

**Submission on the AER's Non-disclosure Guideline – Electricity Infrastructure Act 2020
(NSW)**

Louise Benjamin
Mark Grenning
20 March 2026

Introduction and Summary

This submission is made by us in an independent capacity. It draws on our experience as members of the Ausgrid Hunter-Central Coast (HCC) REZ Reg Panel and the Transgrid TAC examining the Enabling (non-competitive part of) the Central West Orana REZ. Our submissions on these two projects¹ have involved extensive comments on the matters addressed in this draft Guideline.

At the outset we wish to congratulate the AER on its approach to the issue of information disclosure which is central to their role as an independent regulator to making well-informed and accountable decisions that are in the long term interests of consumers. To do this they²:

“... 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.”

While the NSW Roadmap does prescribe the role of the AER that is much narrower than its role under the National Electricity Rules (NER), we encourage the AER to ‘push the limits’ of that prescription to enable it to be in the best position to ensure the long term financial interests of NSW electricity consumers. Key to achieving that objective is a Non-disclosure Guideline that provides as much transparency as possible for consumers to have confidence that the revenue determination process does indeed achieve that objective.

The NSW Roadmap aims for faster network build than is possible under the NER. The NSW Government argues that this will ensure the benefits of the renewable build will come sooner to consumers. But this faster build comes at the expense of the usual network due diligence process under the NER for a similar project:

- informed consumer engagement in the development of the revenue proposal where network information transparency facilities informed consumer challenge,
- detailed cost benefit analysis to support the prudence and efficiency of the investment; and
- capex forecast accuracy

As we said in our submission on the AER’s Preliminary Position Paper (PPP) on the HCC REZ revenue proposal³:

“The impact of this fast timetable is that networks are unable to fully investigate capex risks. They have two options - put in a high capex estimate to cover unknown unknowns and push that risk on to customers through pass through rights under adjustment events. The result for Roadmap projects is that consumers are being left with significant capex risk under an increasing number of uncapped adjustment events negotiated between the network and EnergyCo without customers in the room to put their case of what risks they think they are best placed to bear.”

Roadmap costs recovered from NSW distribution connected customers are increasing rapidly and so far only include a small proportion of the Roadmap projects covered by this draft Guideline:

¹ HCC REZ submissions – [here](#) and [here](#); Transgrid submissions - [here](#) and [here](#).

² Draft Guideline p.4

³ See p. 2 [here](#)

2023-24	2024-25	2025-26	2026-27	Total
\$138.14m	\$341.24m	\$493.18m	\$593.16	\$1,565.72m

These costs will increase significantly when the full costs of the REZ networks are included.

This increases the importance of information transparency and consumer challenge around the revenue determinations. Without this there is a high risk of falling consumer support for the Roadmap and lack of trust in the AER’s regulatory process.

In summary:

- we support the AER Guideline as it will provide significant benefits to NSW consumers
- the Guideline should be strengthened with a clear statement that disclosure is the AER’s default position; there should be a very high evidence bar to allow non-disclosure
- to support the increased disclosure and to give consumers confidence in the Roadmap process where non-disclosure is allowed, the AER should require a network making a revenue determination (whether from a competitive or non-competitive process) to establish a Consumer Reference Group (CRG) to provide feedback and challenge to the network as it develops its revenue proposal.

Response to AER questions

While we divide our responses to the questions provided, some responses cover more than one question so the responses should be read as a whole.

1. *What changes could be made to improve our approach to dealing with claims of non-disclosure under the EII regulatory framework?*

Importance of consumer engagement

From our experience in working with Ausgrid on the HCC REZ proposal we strongly endorse the AER’s view⁴:

“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.”

While Ausgrid was not required to establish the HCC REZ Reg Panel it saw the value in doing so. We signed confidentiality agreements that enabled us to deeply engage on a range of matters of interest to NSW consumers as Ausgrid developed its revenue proposal including:

- pre-lodgement engagement with the AER and advising on key areas of interest for consumers in accordance with the AER’s Better Resets Handbook (BRH)
- reviewing and providing feedback on elements of the revenue proposal including the meaning of ‘reasonable’ costs in section 38 of the EII Act (‘transmission efficiency test’), the allocation of risk between Ausgrid and customers, including contingency and Adjustment

⁴ Draft Guideline p. 8

Events, what all that means for the capex forecast and the program for delivery of the project.

Ausgrid concluded that⁵:

“Our Revenue Proposal has been shaped and significantly improved through the input of our customers and stakeholders... we greatly value the feedback...”

This engagement enabled the Panel to make detailed submissions to the AER on the revenue proposal and the PPP and present at the AER’s HCC REZ Public Forum on the PPP.

A major focus of all our work on the Panel was the importance of transparency and accountability to enable consumers to be confident that the roadmap was achieving its objectives, We saw wide claims of confidentiality by various parties that served to restrict consumers ability to gain that confidence.

Under the EII Act the AER *may* publish information they receive as part of a non-contestable revenue determination. We consider that publication should be the AER’s default position. Further, rather than simply ‘strongly encouraging’ network operators to engage with consumers during pre-lodgement, we would recommend the AER, to the extent possible under the EII Act, follow the example of Ausgrid in the HCC REZ:

- Make such engagement a requirement through a network appointed and funded CRG that would be bound by a confidentiality agreement
- Require that the engagement meets the expectations of the BRH
- Highlight its expectation that the CRG be funded by the network to make submissions on the network’s non-disclosure claim and the revenue proposal

Dealing with ‘pass through’ confidentiality

In our experience the network is often forced to apply for confidentiality because EnergyCo or another party requires confidentiality on the information they provide to the network or on key provisions of contracts they enter with the network. We do not think that simply accepting this ‘pass through’ confidentiality is in consumers’ interests.

The largest of these claims was for confidentiality around the Infrastructure Planner Fee (IP Fee) charged to Ausgrid by EnergyCo. While we accept that the AER is unable to assess if the IP Fee is ‘prudent, efficient and reasonable’, that is not an excuse for not having transparency around the components and how they have been calculated. We acknowledge that the AER is taking steps to improve the transparency around the components of the IP Fees⁶. However we encourage the AER to continue to press EnergyCo for greater transparency of those components and how they are calculated, given their materiality.

⁵ Ausgrid discussed the role and contribution of the Panel on pp 17-20 of its [revenue proposal](#)

⁶ Section 4.4 [CWO REZ final determination](#) and section 9.2.10 [HCC REZ final determination](#)

2. *What practical challenges might occur in applying the proposed approach in the ND Guideline, and how might they be addressed?*

We offer the following comments on Attachments A and B

We support the AER's approach of requiring the network to make non-disclosure claims that are specific, well-reasoned and fully justified.

Given our view that disclosure should be the AER's default position, there needs to be a very high burden of proof on the network in completing the template. For example, some of Transgrid's original justifications for its confidentiality claims in the Enabling CWO REZ revenue proposal included 'potential harm to Transgrid's commercial interests' and 'possible disadvantage to Transgrid in potential negotiations with EnergyCo and with landowners'. We note that the AER was unsatisfied with this level of detail provided by Transgrid and that in response to the AER's request for further justification Transgrid chose to withdraw many of those confidentiality claims⁷. In future we would expect considerable justification to be provided at the time a network makes a non-disclosure claim.

Given our comment above on 'pass through' confidentiality, we would recommend that the table in Attachment A should also include a column on whether a third party is imposing the confidentiality claim on the network e.g. EnergyCo or a contractor. We also encourage the AER to engage in dialogue with EnergyCo directly with a view to minimising confidentiality claims to lead to improved transparency. EnergyCo should not be treating the network as a pass through for these claims.

We think the current drafting of Attachment B is of limited use and may be misleading. The proportion of pages of a revenue proposal where confidentiality is claimed is not a meaningful measure of the scale or impact of the claim on consumers' interests. Take the example of a 100 page revenue proposal. The implication of the draft Attachment B is that an application for non-disclosure for 5 pages is more likely to be approved than an application for 20 pages. The issue for consumers is not the number of pages but the materiality of the application ie how does it restrict the ability of consumers to make a submission on the revenue proposal?

A core issue that consumers seek disclosure on is the risk allocation under the adjustment events. These might be covered in 5 pages or 20 pages - so it is not the number of pages, it is the materiality of scope of the application. This information should be provided in Attachment A – with evidence to meet the AER's aim of 'specific, well-reasoned and fully justified'. The AER can then assess its materiality and impact on consumer engagement.

Given the non-disclosure template will be published on the AER's website⁸, we expect that this publication will provide very little detail. After all, the network may well be providing confidential information to justify non-disclosure. This is where pre-lodgement consumer engagement we recommended above is important as that would test these sorts of claims prior to the network making their submission. If the CRG did not agree with the network's claim they would be able to outline their reasons in a, perhaps confidential, submission to the AER.

⁷ [Enabling CWO REZ Preliminary Position Paper](#) p. 6

⁸ Draft Guideline p. 9

Given the short timetable and reduced role the AER has under the EII Act, if a network makes a non-disclosure claim which is subsequently withdrawn (which happened with both Ausgrid and Transgrid's claims), the opportunity for meaningful transparent pre lodgement consumer engagement is lost. Therefore we support the AER's proposal to bring forward their decision on non-disclosure to prior to publication of the revenue proposal. The compressed EII timetable offers limited time for detailed engagement after publication of the AER's Preliminary Position Paper.

3. *What additional circumstances might be considered alongside the non-exhaustive list of considerations that we may take into account when assessing:*

- *public interest considerations for and against disclosure of information*
- *whether the information is confidential or commercially sensitive*
- *the effect of publishing the information on future competitive assessment processes.*

Public interest

We recommend that the AER strengthen the text in the draft Guideline on the importance of transparency of information through publication and how this is in the public interest. In the Supplementary Appendix to the PPP on the HCC REZ project, the AER discussed in detail why it believed that it was in the long term interests of consumers for information on the relevant adjustment mechanisms to be made public⁹:

“...we consider there is a strong public interest case for disclosure of information on the adjustment mechanisms. Transparency is vital to preserving confidence in the regulatory framework and social licence. In this case, the importance is heightened because the adjustment mechanisms go to the allocation of risks and costs between the Network Operator and consumers. Keeping the material confidential prevents consumers from being informed about the potential risks they bear. Absent publication of this information, stakeholders cannot engage in informed discussion on the merits of the revenue proposal.”

Confidential vs commercial

We agree with the AER's position that a confidentiality agreement between the network and a third party will not be determinative of whether that information is confidential. The existence of a confidentiality agreement should not bind the AER's discretion.

We would recommend that the AER closely review where non-disclosure is based on network perceived commercial advantage. Given the network has already been selected to develop the project (whether in a contestable or non-contestable process), the issue is how long should some information be kept confidential to protect the intellectual property of the winner in any future Roadmap tender process. We offer the following comments:

- in considering the potential impact that disclosure might have on future competitive assessment processes we need a clear understanding of what 'imminent' means
- what happens if the 'next project timetable' relied on by the AER in deciding it is 'imminent' is subsequently changed by the Government resulting say a 12 month project delay? Does the AER then disclose the information it previously agreed not to disclose? If so, when?

⁹ [Supplementary Appendix to the Preliminary Position Paper](#) in the HCC REZ project pp 7-8

- how will the AER balance the network’s claim that the information should never be disclosed with the benefits that transparency brings to the competitive process? How will the AER balance the effective granting of a ‘patent’ that non-disclosure gives against the aim of the long term financial interests of consumers? Should a network that wins one process due to a clever idea be able to effectively continue to use that idea to win future processes and extract monopoly rents from consumers? Is allowing non-disclosure in the ‘public interest’?

Non-disclosure claims: contestable revenue determination

The AER’s justification for publishing only limited information on contestable revenue or adjustment proposals reflects¹⁰:

“... that, under the contestable framework, the competitive market is being relied upon to produce an outcome that reflects prudent, efficient and reasonable costs rather than a detailed assessment of costs.”

The AER’s role is confined to making a ruling that the process is competitive.

Our concern is that while the competitive process may be relied upon to produce a competitive outcome for the selection of the preferred bidder, subsequent negotiations between the preferred bidder and EnergyCo may result in a different risk allocation between the bidder and consumers from what the initial bid was based on. Consumers are not represented in that negotiation to express a view on any changes in the initial bid risk allocation. The revenue proposal may reflect a different risk profile to that on which the initial winning bid was made.

How do consumers get comfort that the risk allocation finally agreed with the preferred bidder and incorporated into the revenue proposal will result in prudent, efficient and reasonable costs? They will not get any comfort from the current approach of a confidential revenue review where consumers are unable to make a submission.

We recommend that the AER explore whether it is able to require (or at least create an expectation) that networks making a contestable revenue application also establish a CRG along the lines recommended above for non-contestable revenue proposals:

- network appointed and funded CRG bound by a confidentiality agreement
- require that engagement meets the expectations in the BRH
- highlight its expectation that the CRG be funded to make a confidential submission to the AER on the network’s disclosure claim and critical aspects of the revenue proposal such as adjustment events

Louise Benjamin

Mark Grenning

¹⁰ Explanatory Statement p. 7