website as soon as reasonably practicable.¹⁶ Therefore, our starting point is that we are required to publish the information that must be included in a revenue determination, as set out in the EII Act, the EII Regulation and our Non-contestable Guideline, and the reasons for making the revenue

¹³ EII Act, s. 37(1)(d).

¹⁴ AER – [Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects](#) – December 2025, section 4.2.

¹⁵ EII Act, s. 38(7); EII Regulation, cl. 48.

¹⁶ EII Regulation, cl. 53(1).

determination.¹⁷ Whilst our expectation is that information provided to us for which we rely on and assess in making a revenue determination should be made publicly available, we acknowledge that, in some circumstances, the publication of certain information may cause detriment to the network operator or may potentially harm the long-term interests of energy consumers. Clause 53(6) of the EII Regulation provides that we may decide not to publish part of a non-contestable revenue determination or reasons if we are satisfied it is not appropriate, taking into account the following:

- the public interest
- the extent to which publishing the part of the revenue determination will disclose information that is confidential or commercially sensitive
- the effect of publishing the part of the revenue determination on future competitive assessment processes.

Section 4 of this Guideline provides guidance on how we will apply the factors in clause 53(6) of the EII Regulation. Before we decide to publish information over which a non-disclosure claim has been made, we will consult the network operator and any persons whose interests may be adversely affected by the publication of the information.¹⁸ Section 5 of this Guideline sets out our approach to consultation on non-disclosure claims where we consider a claim is not substantiated.

We must also consult with the Infrastructure Planner before publishing a revenue determination and reasons on our website.¹⁹

2.7 Revenue adjustment proposals

Where a network operator submits a revenue adjustment proposal to us, it must include details of the adjusted revenue and adjusted payment schedule.²⁰ For revenue adjustments that are not routine and require a particular trigger mechanism to be satisfied, we may publish the revenue adjustment proposal on our website. Consistent with the approach outlined for submitting a revenue proposal, we expect the network operator to engage with us regarding any anticipated non-disclosure claims before submission and subsequently identify any parts of the revenue adjustment proposal that are subject to a non-disclosure claim. The network operator should submit material in its adjustment proposal supporting its non-disclosure claims against the factors in clause 53(6) that are specific, well-reasoned and fully justified.

Once we have approved the revenue adjustment proposal, we will advise the network operator. Where we make an adjustment to a revenue determination that did not require the revenue determination to be reviewed and remade, we must publish the adjusted revenue and updated payment schedule on our website.²¹ However, we may decide not to publish part of an updated payment schedule if we are satisfied that it is not appropriate, taking into

¹⁷ For example, see EII Regulation, cl. 50A and EII Act, s. 38.

¹⁸ EII Act, s. 37(1)(d).

¹⁹ EII Regulation, cl. 53(5).

²⁰ AER – [Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects](#) – December 2025, page 30.

²¹ EII Regulation, cl. 53(1)(b)(i).

account the factors in clause 53(6) of the EII Regulation. Section 4 of this Guideline provides guidance on how we will apply the factors in clause 53(6).

Our revenue adjustment decision may also include reasons accompanying an updated payment schedule, which we may publish. In doing so, we will have regard to any non-disclosure claims made by the network operator in line with our approach set out in section 2.6 of this Guideline.

2.8 Hybrid revenue determinations

A hybrid revenue determination is a non-contestable revenue determination that contains contestable and non-contestable cost components. The non-disclosure framework that applies to hybrid revenue determinations aligns with the non-disclosure framework that applies to non-contestable revenue determinations (see section 2 of this Guideline). For example, we still expect network operators to engage in pre-lodgement discussions with us regarding any anticipated non-disclosure claims in their hybrid revenue proposal.

We expect that a network operator's hybrid revenue proposal will clearly separate out the contestable and non-contestable components of a hybrid project. Generally, we expect network operators provide stakeholders with as much information as possible on both the contestable and non-contestable components of a hybrid revenue proposal. Consistent with the approach outlined in section 2 of this Guideline, we expect narrowly confined non-disclosure claims over the elements of a hybrid revenue proposal. Any non-disclosure claims made over a hybrid revenue proposal should be made in accordance with the approach outlined in section 2.3.1 of this Guideline.

When publishing a hybrid revenue proposal, we will apply the approach outlined in section 2.4 of this Guideline and similarly when making a decision to publish a hybrid revenue determination, we will apply the approach outlined in section 2.6 of this Guideline.

3 Non-disclosure claims: contestable revenue determination

3.1 Overview of process

Our role as Regulator is to make revenue determinations for network operators who are subject to an authorisation to carry out a network infrastructure project.²² Under a contestable process, a network operator (or a person to assist a network operator) is selected through a competitive assessment process conducted by the Infrastructure Planner. We are required to assess the Infrastructure Planner's competitive assessment process. Where we are satisfied the process was genuine and appropriate, we must make a revenue determination that adopts the amounts payable to the network operator (and any mechanisms to adjust those amounts) that result from the process.²³

3.2 Submission of revenue proposal or adjustment proposal

Where a network operator has been authorised, appointed or directed to carry out a network infrastructure project under the EII Act, it must provide us with the proposed amounts payable to the network operator to carry out the project and any mechanism for those amounts payable to be adjusted (a revenue proposal).²⁴ The revenue proposal must be consistent with our [Revenue determination guideline for NSW contestable network projects](#) (Contestable Guideline), and any other requirements notified by us.²⁵ Subsequent to a contestable revenue determination, a network operator may submit an adjustment proposal requesting the AER apply any adjustment mechanisms included in that contestable determination.

We do not expect network operators to undertake pre-lodgement stakeholder consultation on their revenue or adjustment proposals where all components of revenue have been established through a competitive assessment process. This is because the policy intent of the contestable framework is that the competitive market is being relied upon to produce an outcome that reflects prudent, efficient and reasonable costs for NSW electricity consumers.

We would typically expect to publish only limited information regarding a network operator's proposal for a contestable revenue determination or revenue adjustment. This may include a notice that we have received a proposal, and high-level information on the project or the adjustment proposal. For those parts of a proposal that we have confirmed with the network operator that we do not intend to publish, we do not require the network operator to identify confidential and/or commercially sensitive information.

²² See EII Act, s. 36A and s. 38.

²³ EII Regulation, cl. 46(1).

²⁴ EII Act, s. 38(7); EII Regulation, cl. 48.

²⁵ EII Regulation, cl. 48(3).

A network operator should contact us prior to submitting a contestable revenue proposal or adjustment proposal to clarify expectations around its contents, any consultation required and our expectations around publication.

3.3 Publication of notice and related information

Following a decision to make or remake a contestable revenue determination, we must as soon as reasonably practicable, publish on our website a notice that includes the following:

- a summary of a revenue determination; and
- the NER-equivalent capital cost of the network infrastructure project given to us by the Infrastructure Planner under clause 53(2) of the EII Regulation.²⁶

The notice must also be accompanied by our reasons for making the revenue determination.²⁷

The summary of the contestable revenue determination must include the following information:

- a description of the legislative framework (including relevant provisions of the EII Act or EII Regulation) under which the determination is made or remade;
- a description of the network infrastructure project;
- the operating costs of the network infrastructure project for the 5 years following the revenue determination being made or remade;
- a schedule of the amounts required to be paid to or by the network operator for the 5 years following the revenue determination being made or remade;
- the provisions in the revenue determination as made or remade for the adjustment of amounts; and
- other information the regulator considers appropriate, including information provided to the regulator under clause 48 of the EII Regulation.²⁸

For an adjustment to a contestable revenue determination that did not require the determination to be reviewed and remade, we must publish an updated schedule of amounts required to be paid to or by the network operator for the 5 years following the revenue determination being made or remade.²⁹

3.3.1 Discretion not to publish part of a notice and related information

Under clause 53(6) of the EII Regulation, we may decide not to publish part of a notice, reasons or schedule, if satisfied it is not appropriate, taking into account the following:

- the public interest;
- the extent to which publishing the part of the revenue determination would disclose information that is confidential or commercially sensitive;

²⁶ EII Regulation, cl. 53(1)(ii).

²⁷ EII Regulation, cl. 53(1)(a)(ii), (iii) and cl. 53(4).

²⁸ EII Regulation, cl. 53(3).

²⁹ EII Regulation, cl. 53(1)(b)(ii).

- the effect of publishing the part of the revenue determination on future competitive assessment processes.

Section 4 of this Guideline provides guidance on how we will apply the factors in clause 53(6).

3.3.2 Manner in which non-disclosure claims must be made

Once we have made or remade a contestable revenue determination, we will provide a draft of the notice and reasons to the network operator and invite them to review the documents and make any claims of non-disclosure in accordance with this Guideline and the non-disclosure template at Attachment A. We will also do the same for the updated schedule of payments for an adjustment decision that did not require the determination to be reviewed and remade.

We must also consult with the Infrastructure Planner before publishing a notice, reasons or schedule on our website, and we must not publish this information until the Infrastructure Planner has notified us that financial close of the project has been reached.³⁰

We expect the network operator and Infrastructure Planner to only make non-disclosure claims that are specific, well-reasoned and fully justified against the factors outlined in our non-disclosure template at Attachment A. We will not accept:

- blanket non-disclosure claims
- non-disclosure claims that are poorly justified and/or poorly evidenced
- an incomplete non-disclosure template.

Before we decide to publish information over which a non-disclosure claim has been made, we will consult the network operator and any persons whose interests will be adversely affected by the publication of the information.³¹ Section 5 of this Guideline sets out our approach to consultation on non-disclosure claims where we consider a claim is not substantiated.

3.4 Contestable augmentation

A contestable augmentation is a network infrastructure project carried out by a network operator to augment an existing network infrastructure project that is subject to a contestable revenue determination.³² A contestable augmentation is a separate network infrastructure project that is subject to its own authorisation and revenue determination.³³ A contestable augmentation revenue determination can be established using individual component costs. These component costs can be determined through a genuine and appropriate competitive assessment process, through an appropriate referenced cost process set out in the existing contractual arrangements or be determined by the AER in accordance with the Non-contestable Guideline.

³⁰ EII Regulation, cl. 53(4) and (5).

³¹ EII Act, s. 37(1)(d).

³² EII Regulation, Schedule 4 definition of 'contestable augmentation'.

³³ EII Regulation, cl. 47E(1) and cl. 48(1A).

A network operator who is subject to an authorisation for a contestable augmentation must provide us with information we reasonably require in order to exercise our functions under the EII Act.³⁴ We may publish on our website information that is given to us by the network operator that relates to a non-contestable component of a contestable augmentation determination.³⁵ This would include any information given to us in a revenue proposal. This will only occur if that component's costs are determined by the AER in accordance with the Non-contestable Guideline. That is, the cost component was not a result of a genuine and appropriate competitive assessment process or was not derived from an appropriate referenced cost process set out in the existing contractual arrangements.³⁶

However, we must not publish information on a non-contestable component if we are satisfied that the information is confidential or commercially sensitive.³⁷ Please refer to sections 2.3.1, 2.3.2 and 2.4.1 of this Guideline for information on the manner in which non-disclosure claims must be made in relation to information provided to us for non-contestable components of a contestable augmentation revenue determination and our approach to publishing information that we consider is not confidential or commercially sensitive. For all other components of a contestable augmentation (contestable components and reference cost components), the approach to submission is the same as for contestable revenue or adjustment proposals set out in section 3.2 of this Guideline.

Once we have made a contestable augmentation decision, similar to a contestable revenue determination, we must publish a notice and reasons for our decision.³⁸ Please refer to section 3.3 of this Guideline for further information on what information the notice must contain and further information on when we may decide it is not appropriate to publish part of our notice or reasons having regard to the factors in clause 53(6) of the EII Regulation.

³⁴ EII Regulation, cl. 48(1A).

³⁵ EII Regulation, cl. 53(7)(b).

³⁶ EII Regulation, cl. 47E(4).

³⁷ EII Regulation, cl. 53(8).

³⁸ EII Regulation, cl. 53(1)(a)(ii) and (iii).

4 Consideration of non-disclosure claims

4.1 Purpose of this section

Under clause 53(6) of the EII Regulation, we may decide not to publish part of a revenue determination, notice, reasons or schedule if satisfied it is not appropriate, taking into account the following—

- the public interest,
- the extent to which publishing the part of the revenue determination, notice, reasons or schedule would disclose information that is confidential or commercially sensitive,
- the effect of publishing the part of the revenue determination, notice, reasons or schedule on future competitive assessment processes.

This section provides guidance on how we will apply the factors under clause 53(6) of the EII Regulation, in deciding whether it is not appropriate to publish part of a revenue determination, notice, reasons or schedule. This guidance is intended to promote consistent and transparent non-disclosure outcomes across the information we publish under the EII Act and EII Regulation. As noted in sections 2.3.1 and 2.4 of this Guideline, the guidance on the factor in clause 53(6)(b) is also applicable to a decision on whether the information, over which a non-disclosure claim has been made in the revenue proposal or our preliminary position paper, is confidential or commercially sensitive.

In applying the factors in clause 53(6), we are guided by the objectives of the EII Act,³⁹ and the principles set out in section 37(1) of the EII Act and clause 46 of the EII Regulation. We will take a case-by-case approach to assessing non-disclosure claims and our assessment may involve a weighing up of different factors specific to the circumstances.

4.2 Public interest

Clause 53(6)(a) of the EII Regulation provides that we may decide not to publish part of a revenue determination, notice, reasons or schedule if satisfied it is not appropriate, taking into account the public interest. We consider the term ‘public interest’ broadly as encompassing something that is of benefit or advantage to the public, rather than of individual benefit.

In applying the public interest factor, we will take a case-by-case approach. We may also take into account public interest considerations that are both for and against disclosure of the information and weigh up any competing considerations.

Table 1 outlines a non-exhaustive list of the types of public interest considerations we may take into account.

³⁹ EII Act, s. 3. The objects of the EII Act include: to improve the affordability, reliability, security and sustainability of electricity supply; and to encourage investment in generation, storage, network and related infrastructure by reducing risk for investors.

Table 1: Public interest considerations

The AER may consider that publication is appropriate if...	The AER may consider that publication is not appropriate if...
Publication will promote transparency over the AER's determination and enable stakeholders to understand the substance of issues that affect their interests.	Publication may lead to inefficient outcomes, such as consumers incurring higher costs.
Publication would provide incentives to network operators to promote economic efficiency and affordability for consumers. ⁴⁰	Publication could reasonably be expected to disincentivise investment in new generation, storage, network and related infrastructure.
Publication would support the AER being able to meaningfully engage with affected parties on material issues.	Publication could compromise network or system security.

4.3 Confidential or commercially sensitive

Clause 53(6)(b) of the EII Regulation provides that we may decide not to publish part of a revenue determination, notice, reasons or schedule if satisfied it is not appropriate, taking into account the extent to which publishing the information would disclose information that is confidential or commercially sensitive. Similarly, clause 53(8) of the EII Regulation provides that we must not publish information given to us in relation to a non-contestable revenue determination or a non-contestable component of a contestable augmentation determination (i.e., information contained in the revenue proposal and preliminary position paper), if satisfied that the information is confidential or commercially sensitive.

The concepts of commercial sensitivity and confidentiality are separate but related. For example, information that is commercially sensitive may also be confidential because its commercial value lies in it being known only by a limited group of people. However, not all confidential information will be commercially sensitive – for example, personal information. When applying this factor in making a non-disclosure claim, the network operator must clearly specify which information is 'confidential' and which information is 'commercially sensitive', and why.

Categories of confidential or commercially sensitive information may include:

- Information affecting the security of the network
- Market sensitive cost inputs
- Market intelligence
- Strategic information
- Personal information

⁴⁰ EII Act, s. 37(1)(b).

4.3.1 Confidential information

What constitutes 'confidential' information is a factual question and will require a case-by-case assessment. We will consider the nature of the information, individual circumstances of the case and the submissions provided by the network operator to substantiate its claim. We will consider whether the information is already in the public domain or if the information is known only by a limited group of people and was communicated on the understanding that it would be kept in confidence. Information is generally considered to be in the public domain if it is publicly available or if the information is a matter of common knowledge in the relevant industry.

We may also take into account the following factors when assessing whether information is confidential or not:

- the nature of the information and its relevance within the regulatory framework that the AER administers under the EII Act
- whether the information is subject to an obligation of confidentiality which may arise under contract or a legislative requirement
- any detriment that might be caused to the network operator or a third party if the information were to be disclosed.

Confidentiality agreements

We acknowledge that when negotiating contractual agreements, parties may include provisions that prevent the parties from disclosing any part of the contractual agreement unless certain circumstances exist. Whilst these types of agreements may be relevant to our consideration of whether information could be confidential, they do not bind us. That is, information that is covered by a confidentiality agreement is not determinative of whether we will be satisfied that the information is confidential. We expect that parties have regard to the AER's responsibilities as Regulator and this Guideline when discussing confidentiality arrangements between themselves.

4.3.2 Commercially sensitive information

We recognise that a wide range of information provided by network operators during the revenue determination process may have commercial value. As discussed in sections 2.3.1 and 3.3.2 of the Guideline, it is the responsibility of the network operator to only make a claim that is specific, well-reasoned and fully justified. Claims that do not meet this threshold will not be accepted. For example, we will not accept blanket claims that information is 'commercially sensitive' or 'confidential.'

We also expect network operators to clearly identify the relevant time period in which it considers the information remains commercially sensitive. For example, some information may be commercially sensitive only up until the network infrastructure project has reached financial close.

In assessing whether information is commercially sensitive, we will consider whether the information has commercial value, and whether publishing the information may reduce that commercial value. For example, by giving a competitive advantage to a competitor to the detriment of the owner of the information.

Where we have decided to not publish part of a revenue determination, reasons or schedule because we are satisfied that the information is commercially sensitive, we may redact the information in the document we publish on our website. In the future, if for some reason we are required to review and remake the revenue determination, we may revisit whether the redactions are still needed and, if appropriate, consider whether the redactions can be removed if the information is no longer commercially sensitive.

Table 2 outlines a non-exhaustive list of the types of considerations that we may take into account when assessing whether the information is commercially sensitive.

Table 2: Commercially sensitive considerations

The AER may consider that publication is appropriate if...	The AER may consider that publication is not appropriate if...
The information relates to previous or completed transactions that are no longer commercially sensitive.	Publication of the information could prejudice commercial negotiations relating to contractual terms, financing arrangements or investment decisions.
The information can be summarised in a way that prevents identification of specific commercially sensitive information or data. ⁴¹	Publication of the information may affect a competitive advantage held by the Network Operator. ⁴²
Publication of the information will not result in financial harm to the network operator, or if it does then this financial harm is offset through cost recovery under the revenue determination. ⁴³	Publication of the information may negatively affect market outcomes such that it will result in increased project costs.

4.4 Effects on future competitive assessment processes

Clause 53(6)(c) of the EII Regulation provides that we may decide not to publish part of a revenue determination, notice, reasons or schedule if satisfied it is not appropriate, taking into account the effect of publishing the information on future competitive assessment processes.

We recognise that certain information, if published, may affect market behaviour in future competitive tender processes. We also recognise that certain information, if published, may impact the Infrastructure Planner's ability to successfully achieve a competitive outcome in future competitive assessment processes (including achieving an efficient price and risk allocation). As a general principle, these considerations will carry greater weight where future

⁴¹ For example, aggregate data.

⁴² For example, methodologies developed at a high cost to the business that, if published, could give other businesses a competitive advantage.

⁴³ For example, if the publication of the information could result in potential cost increase but the business can recover the costs through the adjustment mechanism.

tender processes are imminent, rather than where such processes are expected to occur in the future.

Table 3 outlines a non-exhaustive list of the types of considerations we may take into account when assessing the effect of publishing the information on future competitive assessment processes.

Table 3: Future competitive assessment process considerations

The AER may consider that publication is appropriate if...	The AER may consider that publication is not appropriate if...
The information is already in the public domain such that if published it would not materially affect future market behaviour.	The information reveals costs of contractual outcomes, which if published would reduce competitive tension in future competitive assessment processes.
The information relates to a completed competitive assessment process and is unlikely to provide an advantage to bidders in future competitive assessment processes.	The information, if published, may reduce competitive tension between bidders in future competitive assessment processes.

5 Approach to consulting on non-disclosure claims

When assessing non-disclosure claims, we will ensure claims are considered consistently, fairly and as transparently as possible. Under the EII Act, we must be guided by the principle that a network operator is entitled to be informed of material issues being considered by us under the EII Act.⁴⁴ We must also consult with the Infrastructure Planner before publishing a revenue determination, notice or reasons on our website.⁴⁵

In addition to these obligations, we will also consult with any persons whose interests will be adversely affected by our decision to publish information over which a non-disclosure claim has been made, such as a third party assisting a network operator to carry out a network infrastructure project.

Where we consider a claim is not substantiated, our approach to consulting with the network operator and any persons whose interests will be affected by our decision to publish the information is outlined below.

Stage	Process
Notify the network operator and any relevant persons	<p>We will notify the network operator and any relevant persons in writing that we expect to publish the information on our website. In this notification:</p> <ul style="list-style-type: none"> • We will explain that we have assessed the non-disclosure claim submitted by the party who provided the information to us and outline the reasons why we do not agree with the claim. • We will outline the reasons why we are proposing to publish the information. • We will invite the network operator and any relevant persons to make a written submission on the issue(s) being considered, including why the information should be withheld from publication. • We will provide the network operator and any relevant persons with reasonable time to provide their submission. What is a reasonable time will depend on the facts and circumstances of each case, but it is likely that we would request the network operator and any relevant persons provide their submission within 5 business days.
Assess submission made by the network operator or any relevant persons	We will consider any submission made by the network operator and any relevant persons prior to making a

⁴⁴ EII Act, s. 37(1)(d).

⁴⁵ EII Regulation, cl. 53(5).

	decision on whether to publish or not publish the information.
Notify the network operator of our decision and any relevant persons	Where we decide to publish information over which a non-disclosure claim has been made, we will notify the network operator and any relevant persons of our decision, reasons and when we expect to publish the information.

Glossary

Term	Definition
AER	Australian Energy Regulator
Adjustment	Adjustment, of amounts, includes an adjustment of amounts under a provision included in a determination, whether under section 38(3) of the EII Act or otherwise. ⁴⁶
Authorisation	<p>Means—</p> <ul style="list-style-type: none"> (a) an appointment by the infrastructure planner under section 31A(1) of the EII Act in relation to an authorised REZ network infrastructure project, or (b) an authorisation by the Minister under section 36(2) of the EII Act, or (c) a direction given by the Minister under section 32 of the EII Act to carry out an infrastructure project.⁴⁷
Competitive assessment process	<p>Means a process carried out by the infrastructure planner under clause 45 to competitively assess persons who apply to carry out all or part of—</p> <ul style="list-style-type: none"> (a) REZ network infrastructure project, or (b) a priority transmission infrastructure project.⁴⁸
Component of a revenue determination	Means a component referred to in the EII Act, section 38(2) and includes part of a component. ⁴⁹
Consumer Trustee	Means the person or body authorised under section 60 to exercise the functions of the consumer trustee. ⁵⁰
Contestable augmentation	<p>Means a network infrastructure project carried out by a network operator where—</p> <ul style="list-style-type: none"> (a) the project is an augmentation to a network infrastructure project (the related project), and (b) the network operator is subject to a contestable revenue determination in relation to the related project.⁵¹
Contestable revenue determination	Means a revenue determination made as a result of a competitive assessment process. ⁵²
Contribution determination	The AER is required to make an annual contribution determination that sets out the amount required for the Scheme Financial Vehicle to be able to make payments from the Fund that are required under the EII Act, including the amount required for the Scheme Financial Vehicle to meet its liabilities as they fall due. The purpose of the contribution determination is to determine the amount required to be recovered from distribution network service providers. ⁵³

⁴⁶ EII Act, s. 36A.

⁴⁷ EII Act, s. 36A.

⁴⁸ EII Regulation, Schedule 4.

⁴⁹ See Dictionary section of the EII Act.

⁵⁰ See Dictionary section of the EII Act.

⁵¹ EII Regulation, Schedule 4.

⁵² See Dictionary section of the EII Act.

⁵³ EII Act, s. 56.

Term	Definition
EII Act	<i>Electricity Infrastructure Investment Act 2020 (NSW)</i>
EII Regulation	<i>Electricity Infrastructure Investment Regulation 2021 (NSW)</i>
Infrastructure Planner	Means a person authorised to exercise the functions of an infrastructure planner under section 63 of the EII Act. ⁵⁴
Long-term energy service (LTES) agreement	Means an agreement entered into between the scheme financial vehicle and a person (the LTES operator) under which— <ul style="list-style-type: none">(a) the LTES operator constructs and operates infrastructure to which this Part applies as specified in the agreement, and(b) if the LTES operator does this, the LTES operator may periodically opt to exercise a derivative arrangement.⁵⁵
NEL	National Electricity Law
NER	National Electricity Rules
Network infrastructure project	Means a network infrastructure project that— <ul style="list-style-type: none">(a) forms part of a renewable energy zone, and(b) consists of network infrastructure of a class prescribed by the EII Regulation.⁵⁶
Network Operator	Means a person who owns, controls or operates, or proposes to own, control or operate, network infrastructure. ⁵⁷
NGL	National Gas Law
NGR	National Gas Rules
Non-contestable revenue determination	Means a revenue determination, made other than as a result of a competitive assessment process, that— <ul style="list-style-type: none">(a) does not include a contestable component, or(b) includes at least—<ul style="list-style-type: none">(i) 1 contestable component, and(ii) 1 component that is not a contestable component.⁵⁸
NSW Electricity Infrastructure Roadmap	The Roadmap is the NSW government's 20 year plan to transform NSW's electricity system into one that provides affordable, clean and reliable energy for everyone. The Roadmap is enabled by the EII Act.
NSW Roadmap entities	Entities and stakeholders who work together to deliver the NSW's Electricity Infrastructure Roadmap.
Priority network infrastructure project	Means a network infrastructure project— <ul style="list-style-type: none">(a) located in the State, and(b) identified in or forming part of a network infrastructure project identified in—<ul style="list-style-type: none">(i) a report prepared under or published in accordance with the <i>National Electricity Rules</i>, Chapter 5, 6, or 6A, or

⁵⁴ See Dictionary section of the EII Act.

⁵⁵ EII Act, s. 46(1).

⁵⁶ See Dictionary section of the EII Act.

⁵⁷ See Dictionary section of the EII Act.

⁵⁸ See Dictionary section of the EII Act.

Term	Definition
	(ii) an assessment and recommendation by an infrastructure planner under section 63(4A) of the EII Act. ⁵⁹
Regulator	A person or body appointed as a regulator under section 64 of the EII Act. The AER has been appointed as a Regulator for the purposes of Part 5 of the EII Act.
Renewable Energy Zone or REZ	Means the geographical area of the State and the infrastructure specified in a declaration by the Minister under section 19 of the EII Act. ⁶⁰
Risk management framework	Means a framework prepared by the Consumer Trustee to protect the financial interests of NSW electricity customers in connection with the risks associated with long-term energy service agreements. ⁶¹

⁵⁹ See Dictionary section of the EII Act.

⁶⁰ See Dictionary section of the EII Act.

⁶¹ EII Act, s. 51(1).

Attachment A – Non-disclosure claim template

Document name or identification number, page and paragraph number	Topic the information relates to	Description of the information	Reasons for non-disclosure relating to public interest	Reasons for non-disclosure relating to confidential or commercially sensitive information ⁶²	Reasons for non-disclosure relating to effects on future competitive assessment processes	Detriment the information provider may incur if the information is published

⁶² At the revenue proposal stage, we assess non-disclosure claims under clause 53(8) of the EII Regulation. If we determine that the information is not confidential or commercially sensitive for the purposes of that clause, we may, where appropriate, consider the factors in clause 53(6) to decide whether the information should be disclosed.

Attachment B – Non-disclosure notice

Proposal Title	Number of pages that contain information subject to a non-disclosure claim	Number of pages that do not contain information subject to a non-disclosure claim	Total number of pages of proposal	Percentage of proposal that contains information subject to a non-disclosure claim	Percentage of proposal that does not contain information subject to a non-disclosure claim