

Transgrid: Project EnergyConnect capex reopener

Opinion as to the proper construction of NER cl 6A.7.1(a) and responses to the AER's questions

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Overview

1. On 1 September 2026, the AER published its consultation paper in response to the capex reopener application that Transgrid submitted in February 2026.¹ The AER has raised 12 questions for consultation with stakeholders relating to specific issues that the AER has addressed in its consultation paper.
2. On the same day, the AER also sent information request #005 (**RFI #005**) to Transgrid, in which it formally requested Transgrid's responses to the same 12 questions.
3. In response to the consultation paper, we have been instructed to provide our opinion:
 - a. setting out, in summary form, the proper construction of the provisions of **clause 6A.7.1(a)** of the National Electricity Rules (**NER**) that the AER has specifically addressed in the consultation paper; and
 - b. responding to the questions raised by the AER in the consultation paper and RFI #005 that relate to the proper construction of, and approach to applying, **cl 6A.7.1(a)**.
4. We set out our opinion as to the proper construction of cl 6A.7.1(a) in two parts.
5. First, in the part titled "Detailed responses to the AER's questions", we respond to each of the questions raised by the AER (apart from questions 3, 5 and 9, which are conclusory). We have reordered and subdivided those questions, where appropriate, in order to provide our responses in a clearer logical sequence.
6. Thereafter, we have summarised our conclusions in a final section entitled "Summary Opinion".
7. In this opinion, we have also adopted the AER's convention of referring to the successive subparagraphs of cl 6A.7.1(a) as "*criterion (1)*" through "*criterion (7)*".

¹ AER, *Consultation paper: AER preliminary position on Transgrid's application to reopen the 2023-28 transmission revenue determination for Project EnergyConnect*, 1 September 2026 (**Consultation paper**).

Background

8. On 22 December 2025, we provided an opinion to Transgrid addressing issues raised by the AER in its feedback on a draft capex reopener application that Transgrid provided to the AER in September 2025. In that opinion, our key conclusions were that:
 - a. Transgrid’s proposed reopener application was consistent with the purpose of the capex reopener provision in **cl 6A.7.1(a)** of the NER;
 - b. the proposed application properly identified an “event” – namely, the state of affairs that culminated in Contract Failure, as defined in the application;
 - c. a circumstance, such as a conclusion reached by Transgrid’s Board based on objective facts (which the AER has labelled “endogenous”), may comprise part of an event that was not reasonably foreseeable and not within Transgrid’s reasonable control; and
 - d. however, insofar as the event culminates in a business decision by the TNSP, that decision must be substantially based on exogenous events or circumstances.
9. On 15 June 2026, Mr Clarke provided a further opinion to Transgrid, in which he concluded that the date as at which the “reasonable foreseeability” criterion is to be assessed is the date when a TNSP submits its revised revenue proposal – which, for Transgrid, occurred on 2 December 2022.
10. In its consultation paper, the AER has taken a different view on a small number of those issues. In particular, the AER has expressed preliminary conclusions that:
 - a. it is not satisfied that the Contract Failure event meets the requirements of a reopener event, because it includes matters that had not occurred at the relevant time;² and
 - b. it is not satisfied that Transgrid has demonstrated that Contract Failure was beyond its reasonable control because, as the event is defined by reference

² AER, Reopener application, p 10.

to Transgrid's own judgement or decision-making, a question remains whether the event can be said truly to have been beyond Transgrid's reasonable control.³

11. The AER has expressed a preliminary view that the natural and ordinary meaning of the phrase "*at the time of the making of the revenue determination*" is the day the AER made its final decision on Transgrid's revenue determination. However, it is unclear whether that represents the AER's preliminary view as to the correct interpretation of that phrase, as a matter of statutory construction.⁴
12. We continue to hold the views expressed in our earlier opinions.
13. Having carefully considered the AER's preliminary view as set out in the consultation paper (which extend to matters beyond the scope of our previous opinions), we set out below our responses to the questions posed by the AER, insofar as they go to the correct interpretation and application of the capex reopener criteria set out in **cl 6A.7.1(a)**. So far as those questions traverse the matters about which we have previously opined, our detailed responses below explain why we maintain the views we previously expressed.

³ AER, Reopener application, pp 10-12.

⁴ AER, Reopener application, p 12.

Detailed responses to the AER's questions

Criterion (1): AER questions 1, 2, 4 & 6

14. Criterion (1) requires that an event that is beyond the TNSP's reasonable control has occurred during a regulatory control period, and the occurrence of that event (or an event of a similar kind) during that period could not reasonably have been foreseen by the TNSP at the time of the making of the revenue determination.

Question 1: Does Contract Failure fulfil the requirements of an "event"?

15. In section 3.1.2.1 of the consultation paper, the AER has concluded that Contract Failure is not an "event" within the meaning of **cl 6A.7.1(a)**, because one of its elements relates to Transgrid's prediction, opinion or belief about likely future events. As the AER states:

Criterion 1 still requires an event to have occurred. We do not consider it covers events that have not yet happened. This means a hypothetical scenario, or a TNSP's view about what may happen in the future, cannot be included in an event definition for the purposes of Criterion 1. ...

[O]ur preliminary view is that the following parts of the definition of Contract Failure are not described as an 'event' that 'has occurred':

- construction of the PEC would not be completed by SEJV under the existing EPC contract
- if PEC were to proceed, an alternative arrangement to delivery under the EPC contract would be necessary.

We consider that these aspects of Transgrid's Contract Failure event describe Transgrid's prediction, opinion or belief as to what may (or would be likely to or would be highly probable to) occur in the (then) future as a result of the events or state of affairs that had (already) occurred in combination with Transgrid's proposed or possible response to those events or that state of affairs.

For this reason, we are not satisfied that Transgrid's Contract Failure event meets the requirements of an event for the purposes of the reopener clause. It includes matters that had not occurred at the relevant time.⁵

⁵ AER, Consultation paper, pp 9-10.

16. **Clause 6A.7.1(a)** gives a deliberately broad definition of “event”:

a reference to an event includes a series of events and a state of affairs, which may include a greater than anticipated increase in demand.

17. This broad definition is important because it stands in real tension with the AER’s approach to the proper interpretation of Criterion 1. In particular, and as explained below, the express inclusion of “*a greater than anticipated increase in demand*” shows that the concepts of an event, series of events or state of affairs can include judgements about current and continuing levels of demand. It would make little sense to confine the concept of a greater than anticipated increase in demand to recorded levels of demand, and to ignore an increase in demand that a TNSP considers, on all the evidence, will be likely to occur (or continue occurring) into the future.
18. In our opinion, to insist that a reopener “event” cannot include any element of evaluation, judgement or foresight by a TNSP would be both inconsistent with the clear structure of cl 6A.7.1(a), and unworkable in the real world. This can be highlighted by the following considerations.
19. **First**, the “not reasonably foreseeable” element in criterion (1) aligns with the *ex ante* incentive regulation framework for the making of revenue determinations. If the event is one that, before submitting its revised revenue proposal, a TNSP should reasonably have anticipated to occur within the forthcoming regulatory period, then the TNSP is expected to have included the capex required in order to prevent or mitigate the consequences of that event in its revised revenue proposal. And if an event occurs during a regulatory period which the TNSP could reasonably have foreseen, but it has not been included in the TNSP’s forecast capex in its revised revenue proposal, the TNSP is not permitted to seek a reopener. The *ex ante* framework fundamentally depends on TNSPs making reasonable and prudent forecasts of their expected capex requirements over the coming 5 years.
20. Yet, on the AER’s proposed definition of “event”, if any change of circumstances occurs during that regulatory period which had not been reasonably foreseeable, the TNSP would not be permitted to seek a reopener for capex that it spends in order to avoid or mitigate the consequences that the TNSP – exercising its foresight and judgement based on careful analysis and evaluation – now expects

will flow from that previously-unforeseeable change in circumstances. So, to take the example of “a greater than anticipated increase in demand”, the logical consequence would be that the TNSP cannot claim a reopener for capex that it spends to augment its network in response to that unexpected increase in demand in order to avoid or mitigate supply shortfalls that the TNSP expects are very likely to occur from that increased demand (both as recorded and as continuing). Rather, the TNSP would only be permitted to claim a reopener for capex that it spends after, and in response to, actual shortages of supply. Taking that approach to the **cl 6A.7.1(a)** reopener mechanism would be entirely at odds with the exercise of prudent foresight by TNSPs, which is so central to the network revenue, reliability and planning frameworks generally.

21. **Secondly**, as a basic legal proposition, there is no difficulty in characterising the making of a judgement as to the incapacity of a company to complete a construction project under its construction contract as forming part of, or being the final integer of, an event or state of affairs. The state of mind of a natural person is a question of fact,⁶ just as the state of mind of a company is.⁷ Likewise, a state of mind that is based on a careful evaluation of objective facts is itself a fact.
22. As such, the Contract Failure event occurred on 25 October 2023, when Transgrid’s board of directors reached the conclusion that the construction of PEC would not be completed by SEJV under the existing EPC contract and that, if PEC were to proceed, an alternative contractual arrangement would be necessary. Here, Transgrid’s judgement was based on hard facts, namely that:
 - a. Elecnor Australia’s forecast final cost would result in a cost overrun of between \$678 million and \$1,415 million;⁸
 - b. Elecnor Australia was experiencing significant negative cashflows and was facing substantial and insurmountable losses under the EPC contract,

⁶ *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483: “The state of a man’s mind is as much a fact as the state of his digestion.”

⁷ *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172.

⁸ Transgrid, Reopener application, Attachment 2, p 21.

notwithstanding the interim cash flow relief that Transgrid had already provided;⁹

- c. Transgrid was being contacted directly by Elecnor Australia's unpaid subcontractors and suppliers;¹⁰
 - d. Elecnor Australia's parent company had made clear that it could not provide ongoing support absent a commercial resolution.¹¹
23. The mere fact that that conclusion involved an element of forward-looking business judgement does not mean that the event did not occur, as the AER appears to have concluded. To the contrary, it shows that Transgrid was overseeing the PEC project prudently, and with appropriate regard to how the project could be completed effectively and with the greatest efficiency, in the long-term interests of consumers.
24. As Transgrid has previously submitted, it is necessary that an "event" can be articulated with realistic regard to the commercial and contractual context in which Transgrid operates – including the need for decisions about major capital expenditure to be made within an appropriate corporate governance framework.¹²
25. **Thirdly**, an event can only qualify for a reopener if failure to rectify the adverse consequences of the event would be likely to materially adversely affect reliability and security of the transmission system: criterion (6). So a TNSP must consider whether, and how, it should respond to an unexpected change in circumstances so as to be likely to avoid adverse reliability or security effects both efficiently and effectively.
26. On the AER's proposed definition of "event", a TNSP cannot claim that a reopener event has occurred when it forms the view that a change in circumstances will have a material adverse effect on reliability or security, or that it is necessary to undertake substantial new capital expenditure in order to avoid

⁹ Transgrid, Reopener application, Attachment 2, pp 20, 22 & 24.

¹⁰ Transgrid, Reopener application, Attachment 2, p 22.

¹¹ Transgrid, Reopener application, Attachment 2, pp 18, 22 & 24.

¹² Transgrid, *Project EnergyConnect: Application to reopen the 2023-2028 revenue determination*, February 2026 (**Reopener application**), Attachment 6, p 5.

or mitigate those effects. As with the example above, the TNSP would be required to wait for those adverse reliability or security risks to crystallise – most likely, through unplanned outages and loss of supply – before it could articulate a capex reopener event that involves no element of *ex ante* foresight or judgement by the TNSP. That would, in turn, undermine the objective of removing the incentive for a TNSP to defer major vital investment in response to such unexpected shocks.¹³

27. If the AER were to maintain its proposed approach to interpreting the requirement for a reopener “event”, that stance would undermine the capex reopener mechanism and render it unworkable, in the ways we have briefly outlined above.
28. Lastly, we note that AGL submits that the Contract Failure event falls afoul of a “clear distinction between an event and its ‘adverse consequences’.” On AGL’s view, the relevant events are the flooding, labour shortages, inflation, and productivity shortfalls, whereas it describes Contract Failure as an “adverse consequence”.¹⁴
29. That submission misreads the cl 6A.7.1(a) criteria. Where the rule uses the expression “*the adverse consequences of the event*”, it does so as part of a concept of action taken (or not taken) “*to rectify the adverse consequences of the event*”.¹⁵
30. Here, the event or state of affairs culminated in Transgrid recognising and accepting that PEC could not be completed under the existing EPC contract, in particular where the sole remaining contractor was itself on the brink of insolvency. The adverse consequences of that event were, most directly, that PEC Stage 2 would not be completed, absent some viable alternative pathway to completion. The options analysis that Transgrid undertook after October 2023

¹³ AEMC, *Economic regulation of transmission services rule change*, Final rule determination, 16 November 2006, p 61.

¹⁴ AGL submission, p 2. At Consultation paper, p 19, the AER appears to suffer from the same confusion:

We acknowledge AGL's concern. Transgrid's application is based on a counterfactual that PEC would not have been completed if Transgrid had not remedied the event with a new contract. This is complex as the Contract Failure event includes elements of Transgrid's decision-making and whether that has occurred. This results in an overlap between the event, the failure to rectify the adverse consequences of the event and the rectification.

¹⁵ In criteria (3) and (4), and criterion (6) (what effect a “failure to rectify the adverse consequences of the event” would have on network reliability and security).

(informed by its modelling of net market benefits associated with each option) then informed the actions that Transgrid then took to rectify the adverse reliability and security effects that would ensue if PEC Stage 2 were not completed, in the way that would provide the greatest net benefit to consumers.¹⁶

31. This is where the true distinction between the “event” and its “adverse consequences” lies.

Question 4: At what point in time is reasonable foreseeability to be assessed?

32. Answering this question requires close attention to the process by which a revenue determination is required to be made, and to the AER’s legal obligations when making a revenue determination.
33. Criterion (1) relevantly requires that a reopener event must have been an event of a kind that could not reasonably have been foreseen by a TNSP “*at the time of the making of the revenue determination*” for the 5-year regulatory period in which the event occurred.
34. The AER’s preliminary view is that the ordinary meaning of that phrase would refer to the date on which the AER makes its final revenue determination.¹⁷
35. However, the use of the gerund phrase “*at the time of the making of the revenue determination*” in criterion (1) acknowledges that the “making” of a revenue determination is not a single point-in-time event, but a process.¹⁸ Under the NER Ch 6A framework, that process is an iterative and consultative one – requiring both a “propose/respond” dialogue between the TNSP and the AER, and with mandated opportunities for other stakeholders to make submissions in relation to the TNSP’s proposals and the AER’s draft decision.
36. Indeed, the AER correctly acknowledges that it is legally required to give stakeholders a reasonable opportunity to make submissions on a TNSP’s

¹⁶ Transgrid, Reopener application, Attachment 3.

¹⁷ AER, Consultation paper, p 12.

¹⁸ Cf if criterion (1) had been drafted to refer to “the date when the AER makes the revenue determination”.

revenue proposal and revised revenue proposal, before it makes its final revenue determination.¹⁹ We will address that legal requirement further below.

37. The proper interpretation of the NEL is not decided solely, or even principally, by reference to grammatical or linguistic considerations, especially where the words are open to more than one interpretation. Three significant interpretive principles and limitations need to be recognised:
 - a. First, **cl 7(1) of Sch 2** to the NEL requires that, in interpreting a provision of the NEL, the interpretation that will best achieve the purpose or object of the NEL is to be preferred to any other interpretation.²⁰
 - a. Secondly, the NEL must be interpreted in a manner that is consistent with the NEL. Insofar as a provision of the NEL might otherwise be capable of being interpreted *inconsistently* with the NEL, it must be interpreted in a manner that is *consistent* with the NEL, so that the rule does not exceed the rule-making power conferred by the NEL: NEL, **Sch 2, cl 42(1)**.²¹
 - b. Thirdly, provisions of the NEL must be interpreted in their statutory context within – and harmoniously with²² – the framework of the NEL as a whole. The statutory context must be considered in the first instance, and not merely at a later stage if the language used is found to be ambiguous.²³
38. Looking at the timeframes specified under the NEL for the making of a revenue determination by the AER:
 - a. A TNSP must submit its revenue proposal to the AER, no later than 17 months before the expiry of the current regulatory control period: **cl 6A.10.1(a)**.

¹⁹ AER, Consultation paper, p 12; although the AER incorrectly locates the source of that obligation as being the NEL, rather than the National Electricity Law.

²⁰ NEL, **Sch 2, cl 7(1)**; read with **s 3** of the NEL and **cl 41(2)** of **Sch 2** to the NEL.

²¹ See also, eg, *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 983 (Griffith CJ).

²² *Ross v The Queen* (1979) 141 CLR 432 at 440 (Gibbs J; Barwick CJ, Stephen, Mason and Aickin JJ agreeing).

²³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 408; cited in *AER v Pelican Point Power Ltd* [2023] FCA 1110 at [97]. See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14].

- b. The AER must publish the revenue proposal for public consultation (**cl 6A.11.3**), and must then, as soon as practicable, publish its draft decision together with reasons for the draft decision: **cls 6A.12.1 & 6A.12.2(a)**.
 - c. Within 45 days after publication of the draft decision, the TNSP must then submit its revised revenue proposal: **cl 6A.12.3(a)**. The revised revenue proposal may only make revisions to the original revenue proposal so as to incorporate the substance of any changes required by, or to address any matters raised in, the draft decision: **cl 6A.12.3(b)(1)**.
 - d. The AER may then invite further submissions on the revised revenue proposal, specifying the matters about which submissions are invited, allowing at least 15 business days for stakeholders to make any further submissions: **cl 6A.12.4**.²⁴
 - e. The AER is not required to consider any submission made after the time for making the submission has expired: **cl 6A.16(a)**.
 - f. The AER must then make and publish the revenue determination, together with its reasons for the revenue determination, no later than 2 months prior to the commencement of the next regulatory control period: **cl 6A.13.3**.
39. Within those specified timeframes, the latest point at which a TNSP has a right to make submissions to the AER is when it submits its revised revenue proposal. Even at that point, the TNSP may only make revisions to its original revenue proposal to address matters raised in the AER's draft decision. After that point, there is no basis on which the TNSP may unilaterally seek to amend the capex allowance it included in its revised revenue proposal.
40. If, after submitting its revised revenue proposal, a TNSP were to become aware of information that would cause a particular kind of capex reopener event to become reasonably foreseeable during the forthcoming regulatory control period – and therefore wished to submit to the AER that a significantly higher

²⁴ Although **cl 6A.12.4** is expressed as a discretionary power, rather than a mandatory obligation, the AER is required, by **s 16(1)(b)** of the NEL to give notice to stakeholders of all material issues under consideration, and to allow stakeholders a reasonable opportunity to make submissions before the revenue determination is made: see para 43 below.

capex allowance is required in order to reasonably reflect the *capex criteria*²⁵ – then the TNSP cannot amend its submitted capex estimate and it has no right to make a further submission to the AER to request an increased capex allowance.²⁶

41. Conversely, if a TNSP were permitted to make late requests for a substantial additional capex allowance, the AER may be unable, in the remaining time available:
 - a. to notify stakeholders of the requested substantial capex increase, so that stakeholders would be afforded a reasonable opportunity to make submissions; and
 - b. to consider the TNSP's request and stakeholders' submissions, prior to making its final decision.
42. At a minimum, there would be a real risk of substantial capex increases being raised very late in the long consultative and deliberative process in a way that would significantly complicate, and potentially undermine, the AER's decision-making processes. This difficulty is underscored by the consultation and procedural fairness obligations that the AER is bound to observe under **s 16(1)(b)** of the NEL.

²⁵ The *capex criteria* (set out in **cl 6A.6.7(c)(3)**) include a realistic expectation of the cost inputs and other relevant inputs required to achieve the *capex objectives*.

²⁶ The example of the AER gives, referring to a letter that Transgrid sent to the AER on 3 April 2023, is not to the point. That letter did not request the AER to provide an additional capex allowance, but corrected a material omission of an amount of as-commissioned capex from the capex model that Transgrid had provided in support of its revised revenue proposal. The AER accepted that that as-commissioned capex had been erroneously omitted from Transgrid's capex model: AER, *Transgrid transmission determination, 1 July 2023 to 30 June 2028: Final determination*, Attachment 5, p 36.

43. **Section 16(1)(b)** imposes obligations of consultation and procedural fairness on the AER when making a revenue determination:

16— Manner in which AER performs AER economic regulatory functions or powers

- (1) The AER must, in performing or exercising an AER economic regulatory function or power— ...
 - (b) if the function or power performed or exercised by the AER relates to the making of a ... transmission determination, ensure that—
 - (i) the regulated network service provider to whom the determination will apply; and
 - (ii) any affected Registered participant; and
 - (iii) if AEMO is affected by the determination— AEMO; and
 - (iv) network service users or prospective network service users of the relevant services that the AER considers have an interest in the determination; and
 - (v) any user or consumer associations or user or consumer interest groups that the AER considers have an interest in the determination,
 are, in accordance with the Rules—
 - (vi) informed of material issues under consideration by the AER; and
 - (vii) given a reasonable opportunity to make submissions in respect of the determination before it is made.

44. If the AER were to interpret **cl 6A.7.1(a)(1)** so that:

- a. the date at which reasonable foreseeability is to be assessed is the date when the AER makes its final decision for a revenue determination;
- b. a TNSP is therefore permitted, up to the time of the AER's final decision, to notify the AER of, and to request an increased capex allowance on account of, a major event that the TNSP reasonably expects to occur during the forthcoming regulatory control period; and
- c. therefore, the TNSP may later be denied the ability to obtain a capex reopener on the basis that an event beyond its reasonable control became

reasonably foreseeable after the TNSP submitted its revised revenue proposal but before the AER made its final decision,

then the AER would be unable to comply with its obligation under s 16(1)(b) to ensure that affected stakeholders (including consumer and user associations and interest groups) are informed of, and given the opportunity to make submissions about, material issues under consideration by the AER.

45. The AER's inability to comply with its s 16(1)(b) obligation in that event is also underscored by the AER's obligation to make and publish the reasons for its final decision before a hard deadline of not later than 2 months before the commencement of the new regulatory control period: cl 6A.13.3. In Transgrid's case, it is notable that the AER published its revenue determination on Friday, 28 April 2023, which was the last business day before that deadline. Had Transgrid submitted a late request for substantial additional capex shortly prior to 28 April 2023, the AER would have had no ability to extend its deadline for making the revenue determination, in order for it to be able to comply with its s 16(1)(b) consultation and procedural fairness obligations.
46. In its consultation paper, the AER seeks to avoid or downplay that difficulty by noting that it previously delayed making Transgrid's 2018-23 revenue determination from the statutory deadline of 30 April 2018 to 17 May 2018.²⁷ The AER had no legal power to extend that 30 April 2018 deadline. By making and publishing its revenue determination only on 17 May 2018, the AER contravened cl 6A.13.3 of the NER.
47. For present purposes, the important point is this: if a regulator seeks to rely on its own previous failures to comply with the NER in order to inform its own interpretation of other provisions of the NER, that is not only a wholly unorthodox and impermissible approach to statutory interpretation – more fundamentally, it would undermine the rule of law, by enabling a regulator to disregard its own breach of some provisions of the rules that it administers, in order to arrive at incorrect and unlawful interpretations of those same rules.
48. The AER says that it has not reached a final view on the precise point at which reasonable foreseeability is to be assessed. In its view, one option is the date of

²⁷ AER, Consultation paper, p 13.

the final revenue determination and the only other option is that “*the relevant date could be some weeks before [the date on which the AER makes the final determination], allowing time to have regard to any submission before making the determination*”.²⁸ There is a further difficulty with this suggested approach, in that the NER timeframes for the making of a final determination provide no certain point in time at which that notional deadline could be fixed. A TNSP would have no idea when the relevant deadline is, until the AER determines that deadline on a case-by-case basis after the event, in response to a later capex reopener application.

49. This would leave TNSPs, stakeholders and the AER itself in a situation of unworkable uncertainty, where TNSPs would be incentivised to make last-ditch submissions for additional capex up to 2 or 3 weeks before the AER makes its final determination – which the AER would then be required, under NEL s 16(1)(b) to allow all stakeholders to have a reasonable opportunity to make submissions about, all of which the AER would then need to read and consider, before making its final decision by the statutory deadline.
50. If the AER were to set the date for assessing reasonable foreseeability under criterion (1) at a date that would make it impossible for the AER to comply with its NEL s 16(1)(b) obligation to stakeholders, that would be to interpret the NER in a way that is inconsistent with the NEL. That would be a legally incorrect and impermissible interpretation.
51. Given all of the foregoing considerations, the latest date for assessing the reasonable foreseeability requirement that can be fixed with any certainty is the date when the TNSP is required to submit its revised revenue proposal. In the case of Transgrid’s 2018-23 revenue determination, that date was 2 December 2022.

Question 6: How is reasonable foreseeability to be assessed?

52. In its reopener application, Transgrid submitted that the appropriate test of reasonable foreseeability under criterion (1) is:

Was the capex required to rectify the adverse consequences of the event (or an event of a similar kind) a cost that a prudent and efficient TNSP would,

²⁸ AER, Consultation paper, p 13.

during the revenue determination process, realistically have expected to incur during the forthcoming 5-year regulatory period?²⁹

53. The AER observes that this approach is similar to the test that the AER has applied.³⁰
54. The AER considers that foreseeability should be decided by assessing:
 - a. the foreseeability of that event or an event of a similar kind;
 - b. the foreseeability of the event prospectively, not with hindsight in light of the event that actually occurred;
 - c. the foreseeability of the event from the perspective of a reasonable TNSP in Transgrid's position; and
 - d. the foreseeability of the event such that it does not necessarily depend on the probability or improbability of a given occurrence.
55. We see no difficulty with the AER's first 3 propositions, particularly if the AER's concept of a "*reasonable TNSP*" is understood to be the same as a prudent and efficient TNSP.
56. It is not clear what the AER means by its fourth proposition. If it is intended to suggest that evaluating whether a particular event was reasonably foreseeable does not require any assessment as to the probability or improbability of its occurrence – as was the case in the law of negligence,³¹ prior to the *Civil Liability Acts*³² – then that would be a legally incorrect approach.
57. The proper interpretation of an evaluative criterion such as "not reasonably foreseeable" requires close attention to the regulatory setting in which the test is

²⁹ Transgrid, Reopener application, Attachment 6, p 11.

³⁰ AER, Consultation paper, p 14.

³¹ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47:

[W]hen we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful.

³² See, eg, *Civil Liability Act 2002* (NSW), s 5B.

to be applied, rather than referring to some universal or abstract meaning.³³ It would be a legal error for the AER to translate that duty of care standard of reasonable foreseeability to this radically different legal context.

58. In the regulatory setting of reopening a TNSP's revenue determination, the reopener criteria must be interpreted in a way that maintains the incentive properties of the *ex ante* revenue cap that is set in a TNSP's revenue determination.³⁴ In order to align with those incentive properties, the test of reasonable foreseeability to be applied in considering a reopener application must be the same standard as that which the AER applies to the capex forecasts that a TNSP submits during the revenue determination process.
59. This is the standard that we have stated in **paragraph 52** above. It is drawn from, and aligns with, the *capex criteria* that the AER must apply in assessing the reasonableness of a TNSP's capex forecast at the revenue determination stage: **cl 6A.6.7(c)**.³⁵
60. The AER has also referred to submissions made by **AGL Energy** and the Justice and Equity Centre (**JEC**), which assert that the AER should consider whether various individual risks were known to or reasonably foreseeable by Transgrid, rather than by assessing the reasonable foreseeability cumulatively of the

³³ As a recent example see *CRS v Secretary, Department of Home Affairs* [2024] FCA 619 at [77] & [131]-[133], applying the 'reasonably foreseeable future' test stated in *NZYQ v Minister for Immigration* (2023) 280 CLR 137. See also *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at [52] (French CJ, Keifel, Bell, Nettle JJ).

³⁴ AEMC, *Economic regulation of transmission services rule change*, Final rule determination, 16 November 2006, p 62:

This approach is intended to ensure that the incentive properties of the *ex ante* cap and the contingent projects regime are maintained while at the same time limiting the exposure of TNSPs to the full risks and costs of addressing major disruptions to their networks in the process of meeting their regulatory obligations.

³⁵ Under **cl 6A.6.7(c)**, if the AER is satisfied that a TNSP's forecast capital expenditure reasonably reflects the following *capex criteria*, it must accept the TNSP's forecast in making its revenue determination:

- (1) the efficient costs of achieving the *capital expenditure objectives*;
- (2) the costs that a prudent operator would require to achieve the *capital expenditure objectives*; and
- (3) a realistic expectation of the demand forecast, cost inputs and other relevant inputs required to achieve the *capital expenditure objectives*.

overlapping external events and state of affairs that together gave rise to Contract Failure.³⁶

61. As Transgrid has explained in its reopener application, the Contract Failure occurred when, following the accumulation of circumstances that had adversely impacted PEC, and based on information and analysis that Transgrid obtained between August and October 2023, Transgrid recognised and accepted that construction of PEC would not be completed by SEJV under the existing EPC contract.³⁷
62. As such, the Contract Failure event is consistent with **cl 6A.7.1(a)**, which expressly anticipates that a reopener event may include “a series of events or a state of affairs”. In that statutory context, it would be a clear error for the AER to apply the “not reasonably foreseeable” criterion, in isolation, to any of the individual circumstances that, in combination, ultimately precipitated the Contract Failure event.

Question 2: How is the “beyond reasonable control” criterion to be assessed?

63. Criterion (1) requires that the Contract Failure event was beyond Transgrid’s reasonable control.
64. “Reasonable control” is not a legal term of art. But it is at least clear that the adjective “reasonable” operates to limit or qualify what would otherwise be an absolute notion of “control”.³⁸ And what is within or beyond a TNSP’s

³⁶ AER, Consultation paper, p 16. See, eg, AGL submission, 28 April 2026, pp 2-3:

Transgrid’s application states that the contract failure was not reasonably foreseeable, due to the unknown cumulative impact of the factors affecting the contractor’s position. It does not, however, claim that these factors were individually not reasonably foreseeable In any event, these factors were reasonably foreseeable as flooding was a known risk in the PEC construction area, and both labour shortages and elevated inflation had become well-established risks since covid. (emphasis added)

³⁷ Transgrid, Reopener application, Attachment 6, pp 2 and 4-5.

³⁸ *Snedden v Minister for Justice* (2014) 230 FCR 82 at [116] (Middleton and Wigney JJ; Pagone J agreeing); *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [65]:

The word “reasonably” in the expression “reasonably practicable” limits or qualifies what would otherwise be an almost absolute obligation The removal of a non-citizen may be practicable in the sense that it is feasible, but not “reasonably practicable” as required by s 198(6) of the Act.

reasonable control is an evaluative question of fact and degree which depends on the individual circumstances of each case.³⁹

65. As it appears in criterion (1), the expression “reasonable control” must also be interpreted harmoniously with the Chapter 6A economic regulation framework as a whole, and in a manner that will best achieve the purpose of the reopener mechanism.⁴⁰
66. Two important consequences flow from those basic propositions. In a setting where a TNSP has undertaken large capex in addition to the 5-yearly forecast capex approved by the AER in its revenue determination, the question whether an event is within a TNSP’s reasonable control must therefore be assessed:
 - a. realistically, with regard to the contractual, commercial and regulatory context in which the TNSP was operating at the relevant time; and
 - b. so as to promote efficient investment in electricity services for the long-term interests of consumers, including with respect to reliability and security of supply and the achievement of emissions reduction targets.

Was Contract Failure within Transgrid’s reasonable control, merely because it involved an element of commercial judgement and decision-making?

67. In section 3.1.2.2 of the consultation paper, the AER twice raises the question of whether the Contract Failure event can be said to have been beyond Transgrid’s reasonable control, where the event is defined, in part, by reference to Transgrid’s own judgement or decision-making.⁴¹ We note that the AER has not expressed a concluded view on this issue yet, and is continuing to seek stakeholder views.
68. We have already answered that objection, in part, in answer to Question 1 above.⁴²

³⁹ *Berry v Commissioner of Police* [2015] 1 Qd R 388 at [62] (Morrison JA; Holmes JA and North J agreeing).

⁴⁰ NEL, **Sch 2, cl 7**. See further **paragraphs 37.a and b** above.

⁴¹ AER, Consultation paper, pp 11 & 12.

⁴² See **paragraphs 19-31** above.

69. In addition, where a very significant change in circumstances affects a major capital project that a TNSP is carrying out – invariably, through a suite of project and construction contracts – it is inescapable that the TNSP’s response to that change in circumstances will require the TNSP to form judgements and make decisions about how to respond to that situation, either within or outside of the existing contract framework.
70. The Contract Failure event is primarily based on the succession of external (or “exogenous”) changes that cumulatively affected the PEC project between December 2022 and October 2023 and which heavily impacted SEJV’s ability to complete the project. Transgrid monitored and scrutinised SEJV’s ability to complete the project increasingly closely through 2023. Thereafter, in October 2023 Transgrid’s Board recognised and accepted that it was no longer possible for PEC Stage 2 to be completed under the existing EPC contract, and that an alternative delivery arrangement to the EPC contract would be necessary if the PEC were to be completed. That internal (or “endogenous”) decision-making element was a response to that cumulation of external shocks and it was based on its careful assessment of their impact on the project and the SEJV’s inability to complete it. The mere fact that Transgrid’s Board saw no remaining pathway through to completing PEC Stage 2 under the EPC contract does not, of itself, mean that Contract Failure was an event within Transgrid’s reasonable control.⁴³ If the AER were to reach that conclusion, based on an overly-simplistic dichotomy between “exogenous” and “endogenous” events, it risks repeating the kind of error that the Competition Tribunal has previously found the AER to have made.⁴⁴

⁴³ Transgrid, Reopener application, Attachment 6, pp 5-6.

⁴⁴ See *Applications by PIAC and Ausgrid* [2016] ACompT 1 at [421]-[436]. The Competition Tribunal held that the AER erred in failing to allow labour costs in accordance with enterprise bargaining agreements, where the AER had concluded that EBAs made by a DNSP were an endogenous managerial choice. As EBAs were legally binding, it was appropriate for the agreed annual wage increases to be allowed as a realistic estimate of cost inputs, even though the EBAs were not “regulatory obligations or requirements” as defined in the NEL. The AER’s application for judicial review of Competition Tribunal’s decision was dismissed: *AER v Australian Competition Tribunal (No 2)* [2017] FCAFC 79 at [356]-[371].

Within what timeframe, and contractual framework, must the “reasonable control” criterion be considered?

71. In order to place the “reasonable control” enquiry within its proper context, it is helpful to briefly recap the sequence of regulatory events and submissions that preceded Contract Failure.
72. In the AER’s final decision on Transgrid’s 2018-2023 revenue determination, the AER approved the “New South Wales to South Australia Interconnector” as a contingent project, under NER **cl 6A.8.1(b)**. (In doing so, the AER noted that, as the forecast withdrawal of over 1,000 MW of generating capacity reserves in South Australia was expected to cause low reserve conditions which can compromise system security, Transgrid had identified an option to manage low reserve conditions (i.e. lack of reliability) and system security by increasing interconnection to NSW.)⁴⁵
73. In June 2020, Transgrid submitted an application under **cl 6A.8.2** for an additional capex allowance in the 2022/23 year for commencement of the PEC project (the **contingent project application**).
74. When making its final decision on the contingent project application, the AER was required to determine:
 - a. the total capex which it considered would reasonably be required by a prudent and efficient TNSP, on a realistic estimate of costs and other relevant inputs, to carry out the PEC project: **cl 6A.8.2(e)(1)(ii) & (f)(2)**;⁴⁶ and
 - b. whether Transgrid’s forecast commencement and completion dates for the project were reasonable: **cl 6A.8.2(e)(1)(iii) & (f)(4)**.
75. When it approved the contingent project application in May 2021, the AER paid close regard to Transgrid’s project delivery model and its proposal to enter into a fixed-price EPC contract. The AER specifically assessed the reasonableness of Transgrid’s estimate of the capex required to carry out the PEC project, taking

⁴⁵ AER, Transgrid 2018-2023 revenue determination, final determination, attachment 6, pp 6-148–6-149.

⁴⁶ Reasonably reflecting the *capex criteria* that are stated in **cl 6A.6.7(c)**.

account of the allocation of risks under that EPC contract.⁴⁷ The AER determined that a total of \$1,817.9 million (in \$2017-18) would be required for Transgrid to carry out the PEC project – including into the 2023-2028 regulatory period.⁴⁸

76. Transgrid entered into the EPC contract with the SEJV in June 2021, shortly after obtaining the AER's approval of its contingent project application.
77. When submitting its revenue proposal and revised revenue proposal in the course of making its 2023-2028 revenue determination, Transgrid twice emphasised that it was committed to delivering PEC in line with the total capex allowance that the AER had determined in May 2021.⁴⁹
78. Importantly, when Transgrid made those statements in January and December 2022, it did not foresee – and could not reasonably have foreseen – the cumulative sequence of external events which, by October 2023, had created a state of affairs that resulted in Transgrid recognising that completion of the PEC Stage 2 would not be possible under the existing EPC contract. As such, so far as it related to PEC, Transgrid's revised revenue proposal was submitted, and approved in full by the AER,⁵⁰ on the premises that the project was being carried out, and would be completed, under the EPC contract.
79. It is that revenue determination which Transgrid has now applied to reopen on account of the increased capex that Transgrid has had to undertake, in order to ensure that PEC Stage 2 is completed, and so to realise the reliability and security

⁴⁷ AER, *Transgrid - Project EnergyConnect contingent project*, Final decision, May 2021, pp 2-3 & 17-18. The AER specifically rejected an additional risk premium that Transgrid had requested in relation to "biodiversity risks", reasoning that Transgrid was best placed to mitigate the likelihood of additional biodiversity risk costs being incurred in project delivery: pp 4 & 36.

⁴⁸ AER, *Transgrid - Project EnergyConnect contingent project*, Final decision, May 2021, p 1.

⁴⁹ Transgrid, Revenue proposal, 31 January 2022, at p 93:

We are committed to delivering this Project in line with the total approved capex allowance ... and are not seeking any additional capex for this Project in this Revenue Proposal.

Transgrid, Revised revenue proposal, 2 December 2022, at pp 58-59:

Notwithstanding this change to the timing of undertaking capex, we are committed to delivering this project in line with the total approved capex allowance ... and are not seeking any additional capex for EnergyConnect in this Revised Revenue Proposal.

⁵⁰ AER, *Transgrid revenue determination 2018-23*, Final decision, 28 April 2023, attachment 5 (Capex), pp 36-37.

benefits that had originally underpinned Transgrid’s proposal of the PEC contingent project in 2018.

80. As such, the EPC contract and the risk-management provisions that were embedded in that contractual structure (which was the market standard at the time)⁵¹ comprise part of the background against which the AER must assess whether Contract Failure was within Transgrid’s reasonable control.
81. On this point, we note that the AER expresses a preliminary view that a distinction should be drawn between two matters:

The first is Transgrid’s limited ability to direct or influence the day-to-day delivery of the project under the EPC contract. The second is whether Transgrid had reasonable control over contract management, risk monitoring, escalation, enforcement strategy, decisions about whether to call on security and about how to respond to warning signs that the EPC contract may not deliver the project as expected.⁵²

82. The AER’s first matter appears to be consistent with the correct premise for approaching the “reasonable control” question that we have identified in **paragraph 80** above, namely that the EPC Contract was an appropriate, market-standard contractual arrangement. Its consideration of the second matter must therefore be focussed on those questions as the situation developed between 2 December 2022 and 25 October 2023.
83. However, we note that some of the stakeholder submissions (in particular, those submitted by the JEC and by Dufty and Benjamin) assert that the “reasonable control” criterion is not satisfied because Transgrid was in control of the initial contract terms it agreed to.⁵³ Those submissions fail to appropriately consider the “reasonable control” criterion within the contractual and regulatory frameworks that Transgrid had committed to, and against which its 2023-2028 capex forecast was approved by the AER.

⁵¹ Transgrid, Reopener application, Attachment 6, p 6.

⁵² AER, Consultation paper, p 11.

⁵³ JEC submission, April 2026, p 13; Dufty and Benjamin submission, April 2026, pp 12-13, which is noted in the AER Consultation paper at p 11.

Rectification actions considered and taken by Transgrid after Contract Failure are also irrelevant to the “within reasonable control” criterion

84. Similar issues arise in relation to criticisms made by stakeholders about the option that Transgrid took forward following the options analysis it conducted after the Contract Failure event occurred.
85. Criterion (1) asks whether the Contract Failure event was beyond Transgrid’s reasonable control. That is, were the external events and circumstances that led Transgrid to conclude in October 2023 that PEC could not be completed under the existing EPC contract, and that an alternative delivery arrangement to the EPC contract would be necessary if the PEC were to be completed, beyond Transgrid’s reasonable control?
86. Of course, once Transgrid’s Board had accepted and acknowledged that state of affairs, how Transgrid chose to proceed thereafter was a matter within Transgrid’s reasonable control. But any analysis of what termination, re-tendering or other measures that Transgrid might have taken to rectify the adverse consequences of Contract Failure goes to a later stage of the analysis – namely, should the AER determine that the additional capex allowance that Transgrid now seeks through this reopener application is an appropriate amount: that is the separate and the later question that the AER must determine under **cl 6A.7.1(f)(1)**, if the AER first determines that each of criteria (1) to (6) are satisfied in respect of the Contract Failure event.
87. As for enforcement steps, Transgrid considered whether it should attempt to enforce the parent company guarantee against Elecnor Australia’s Spanish parent when it recognised and accepted that the PEC could not be completed under the EPC Contract. In that regard, Transgrid, acting prudently and reasonably, formed the view that attempting to enforce the parent company guarantee would not have prevented the Contract Failure. Therefore, it is not relevant to the “reasonable control” enquiry.⁵⁴ It could only become relevant if a stakeholder (or the AER) can cogently and convincingly explain how enforcing

⁵⁴ Cf AGL submission at pp 3-6.

the parent company guarantee would have prevented Contract Failure from occurring, but no-one has done so.⁵⁵

88. And, insofar as those matters are appropriately to be taken into account in the AER's assessment of the reasonableness of the capex that Transgrid incurred after the Contract Failure event, that later stage is where Transgrid's net market benefit assessment of all potential rectification options becomes relevant. The AER is required to assess the reasonableness of that additional capex by reference to the **cl 6A.6.7(c)** capex criteria:⁵⁶ that is, whether that additional capex reasonably reflected the capex that a prudent and efficient TNSP in Transgrid's position following Contract Failure would have incurred, taking into account realistic estimates of cost inputs.

Proper consideration of the "reasonable control" criterion requires a close and realistic counterfactual analysis

89. As such, the "reasonable control" criterion requires the AER to undertake a close and commercially realistic analysis of what controls were available to Transgrid to use, between December 2022 and October 2023, that would have prevented Contract Failure from occurring – in circumstances where, amongst other things, Elecnor Australia found itself incurring very substantial financial losses as a result of having to manage substantial input cost escalations, delays and other challenges to the project within the confines of the fixed-price EPC contract, and where Elecnor SA confirmed that it would not financially support Elecnor Australia on and after 24 April 2023.⁵⁷

⁵⁵ Following Contract Failure, Transgrid considered that there was only a low likelihood that Elecnor Australia would continue to deliver PEC while litigation was ongoing. By contrast, Transgrid used the threat of enforcing the parent company guarantee as leverage in commercial negotiations with Elecnor Australia: Transgrid, Reopener application, Attachment 2, p 22 and Attachment 3, p 7.

⁵⁶ Because the amount allowed by the AER is taken to have been accepted by the AER under cl 6A.6.7(c): see **cl 6A.7.1(f)(1)**.

⁵⁷ Transgrid, Reopener application, Attachment 2, p 18.

90. That analysis also needs to be undertaken with close attention to:
- a. what information was available to Transgrid from time to time during the relevant period about Elecnor Australia's financial position and the existence or otherwise of parent support;
 - b. what additional contract management or enforcement steps it would have been commercially prudent for Transgrid to take as a prudent and efficient TNSP – and when, and in response to what new information; and
 - c. whether, if taken, those other steps would likely have prevented Elecnor Australia from reaching such a state of financial distress that continuing to implement and enforce the EPC contract would likely have resulted in Elecnor Australia falling into insolvency, in addition to Clough Ltd.
91. To be clear, that kind of close and commercially-realistic counterfactual analysis is required, because criterion (1) requires that the Contract Failure event “was beyond the reasonable control” of Transgrid. It is not sufficient merely to assert that there were other measures potentially open to Transgrid that were intended in a general sense to mitigate the kinds of risks to completion of the project that escalated rapidly between December 2022 and October 2023. It is only if a prudent and efficient TNSP would have taken other commercially reasonable steps, or exercised other available controls in a commercially reasonable way, and those actions would have ensured that the Contract Failure did not occur, that it might be open to the AER to conclude that the Contract Failure event was within Transgrid's reasonable control. But the AER does not seek to make out any such case.
92. The brief summary of the AER's consideration of the “reasonable control” criterion that is set out in section 3.1.2.2 of the consultation paper does not come close to the level of rigour and engagement with the facts that the AER's consideration of this criterion properly requires.

Criteria (3) and (4): AER question 12

93. Criterion (3) requires that the TNSP proposes to undertake capital expenditure to rectify the adverse consequences of the reopener event.
94. Criterion (4) considers the total of the capital expenditure required during the regulatory control period to rectify the adverse consequences of the event.

Question 12: Do criteria (3) and (4) only allow recovery of capex that a TNSP has not yet incurred?

95. In sections 2.1 to 2.3 of its submission, the JEC advances a stark and literalist interpretation of criterion (3) to assert that a TNSP is disqualified from obtaining a reopener if it has incurred any capex to rectify the adverse consequences of a reopener event before the TNSP submits, and the AER approves, a reopener application. The JEC reasons that, because criterion (3) requires that a TNSP “*proposes to undertake capital expenditure to rectify the adverse consequences of the event*”, a reopener application must be refused if the TNSP has already undertaken any capex to rectify those adverse consequences.⁵⁸
96. A less stringent alternative to the JEC’s proposed interpretation would be that, if a TNSP has undertaken rectification capex prior to submitting its reopener application, but still proposes to incur further rectification capex thereafter, the AER may only adjust the revenue determination to take account of capex that the TNSP has not yet undertaken before submitting its application.
97. In its consultation paper, the AER has noted the JEC’s more absolute interpretation, but has expressed a preliminary view supporting that alternative, less stringent, interpretation.⁵⁹ The AER also noted that it has not undertaken any assessment of Transgrid’s reopener based on this interpretation as it is not satisfied that the reopener meets the statutory criteria.⁶⁰

⁵⁸ See in particular JEC submission, pp 7-9.

⁵⁹ AER, Consultation paper, p 28: “Our preliminary view is that Transgrid’s application would satisfy Criterion 3, as long as some expenditures to rectify the Contract Failure remained to be incurred on the date of the application. However this is a finely balanced conclusion.”

⁶⁰ AER, Consultation paper, p 29.

98. Based on its preliminary view regarding criterion (3), the AER then observes that criterion (4) might only be satisfied if the total amount of the capex that the TNSP has not yet undertaken, but proposes to undertake in the remainder of the regulatory period, exceeds 5% of the value of its RAB.⁶¹ However, the AER has declined even to form a preliminary view about whether this interpretation of criterion (4) is correct.
99. The short answer to these proposed interpretations of criteria (3) and (4) is that they are all founded on a legally incorrect interpretation of criterion (3). In criterion (3), the expression “proposes to undertake” is not properly to be interpreted as only referring to capex that a TNSP has not yet undertaken either when it submits its reopener application or when the AER determines that application.
100. As with the other questions of interpretation of the cl 6A.7.1(a) criteria, the primary interpretive principle is that a provision of the NER must be interpreted in the way that best achieves its purpose, and harmoniously with its regulatory context.⁶²
101. At the most basic level, the reopener mechanism exists to enable a TNSP to respond to a major and exceptional occurrence by incurring very substantial additional capex during a regulatory control period. It would be most surprising if, and the JEC does not attempt to explain how, there were an implied requirement that a TNSP must first submit (and, on one view, must wait until the AER determines) a reopener application before undertaking any capex to rectify the adverse consequences of that serious and unexpected event. Such an interpretation could not be said to be one that best advances the purpose of the reopener mechanism. Most obviously, that interpretation would undermine the AEMC’s express objective of removing any incentive for a TNSP to defer major vital investment in response to an event that qualifies for reopening,⁶³ as the AER correctly acknowledges.⁶⁴

⁶¹ AER, Consultation paper, p 28.

⁶² See **paragraphs 37.a and b** above.

⁶³ See **paragraph 26** above.

⁶⁴ AER, Consultation paper, p 27.

102. Even the AER's alternative interpretation would impede, rather than advance, those objectives. It would incentivise a TNSP, in the aftermath of a reopener event, to prioritise the preparation of its reopener application over responding to the major unforeseen event and rectifying the adverse effects on the reliability and security of the network.
103. Both the JEC and AER interpretations of criterion (3) suppose that a TNSP should be incentivised to apply for, and await confirmation of, an increase to its regulatory revenue allowances in priority to rectifying the adverse effect that the event will have on network reliability and security, as experienced by consumers. The premise of both of those interpretations is perverse.
104. Next, when one situates the expression "*proposes to undertake capital expenditure*" in the context of cl 6A.7.1(a), one sees that:
- a. criterion (2) refers to the amount of capex that the AER previously accepted in its revenue determination for the regulatory period in which the reopener event occurs; and
 - b. criterion (4) refers to "*the total of the capital expenditure required during the regulatory control period to rectify the adverse consequences of the event*" – which must exceed 5% of the value of the RAB, and be reasonably likely to result in the TNSP's total actual capex for the regulatory control period exceeding the total capex that the AER allowed in its revenue determination.
105. Thus, one sees that criterion (4):
- a. is plainly not confined to capex that the TNSP incurs after submitting (or after the AER approves) its reopener application. Incidentally, this is a complete answer to the narrow interpretation of criterion (4) that the AER tentatively suggests; and
 - b. compares that total amount of required additional capex with the TNSP's RAB, and with the total capex forecast approved by the AER in the earlier revenue determination (that is, the amount referred to in criterion (2)).
106. If the AER is satisfied that a reopener event has occurred, it must adjust the TNSP's total forecast capex for that regulatory period "*to accommodate the amount of such additional capital expenditure as the AER determines is appropriate*":

cl 6A.7.1(f)(1). Read in the context of cl 6A.7.1(a), and so as to best achieve the purpose of the reopener mechanism, it is clear that the AER is required to determine the amount of additional capex that is appropriate to rectify the adverse consequences of the reopener event.

107. Having regard to that regulatory context and purpose, one then returns to criterion (3) to ask whether the expression “*proposes to undertake capital expenditure*” has one or other of the following meanings:
- a. the TNSP has undertaken, and/or will undertake, capex during the regulatory control period in order to rectify the adverse reliability and security effects of the event?
 - b. an event may only qualify as a reopener event if the TNSP has not undertaken any capex to rectify the adverse reliability and security effects before submitting its reopener application to the AER (or even before the AER determines an application) – being the JEC’s interpretation? or
 - c. the TNSP is only permitted to recover, through a capex reopener, additional capex that it incurs after, but not before, submitting its reopener application – being the AER’s suggested alternative interpretation?
108. The mere fact that criterion (3) uses the expression “*proposes to undertake*”, rather than a formulation such as “*has undertaken and/or proposes to undertake*”, does not provide a strong basis to read an implied temporal limitation of the kind that the JEC and the AER each seek to read in⁶⁵ – not least, where to do so would have perverse incentive effects that undermine the very purpose of the capex reopener mechanism.
109. By contrast, it would be odd and disharmonious if criterion (3) were taken to refer only to capex incurred after a TNSP submits its reopener application, but criterion (4) requires the application to be assessed quantitatively by reference to the total capex required during the regulatory control period to rectify the adverse consequences of the reopener event.

⁶⁵ Cf AER, Consultation paper, p 27.

110. It is well recognised that a legislative drafter may use the present tense to operate descriptively, rather than as imposing a temporal limitation.⁶⁶ That is how the expression “proposes to undertake” in criterion (3) should be understood.
111. In *GTW Investments (Aust) Pty Ltd v Pacreef Investments Pty Ltd* (2023) 74 VR 290, the Victorian Court of Appeal declined to interpret the word “proposed” in the temporally-limiting way that the JEC submits that criterion (3) should be interpreted. There, the court held that a defined expression “*Proposed Recapitalisation*”, which was defined as “*one or more issue(s) of securities ... proposed to be undertaken*”, referred to a situation where there is an actual issue of shares, not just a proposal for or an attempt at the issue of shares.⁶⁷
112. Lastly, we note that cl 6A.7.1(a) is tightly drafted with a number of express temporal limitations that apply in relation to a reopener event, and a TNSP’s submission of and the AER’s determination of a reopener application. These include express requirements:
- a. the event must occur during a regulatory control period, and must not have been reasonably foreseeable by the TNSP at the time of the making of the revenue determination for that period: **cl 6A.7.1(a)(1)**;
 - b. the capex that is required to be spent during the remainder of the regulatory control period must exceed 5% of the value of the RAB (as at the commencement of the regulatory period): **cl 6A.7.1(a)(4)(i)**;
 - c. a TNSP may not submit a reopener application within 90 business days prior to the end of a regulatory year: **cl 6A.7.1(b)**;
 - d. the AER must make its decision on the reopener application within 40 business days from the date it receives the application, or from the date when it receives any further information that it requires under paragraph (f1), whichever is the later: **cl 6A.7.1(c)(2)**;

⁶⁶ See, eg, *Stonehealth Pty Ltd v ZAA Ventures Pty Ltd* (2020) 280 FCR 519 at [60] (Rangiah J; Collier J agreeing).

⁶⁷ *GTW Investments (Aust) Pty Ltd v Pacreef Investments Pty Ltd* (2023) 74 VR 290 at [79] (Ferguson CJ; Macaulay JA agreeing).

- e. if the AER approves a reopener application:
 - i. it must adjust the forecast capex for that regulatory control period by an appropriate amount: **cl 6A.7.1(f)(1)**;
 - ii. it must adjust the forecast opex, the maximum allowed revenue and the X factor accordingly for the remainder of (that is, for each remaining regulatory year in) that regulatory control period: **cl 6A.7.1(f)(2)**; and
 - iii. the substitute revenue determination must take effect from the commencement of the next regulatory year: **cl 6A.7.1(j)**.

113. Against the clear and tight drafting of cl 6A.7.1, which imposes so many temporal limitations expressly, it is only to be expected that, if the drafter had intended either:

- a. to prohibit the making of a reopener application after a TNSP has started to incur rectification capex; or
- b. to disqualify a TNSP from recovering any additional capex that it has incurred either before submitting its application (or before the AER approves the application),

then the drafter would have included clear words to that effect.

114. There is also no indication in any of the rule extrinsic material that the AEMC intended the reopener mechanism to operate in the temporally-limited way for which the JEC contends. To the contrary, as we have noted above, the JEC's suggested interpretation would undermine the effects that the AEMC intended the reopener mechanism to have.

115. Lastly, the JEC incorrectly suggests that a literal and temporally-limiting interpretation must be given to criterion (3) for consistency with the broader *ex ante* revenue determination framework. In particular, the JEC suggests that the broader interpretation would deprive the AER of the opportunity to properly

interrogate the proposed spending or to properly assess a fair sharing of the overrun costs between consumers and Transgrid.⁶⁸

116. That submission is wrong for at least two reasons:

- a. criterion (4) requires the AER to assess the total capex required during the regulatory control period to rectify the adverse consequences of the event; and
- b. the AER interrogates the quantum of a TNSP's reopener application, and determines the amount of additional capex that is to be approved by a reopener under **cl 6A.7.1(f)**, which contains no temporal limitation of the kind that the JEC seeks to imply into criterion (3).⁶⁹

117. Indeed, as the facts of this case highlight, after the Contract Failure event occurred, in order to ensure the completion of PEC Stage 2 with least delay, Transgrid had already incurred the majority of its additional capex prior to submitting its reopener application in February 2026.⁷⁰ In doing so, Transgrid has had to proceed prudently and efficiently, with the discipline exerted by the lack of any prior guarantee that it will obtaining a corresponding additional capex allowance through a reopener. To the contrary, the JEC would have a much stronger justification to criticise Transgrid if Transgrid had chosen to prioritise ensuring its revenue recovery ahead of completing PEC Stage 2 and enabling the realisation of the reliability and security benefits that completion of PEC will bring.

118. For completeness, and as we have noted in passing above, the AER's tentatively-suggested interpretation of criterion (4)⁷¹ is also unsound – both because the JEC's and the AER's alternative interpretations of criterion (3) are incorrect; but, more fundamentally, because it contradicts the clear words of criterion (4), which

⁶⁸ JEC submission, p 7.

⁶⁹ See **paragraph 106** above.

⁷⁰ Of the \$1,142 million additional capex that is the subject of the reopener application, Transgrid incurred \$392.2 million prior to 30 June 2025, with a further \$611.7 million forecast to be incurred during the year to 30 June 2026: Transgrid, Reopener application, Appendix 7a: Capex model.

⁷¹ AER, Consultation paper, p 28.

unambiguously require the AER to assess the total of the capex required during the regulatory period to rectify the adverse consequences of the event.

Criterion (6): AER questions, 7, 8, 10 & 11

119. Criterion (6) requires that a failure to rectify the adverse consequences of the reopener event would be likely to materially adversely affect the *reliability* and security of the relevant *transmission system*.
120. Before addressing the AER's particular questions regarding criterion (6), it may be helpful if we first summarise the rival positions of Transgrid and the AER as to whether a failure to rectify the adverse consequences of Contract Failure would be likely to materially adversely affect the reliability and security of the relevant transmission system.
121. As summarised in its reopener application, Transgrid's position as to criterion (6) is that:
- a. The adverse effect on reliability and security of failing to rectify the consequences of Contract Failure should be assessed on a forward-looking basis, having regard to the impact on the transmission system's ability to meet, or remain within, the *reliability standard* or *interim reliability measure*, and to ensure the operation of the system within the required technical limits to maintain *power system security*.
 - b. Criterion (6) requires an assessment of the reliability and security impacts in the factual case where the adverse consequences of Contract Failure have been remedied, and in the counterfactual case where those adverse effects were not remedied.
 - c. As PEC is an interconnector between New South Wales and South Australia, the relevant transmission system is the transmission systems of South Australia and/or New South Wales.⁷²

⁷² Transgrid, Reopener application, Attachment 6, p 19.

- d. The adverse reliability and security impacts of failing to rectify the adverse consequences of Contract Failure would include:
 - i. compromised reliability, including a failure to meet the *interim reliability standard* in South Australia for 2026, and by inhibiting the development of renewable generation in south-west NSW;
 - ii. compromised system security, by removing the prospect of a second AC interconnector between South Australia and NSW, and reducing system strength in NSW and South Australia.⁷³

122. The AER's preliminary views, as set out in the consultation paper, are that:

- a. The AER acknowledges that there would have been adverse consequences if PEC was delayed or not constructed. However, these adverse consequences relate to benefits that do not arise, which differs from materially adversely affecting the reliability and security of the relevant transmission system.⁷⁴
- b. An adverse effect on the reliability of the transmission network occurs if it becomes less likely to perform its functions adequately over its service life.⁷⁵
- c. An adverse effect upon the security of a transmission system occurs when it becomes less likely to maintain key system parameters within operational boundaries, or to return those parameters to within operational boundaries, if the system is subjected to a credible contingency event.⁷⁶
- d. Customers not receiving the economic benefit of PEC, due to Contract Failure, does not constitute an adverse effect on reliability and security.⁷⁷
- e. Transgrid has not identified specific reliability and security standards that will no longer be met if PEC is not delivered. Rather, Transgrid has

⁷³ Transgrid, Reopener application, Appendix 6a: Reliability and security impacts, p 16.

⁷⁴ AER, Consultation Paper, pp 16-17.

⁷⁵ AER, Consultation Paper, p 20.

⁷⁶ AER, Consultation Paper, p 20.

⁷⁷ AER, Consultation Paper, pp 18-19.

identified overall impacts on security and reliability if PEC had not been delivered, relative to the level of reliability and security if PEC were to be delivered.⁷⁸

Question 7A: Has the AER defined “reliability” correctly?

123. No. In the Consultation Paper, the AER set out an interpretation of “reliability”⁷⁹ that imposes a significant gloss on the Chapter 10 definition of “reliability”, and which disregards or misunderstands the framework for management of the reliability of the power system under the NER generally.

124. The AER first refers to the Chapter 10 definition of *reliability*, namely:

The probability of a system, device, plant or equipment performing its function adequately for the period of time intended, under the operating conditions encountered.

125. The AER then reasons that:

Based on this, an electricity transmission network is reliable if it is probable that it will continue to perform the functions of a transmission network adequately over its service life under the expected operating conditions. Therefore, an ‘adverse effect’ to the reliability of a transmission network occurs if it becomes less likely to perform its functions adequately over its service life under the expected operating conditions.⁸⁰

126. Later, in the AER’s assessment whether a material reliability impact has occurred, the AER applies its own gloss on the Chapter 10 definition – as if its own gloss were the statutory definition – in order to conclude that the Contract Failure event would not have resulted in a material reliability impact, even if a failure to rectify the adverse consequences of the Contract Failure would have led to a forecast reliability gap in the 2025 Electricity Statement of Opportunities (2025 ESOO):

... [T]his would not have meant the NSW or South Australian transmission systems would have become “less likely to perform [their] functions

⁷⁸ AER, Consultation Paper, p 19.

⁷⁹ AER, Consultation Paper, p 20.

⁸⁰ AER, Consultation Paper, p 20 (emphasis added).

adequately over [their] service [lives] under the expected operating conditions.”⁸¹

127. In the Ch 10 definition of *reliability*, to interpret the words “for the period of time intended” as referring to the whole of the service life of a system, device, plant or equipment is a clear legal error. As the concept of reliability is applied in the NER, it refers to a forward-looking assessment of the probability that the power system will fail to supply electricity to meet customer demand over a defined future time period.

- a. This is most centrally captured by the concept of *unserved energy* (or **USE**), which is defined in NER Ch 10 as:

The amount of energy demanded, but not supplied, in a region determined in accordance with cl 3.9.3C(b) expressed as:

- (a) GWh; or
- (b) the percentage of the total energy demanded in that region over a specific period of time such as a financial year.

- b. In turn, the *reliability standard* and *interim reliability measure* are respectively set in **cl 3.9.3C** of the NER as:

- i. ***reliability standard***: a maximum expected USE in a region of 0.002% of the total energy demanded in that region for a given financial year; and
- ii. ***interim reliability measure***: a maximum expected USE in a region of 0.0006% of the total energy demanded in that region for a given financial year.

- c. In practice, for various purposes under the NER, AEMO applies the *reliability standard* to assess the forecast reliability of the power system over time periods between as long as 10 years, and as short as one week.⁸²

- d. However, the **cl 3.9.3C** *reliability standard* and *interim reliability measure* have particular relevance to the PEC project, as those measures are both set as

⁸¹ AER, Consultation Paper, p 21 (emphasis added). See also at p 22 (reduced transfer capacity to NSW).

⁸² AEMO, Reliability Standard Implementation Guidelines, October 2025, p 7.

standards “for generation and inter-regional transmission elements in the NEM”.⁸³ PEC is, of course, an *inter-regional transmission element*.

- e. In addition, cl 3.9.3C specifically requires that, in calculating expected USE, AEMO must include unserved energy that results from power system reliability incidents caused by delays to the construction or commissioning of inter-regional transmission elements. So that, insofar as the Contract Failure resulted in any delay to the construction or commissioning of PEC Stage 2, AEMO is required to include any unserved energy resulting from that delay in calculating expected USE, when it determines whether the *reliability standard* or *interim reliability measure* will be met: **cl 3.9.3C(b)(ii)**.
- f. Using the cl 3.9.3C *reliability standard* and *interim reliability measure*, AEMO is required each year to prepare an Electricity Statement of Opportunities (ESOO), in which AEMO is required to set out its *reliability forecast* for each region for each financial year across the 10-year forecast window: **cl 3.13.3A(a)(10)**.
- g. A *reliability forecast* is defined as meaning:

the forecast of whether there is a *forecast reliability gap* for that region in that year.

- 128. By contrast, there is no provision of the NER that requires the *reliability* of a system, device, plant or equipment to be assessed over its service life.
- 129. Indeed, on a moment’s reflection, one sees that the concept of the “service life” of a transmission network is illusory. A transmission network is made up of numerous items of transmission plant and equipment, each of which have different service lives,⁸⁴ and which are replaced by a TNSP from time to time in the ordinary course, at the end of their service lives.
- 130. So, in addition to having no cogent basis within the text of the NER, the AER’s reference to assessing reliability of a transmission system over its “service life”

⁸³ We address how the **cl 3.9.3C** *reliability standard* and *interim reliability measure* are also relevant to the materiality question further in **paragraph 161** below.

⁸⁴ And which the TNSP is required to depreciate by use of a depreciation schedule that assesses the economic life and depreciation profile of each group of assets separately: **cl 6A.6.3**.

would require the AER to make an assessment according to a period of time that is wholly uncertain or does not exist, and cannot be determined.

131. It follows that, for the purposes of criterion (6), the relevant concept of reliability must either reflect, or be substantially informed by, the **cl 3.9.3C** *reliability standard* and *interim reliability measure*, each of which address the reliability of supply to customers in a particular region over a timeframe of 12 months – rather than over the illusory time period that is embodied in the AER’s gloss on the concept of reliability.

Question 7B: Has the AER defined “security” correctly?

132. No. The AER has applied an artificially narrow definition of “security”, by confining it to consideration of how the transmission system would respond to the occurrence of a single *credible contingency event*.⁸⁵

133. The AER has defined “security” as:

the ability of the electricity transmission network to operate within its technical limits and to withstand credible network contingencies while maintaining the key system parameters (including frequency, thermal loadings, voltages, fault levels and network stability) within operational boundaries, and enabling the power system to remain in, or return to, a secure operating state.⁸⁶

134. In the first instance, the AER’s artificial limitation of its assessment to the transmission system’s response to single *credible contingency events* appears in the immediately following sentence:

Based on this, an “adverse effect” to the security of a transmission system occurs when it becomes less likely to maintain key system parameters within operational boundaries, or key system parameters are less likely to maintain within, or return to within, operational boundaries if the system is subjected to a credible contingency event.⁸⁷

⁸⁵ A *credible contingency event* includes the unexpected disconnection of one major item of transmission plant (including a transmission line). A *non-credible contingency event* includes simultaneous events including the failure of multiple transmission lines, or a double circuit transmission line failure: **cl 4.2.3**.

⁸⁶ AER, Consultation Paper, p 20.

⁸⁷ AER, Consultation paper, p 20 (emphasis added).

135. That single credible contingency limitation reflects the **cl 4.2.4(a)** statement of when the power system is deemed to be in a *secure operating state*.⁸⁸ (Notably, in AEMO's consideration of whether the power system is in a *secure operating state*, AEMO is required to consider the impact of potentially constrained interconnectors: **cl 4.2.4(b)(1)**. We note that, even within its own unduly narrow concept of "security", the AER does not consider how a failure to complete of PEC Stage 2 would affect that aspect of AEMO's assessment of whether the NSW and South Australian transmission systems are in a *secure operating state*.)
136. In ordinary conditions, AEMO's obligation is, to the extent practicable, to operate the power system such that it is, and will remain, in a *secure operating state*: **cl 4.2.6(a)**.
137. However, the concept of *power system security* is broader than that. It is not confined to times when the power system is operating in a *secure operating state*. How the risk of major outages (including a black system event, of the kind that occurred in South Australia in September 2016) is minimised after multiple credible or non-credible contingency events is also a critical aspect of *power system security*.
138. The full breadth of the concept is reflected in the Ch 10 definition of *power system security*, as meaning:
- The safe scheduling, operation and control of the *power system* on a continuous basis in accordance with the principles set out in clause 4.2.6.
139. **Clause 4.2.6** sets out general principles for maintaining *power system security* (described as the *power system security principles*). These are:
- (a) To the extent practicable, the *power system* should be operated such that it is and will remain in a *secure operating state*.

⁸⁸ The power system is in a *secure operating state* if, in AEMO's reasonable opinion, taking into account the *power system security principles*, the power system:

- (1) is in a *satisfactory operating state*; and
- (2) will return to a *satisfactory operating state* following the occurrence of any *credible contingency event* or *protected event* in accordance with the *power system security standards*: **cl 4.2.4(a)**.

- (b) Following a *contingency event* (whether or not a credible contingency event) or a significant change in *power system* conditions, AEMO should take all reasonable actions:
 - (1) to adjust wherever possible, the operating conditions with a view to returning the power system to a *secure operating state* as soon as is practical to do so, and, in any event, within 30 minutes
- (c) *Emergency frequency control schemes* should be available and in service to:
 - (1) restore the *power system* to a *satisfactory operating state* following *protected events*;⁸⁹ and
 - (2) significantly reduce the risk of *cascading outages* and *major supply disruptions* following significant multiple contingency events.
- (e) Sufficient *system restart ancillary services* (SRASs) should be available to allow the restoration of *power system security* and any necessary restarting of *generating units* following a major supply disruption.
- (f) Sufficient *inertia* should be available in each *inertia sub-network* to meet the applicable *inertia requirements*.
- (g) Sufficient *three-phase fault level* should be maintained at each system strength node to meet the applicable *system strength requirements*.

140. As can readily be seen, the NER concept of *power system security* is not confined to AEMO's ordinary obligation to operate the power system so that it is, and will remain, in a *secure operating state*. It extends to how the power system is managed to respond to *non-credible contingency events*, *protected events*, *significant multiple contingency events*, and *major supply disruptions*.

141. Therefore, in confining its consideration of adverse effect on security of the transmission system to whether the Contract Failure creates any risk of insecurity so long as AEMO maintains the system in a *secure operating state*, the

⁸⁹ A *protected event* is a non-credible contingency event the Reliability Panel has declared to be a protected event. In maintaining the power system in a secure operating state, AEMO must seek to ensure that the power system will return to a satisfactory operating state following the occurrence of any credible contingency event or a protected event. That is, AEMO is required to plan for the occurrence of a protected event in the same way that it is required to plan for ordinary credible contingency events. We note that, following the 2016 SA black system event, a non-credible failure of the Heywood interconnector was designated as a protected event until 2023: Reliability Panel, *Revoking the South Australian protected event*, 14 September 2023.

AER has applied an artificially narrow and erroneous interpretation of the concept of *power system security*.

142. Properly understood, an adverse effect to the security of a transmission system occurs when:
 - a. the power system becomes less likely to be able to restore key system parameters to within normal operational boundaries following any contingency event, multiple contingency events, or a major supply disruption; or
 - b. the quantity of available system restart ancillary services or inertia, or the three-phase fault level, is adversely affected.
143. One can clearly see the legal error of the AER's artificially narrow approach to power system security in its attempt to reason away the obvious network security benefits that will be realised by PEC materially reducing the probability that South Australia will become electrically islanded.
 - a. On one hand, the AER correctly acknowledges that consumers will be better off with PEC reducing the likelihood of automatic load shedding following the non-credible loss of either the Heywood interconnector or PEC.
 - b. But then the AER concludes, wrongly:

However, this is an economic benefit of PEC. The absence of PEC would not make the South Australian transmission system less likely to maintain key operational parameters within required boundaries.⁹⁰

144. Here, one sees the erroneous consequences of the AER's artificially narrow conception of security. Even though the AER accepts that PEC will reduce the likelihood of automatic load-shedding following a non-credible contingency, it somehow manages to dismiss that acknowledged benefit as being irrelevant to its assessment of the network security impacts that would have ensued if Transgrid had not rectified the Contract Failure.⁹¹

⁹⁰ AER, Consultation Paper, p 23.

⁹¹ See further **paragraphs 168-169** below.

145. To the contrary, if PEC reduces the likelihood of automatic load shedding following the non-credible loss of a South Australian interconnector, that is a real and material security benefit, in that customers will be less likely to face the risk of major supply disruptions, including a black system event.

Question 8A: How should “materially adversely affect” be interpreted, in criterion (6)?

146. To answer the question how “materially” should be interpreted in criterion (6),⁹² it is first necessary to be clear about what comparison criterion (6) requires the AER to make, in evaluating whether a material adverse effect on the reliability and security of the relevant transmission system would be likely to occur.
147. In the AER’s outline of its assessment methodology,⁹³ the AER describes its first question as: *“Is the impact an adverse effect on reliability and security?”* The AER then states:

Once we have identified whether the individual reliability and security impacts identified by Transgrid meet our definition of an “adverse effect”, we assess the combined impacts to determine whether it is material.⁹⁴

148. What is conspicuously missing is any statement by the AER as to how it determines whether a failure to rectify the adverse consequences of the Contract Failure event would have an adverse effect on reliability and security. What is the AER’s definition of an “adverse effect”?
149. Instead, one later sees a variety of statements by the AER of kinds of impacts that the AER considers do not amount to “adverse effects” on reliability and security. These include:
- a. that an impact consisting solely of a potential or likely increase in the cost of maintaining reliability and security does not constitute an adverse effect on reliability and security;⁹⁵

⁹² Which forms the second strand of Question 8 stated in the AER Consultation paper.

⁹³ AER, Consultation Paper, p 20.

⁹⁴ AER, Consultation Paper, p 20 (emphasis added).

⁹⁵ AER, Consultation Paper, p 21.

- b. that a potential or likely loss of reliability and security improvements, alone, also does not constitute an adverse effect;⁹⁶
- c. that Transgrid not being able to deliver the benefits of expected reliability and security above the standards set out in the NER or by the Reliability Panel is not the same as an adverse effect;⁹⁷ and
- d. that no adverse effect arises if an adverse reliability and security effect of the Contract Failure event could be remedied by steps taken by some other market participant or through some other mechanism, *“because other mechanisms will activate to ensure that there are no adverse effects”*.⁹⁸

150. When criterion (6) is properly interpreted, it becomes clear that the AER is wrong to exclude each of the above outcomes from its assessment of whether a failure to rectify the adverse consequences of the event would have material adverse reliability and security effects.

Assessing “material adverse effect” requires comparison of reliability and security outcomes in networks *with*, and *without*, PEC Stage 2 completed

151. In terms, criterion (6) asks whether:

a failure to rectify the adverse consequences of the event would be likely to materially adversely affect the reliability and security of the relevant transmission system.

152. Therefore, once an event has occurred, criterion (6) requires the AER to make a comparison between the reliability and security of the relevant transmission system:

- a. where the adverse consequences of the event are rectified (the **with rectification outcome**); and
- b. if the adverse consequences of the event were not rectified (the **without rectification outcome**).

⁹⁶ AER, Consultation Paper, p 21.

⁹⁷ AER, Consultation Paper, pp 21 & 22 (Compromised system security).

⁹⁸ AER, Consultation Paper, p 21.

153. As such, the AER is required to compare those two outcomes, and only then to ask whether the difference between those reliability and security outcomes amounts to a material adverse effect on the reliability and security of the relevant transmission system.
154. This approach reflects the conventional basis upon which a “material adverse event” or “material adverse change” clause in a commercial agreement is analysed.⁹⁹
155. We would add that, in making that comparison:
- a. the AER is required to take account of all of the relevant information and analysis provided in Transgrid’s reopener application, such further material as the AER receives from Transgrid and other stakeholders through its consultation process under **cl 6A.7.1(c)(1)**; and
 - b. one would expect the AER to give considerable weight to AEMO’s published analyses and forecasts about reliability and power system security, and to information provided by AEMO in response to questions asked by the AER. This expectation arises from the fact that, in its day-to-day power system operation and planning functions, AEMO engages closely and extensively with matters of reliability and power system security, such that its opinions about those matters are deserving of considerable weight.
156. The “base case” for the comparison that the AER is required to undertake for criterion (6) is the situation where the adverse consequences of Contract Failure were left unrectified. In October 2023, Transgrid accepted that PEC Stage 2 could not be completed under the existing EPC contract. Transgrid reached that conclusion only after a detailed review of Elecnor Australia’s project accounts and solvency position, and in light of Elecnor Australia’s parent company having indicated its unwillingness to maintain financial support.¹⁰⁰ As such, if the Contract Failure had been left unrectified, Elecnor Australia would most likely

⁹⁹ See, eg, *Re Mayne Pharma Group Ltd* [2025] NSWSC 1204 at [255].

¹⁰⁰ Transgrid, Reopener application, Attachment 2, pp 22-23.

have entered into voluntary administration and the construction of PEC Stage 2 would not have been completed.¹⁰¹

157. The base case for the comparison is therefore the state of network reliability and security that would have remained if PEC Stage 2 had not been completed, and the adverse network reliability and security consequences if the non-completion of PEC Stage 2 were not otherwise rectified. It follows that the AER would commit a clear legal error if it were to assess the adverse reliability and security effects of Contract Failure from a base case in which some of those adverse consequences are rectified by some other party¹⁰² or through some other mechanism.¹⁰³ We see this error foreshadowed in the AER's proposition that we have summarised in **paragraph 149.d** above
158. It also follows that the AER is wrong to confine a material adverse effect only to a scenario where a specific reliability or security standard would be breached if the adverse effects of Contract Failure were left unrectified, but would not be breached if the adverse effects are rectified. The AER's propositions summarised in **paragraphs 149.b** and **c** above appear to impermissibly confine the "material adverse effect" analysis in this way, as they appear to exclude the likely loss of reliability and security improvements, or delivery of reliability and security outcomes above standards set out in the NER.

"Material" adverse effect on reliability

159. When used as an adjective to describe a measure of extent, the word "material" is typically understood as being synonymous with words such as "significant" or "substantial". But, ultimately, the critical question of what quantitative margin is "material"¹⁰⁴ – or, indeed, whether any quantitative margin is

¹⁰¹ Transgrid, Reopener application, Attachment 2, p 24.

¹⁰² AER, Consultation paper, p 22 (South Australia reliability gap in 2026: referring to AGL's proposed temporary extension of the operation of Torrens Island B, announced in August 2025). We address other aspects of the AER's use of the Torrens Island B extension counterfactual further in **paragraphs 179-188** below.

¹⁰³ Cf the AER's proposition summarised in **paragraph 149.d** above.

¹⁰⁴ In relation to contractual "material adverse change" clauses see, eg, *Anchorage Capital Master Offshore Ltd v Sparkes (No 3)* [2021] NSWSC 1025 at [316]-[317]; *Re Mayne Pharma Group Ltd* [2025] NSWSC 1204 at [387].

determinative of materiality¹⁰⁵ – is a context-sensitive question of interpretation in each case.

160. As a first observation, by framing its definition of reliability by reference to a non-existent timeframe – namely, the “service life” of a transmission network – the AER has artificially and erroneously attempted to assess the materiality threshold for an adverse reliability effect by reference to a non-existent or illusory measure, which it would be impossible to satisfy: see **paragraphs 123 to 130** above.
161. The NEL and NER provisions relating to the **cl 3.9.3C** *reliability standard* and *interim reliability measure* are also directly relevant to the AER’s assessment of whether a reliability impact of a capex reopener event is material under criterion (6).
 - a. A *forecast reliability gap* occurs when: “the amount of electricity forecast for a region ... does not meet the *reliability standard* to an extent that, in accordance with the Rules, is material.”: NEL, s **14G(1)**.
 - b. A forecast reliability gap: “is material if it exceeds the *reliability standard*”: **cl 4A.A.2**.
 - c. However, until 30 June 2028, the relevant materiality threshold is set at the more stringent level of the *interim reliability measure* – that is, a forecast reliability gap is material if the expected USE in a given region in a given financial year exceeds 0.0006% of aggregate demand: **cl 11.132.2**.
162. As such, and having regard to the “with and without rectification” comparison that we have outlined in **paragraphs 152 to 154** above, an adverse reliability effect in relation to a transmission system should be considered material if:
 - a. rectifying the adverse consequences of Contract Failure would be likely to bring the expected USE for that region in any financial year to below 0.0006% (up to 2027/28) or to below 0.002% (from 2028/29 onwards)

¹⁰⁵ See, eg, *ANZ Banking Group Ltd v ASIC* (2024) 305 FCR 383 at [78]-[87] (Lee J), in the particular context of continuous disclosure obligations under s 674 of the *Corporations Act*.

(the **relevant threshold**), where failing to rectify the adverse consequences would leave the USE above the relevant threshold in that financial year;

- b. rectifying adverse consequences of Contract Failure would not reduce the expected USE to below the relevant threshold, but would substantially reduce the reliability shortfall for that region in that financial year; or
- c. expected USE would be below the relevant threshold even if the adverse consequences of Contract Failure were not rectified, but rectifying those consequences would materially increase the “headroom” between expected USE and the relevant threshold, and thereby materially reduce the risk that the relevant threshold would be exceeded in that financial year.

163. In addition, for the reasons we outline in **paragraphs 171-181** below, an adverse reliability effect may also be material if the cost of maintaining expected USE at, or restoring expected USE to, the level that would be expected in a “without PEC” scenario would be materially greater than the cost of achieving that expected USE by completing PEC.

“Material” adverse effect on security

- 164. Unlike reliability, the security of a power system or transmission system cannot be reduced to a single metric, such as expected USE.
- 165. Therefore, assessing whether an adverse impact on power system security is “material” is inescapably a more qualitative and evaluative exercise than the corresponding exercise in relation to reliability.
- 166. That said, however, particularly when one considers questions of *power system security* as they relate to circumstances when the power system may not be in a *secure operating state*, one is by definition dealing with risks and contingencies that are low-probability, but which potentially have very large impacts on consumers. As an example, one need look no further than the South Australian black system event that occurred in September 2016, following an unprecedented (and essentially unforeseen) combination of *non-credible contingency events*, which caused thermal overloading and tripping of the sole AC interconnector

between South Australia and the eastern states¹⁰⁶ – an outcome which would have been materially less likely had South Australia been connected to NSW and Victoria by multiple AC interconnectors.

167. In that setting, the AER must undertake its consideration of the materiality of an adverse effect on security keeping the potential impact to end users firmly in mind. If rectifying the adverse consequences of Contract Failure would appreciably reduce the probability of a high-consequence cascading outage or major supply disruption, then that effect should properly be considered to be material.
168. In this regard, AEMO's formal advice to the AER as to the network security effect is clear and compelling:

A key benefit PEC provides is to reduce the likelihood of SA becoming electrically islanded from the rest of the NEM following non-credible loss of an interconnector. A non-credible loss of the interconnection between SA and the rest of the NEM could trigger the operation of emergency frequency control schemes, under frequency load shedding or over frequency generation shedding – both of which would cause major disruptions to SA customers. While emergency frequency control schemes are expected to prevent system collapse, the dynamics of large-scale system incidents such as interconnection separations under high loads, mean that such consequences always remain a possibility.¹⁰⁷

169. It is remarkable that the AER has chosen, without any meaningful explanation, to dismiss AEMO's clear assessment of the material security benefits to be realised from completion of PEC Stage 2 as somehow being an irrelevant "economic benefit" – and that, in doing so, the AER has seen fit to adopt a different and narrower concept of *power system security* than AEMO has correctly applied.
170. As we have noted, in undertaking the "with" and "without rectification" comparison that criterion (6) requires, one would ordinarily expect the AER to give substantial weight to AEMO's published analyses and forecasts, and to information provided by AEMO in response to specific requests, about reliability

¹⁰⁶ See, eg, AEMO, *Black System: South Australia 28 September 2016*, Final report, March 2017, pp 6-7.

¹⁰⁷ AEMO letter to AER, 1 June 2026, p 1 (emphasis added).

and power system security matters. At the very least, if the AER ultimately decides not to accept AEMO's analysis or advice, the AER would need to clearly explain why it disagrees with AEMO's observations about those matters.

The AER has proceeded on a false dichotomy between customer benefits and avoiding adverse reliability and security impacts

171. After summarising the adverse reliability and security consequences that Transgrid identified in its reopener application, and AEMO's views in relation to those reliability and security consequences, the AER begins its assessment by commenting that:

Our preliminary view is that Transgrid not being able to deliver the economic benefits of PEC, due to the Contract Failure event, is not an adverse consequence of reliability or security within the meaning of Criterion 6.¹⁰⁸

172. This is a straw man objection. Although Transgrid quantified the net benefits to consumers that would be realised from entering into an altered contractual framework with Elecnor Australia following the Contract Failure event, it has never suggested that those economic benefits wholly reflected avoided reliability and security impacts. However, some of those avoided reliability and security impacts are reflected in Transgrid's net market benefits analysis, as we address further in **paragraph 174** below.
173. Relatedly, after the AER acknowledges that PEC is expected to deliver benefits to consumers, the AER states: *"However, our preliminary view is that any adverse consequences should be considered along with the rest of Criterion 6", and later that, if delay in the completion of PEC meant that consumers would not receive the full benefits of PEC being constructed on time, "we do not consider this adverse consequence relates to the rest of Criterion 6."*¹⁰⁹ It is unclear what the AER means by *"the rest of Criterion 6"* – but the suggestion appears to be that, insofar as Transgrid has quantified the net benefit to consumers of the actions it has taken to rectify the adverse consequences of Contract Failure, those benefits are "economic benefits", which the AER considers to be mutually exclusive from

¹⁰⁸ AER, Consultation Paper, p 18.

¹⁰⁹ AER, Consultation Paper, p 19 (emphasis added).

benefits that consumers experience through avoiding adverse reliability and security effects on the transmission system.

174. If the AER has proceeded on such a dichotomy, then the AER appears fundamentally to have misunderstood the basis upon which Transgrid's net market benefit analysis (NMBA) was carried out.

a. The NMBA quantified benefits that customers would realise from the completion of PEC Stage 2, including:

- i. **avoided generation dispatch and fuel costs:** a reduction in the use of gas for generation dispatch in South Australia as soon as interconnection is established, due to the alleviation of South Australian system security constraints and increased options for sourcing relatively low-cost electricity from other regions;
- ii. **avoided generation and storage investment costs:** reduction in generator capital and fixed operating costs (particularly in South Australia), where the timing, mix of plant technologies and distribution of renewable build changes as a result of PEC;
- iii. **avoided involuntary and voluntary load shedding:** a reduction in unserved energy (both involuntary and voluntary) is a benefit to electricity consumers.¹¹⁰

b. In the modelled NMBA outcomes, the largest component of those market benefits were expected to be provided from avoided generation and storage investment costs.¹¹¹ For example, PEC Stage 2 enables the development of renewable generation in the South-West REZ (SW REZ) in NSW. The geographic separation of the SW REZ from other REZs in New South Wales offers greater geographic diversity between the output of wind farms in the SW REZ and those in the Central-West Orana and New England REZs, and so is likely to produce improved reliability in New South Wales.¹¹² That effect would likely be reinforced by increased import capacity from

¹¹⁰ Transgrid, Reopener application, Appendix 3a: Net market benefit assessment, pp 17-18 (emphasis added).

¹¹¹ Transgrid, Reopener application, Appendix 3a: Net market benefit assessment, pp 36-37.

¹¹² Transgrid, Reopener application, Appendix 6a: Reliability and security impacts, p 16.

renewable generation in South Australia, which would similarly improve the geographic diversity of renewable generation available to meet NSW demand.

- c. The overlaps between avoided generation dispatch and fuel costs and security benefits in South Australia, and avoided load shedding and reliability benefits, as noted in **sub-paragraphs a.i** and **iii** above respectively, are self-evident.

175. As such, the AER will commit a legal error if it fails to have regard to relevant reliability and security benefits that have been realised by Transgrid rectifying the adverse events of Contract Failure, on the misguided supposition that the net market benefits that Transgrid has quantified are “economic benefits”, which are mutually exclusive from the network reliability and security effects to which criterion (6) is directed.

176. The AER then states: *“We have not assessed the quantum of benefits that PEC is expected to provide because the status of PEC as an actionable ISP project is not related to our assessment of Criterion 6.”*¹¹³

177. If the AER’s view is that the benefits that PEC will deliver to customers, as considered by AEMO when designating PEC to be an *actionable ISP project*, are irrelevant to whether failure to rectify the Contract Failure would adversely affect reliability and security, that would disregard that the purpose of the ISP is to establish a whole of system plan for the efficient development of the power system that achieves *power system needs* – where “*power system needs*” include the *reliability standard* and *power system security*: **cll 5.22.2 & 5.22.3(a)**.

178. Similarly, the AER has also expressed the preliminary view that *“an impact consisting solely of potential or likely increase in the cost of maintaining reliability and security, does not constitute an adverse effect on reliability and security, as we have defined it.”*¹¹⁴

¹¹³ AER, Consultation Paper, p 19.

¹¹⁴ AER, Consultation Paper, p 21 (emphasis added).

179. In stating that preliminary view, the AER appears to have treated the NEO as being irrelevant to its consideration of criterion (6).

a. The NEO is, relevantly:

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 –

(a) price, quality, safety, reliability and security of supply of electricity; and

(b) the reliability, safety and security of the national electricity system: NEL, s 7(a)-(b).

b. The AER's decision in relation to Transgrid's application to reopen its revenue determination is an "*AER economic regulatory function or power*", as the decision relates to the economic regulation of services provided by Transgrid by means of a transmission system, and relates to the making of a transmission determination: NEL, s 2.

c. As such, in making its decision on Transgrid's reopener application, the AER must make its decision in a manner that will or is likely to contribute to the achievement of the NEO: s 16(1)(a).

d. If the AER were to consider criterion (6) without regard to whether completing the construction of PEC is a more efficient way of avoiding adverse reliability and security consequences of Contract Failure, that would be to divorce the reliability and security strands of the NEO from the overarching objective of promoting efficiency in the investment in, and operation and use of, electricity services – including with respect to reliability and security of power supply and of the national electricity system.

e. That would involve the AER making its decision in a manner that would not contribute to the achievement of the NEO, contrary to NEL, s 16(1)(a). The AER would also fail to take account of a mandatory relevant consideration.

180. As such, it would be a legal error for the AER to disregard the economic benefits to consumers, or whether completing PEC Stage 2 would rectify the adverse

reliability and security consequences of Contract Failure more efficiently than other potential responses, when considering whether criterion (6) has been met. This error is foreshadowed in the AER's proposition that we have summarised in **paragraph 149.a** above.

181. So, in addition to the direct effect that failing to complete PEC Stage 2 would have on reliability and security, the AER is also required to take account of whether failing to complete PEC Stage 2 would mean that comparable reliability and security outcomes could be achieved but only at an increased cost to consumers. It follows that, in addition to the scenarios identified in **paragraph 162** above, a reliability or security effect may also be material if a comparable reliability or security outcome might be capable of being achieved in a "without PEC Stage 2" scenario, but only at a materially increased cost to consumers.

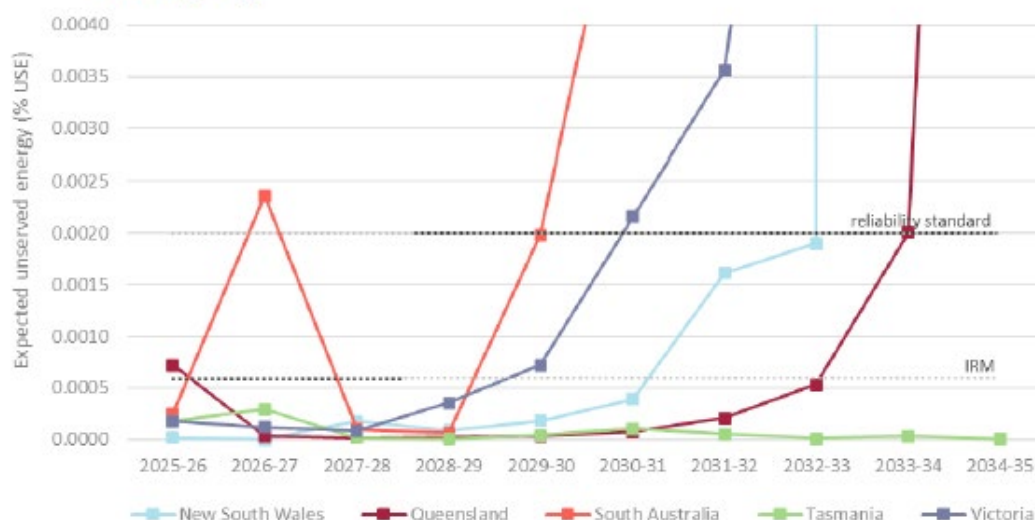
The subsequent temporary postponement of retirement of Torrens Island B is irrelevant to the AER's consideration of criterion (6)

182. As AEMO has formally advised the NER, the 2025 ESOO and ESOO Update show a material improvement in forecast South Australian reliability following the completion of PEC Stage 2, and that PEC can mitigate reliability risks arising from retirement of Torrens Island B and Osborne power stations.¹¹⁵
183. Figure 27 of the 2025 ESOO vividly illustrates both:
- a. the material adverse reliability effect in 2026/27 in South Australia of PEC not being completed by 30 June 2026; and
 - b. how that material adverse effect is avoided in the following years after the completion of PEC Stage 2 by 2027/28.¹¹⁶

¹¹⁵ AEMO letter to AER, 1 June 2026, p 1.

¹¹⁶ AEMO, *2025 Electricity Statement of Opportunities*, [date], p 64.

Figure 27 Expected USE for the Committed and Anticipated Developments reliability assessment, 2025-26 to 2034-35 (% USE)



184. As AEMO described the reliability outlook in South Australia over the years 2025/26 to 2027/28:

- In 2025-26, reliability risks are forecast within the interim reliability measure (IRM) of 0.0006% USE, as demand is forecast to be met under most circumstances from the existing generation fleet.
- In 2026-27, all units of Torrens Island B Power Station (total 800 MW) are advised to retire,¹¹⁷ however the second stage of Project EnergyConnect – a new interconnector between New South Wales and South Australia – is not modelled to release capacity, and insufficient alternative generation is scheduled to be commissioned to adequately replace the retiring capacity, resulting in expected USE above both the IRM and the reliability standard.
- From 2027-28, Project EnergyConnect Stage 2 is advised to release its full 800 MW transfer capacity, reducing reliability risks associated with the advised retirement of both Torrens Island B (800 MW, on 30 June 2026) and Osborne Power Station (180 MW, on 31 December 2027).¹¹⁸

185. Both the AER and AGL place particular emphasis on the fact that, after Contract Failure, in September 2025, AGL reached agreement with the South Australian

¹¹⁷ AEMO here footnoted that AGL had reported ongoing discussions with the South Australian Government regarding a potential extension of Torrens Island B power station for 2 years.

¹¹⁸ AEMO, *2025 Electricity Statement of Opportunities*, [date], pp 65-66 (emphasis added).

government to extend the planned closure date of Torrens Island B from 30 June 2026 until 30 June 2028.¹¹⁹

186. AGL submits that this shows that the reliability risk associated with a delay in completion of PEC Stage 2 was “*conditional and capable of mitigation*”.¹²⁰ That observation only underscores that failing to rectify the adverse consequences of Contract Failure would have an adverse effect on reliability that was capable of being mitigated.
187. The AER adopts an even more extreme position, suggesting that at the time of Contract Failure – that is, in October 2023, at which time AGL proposed to close Torrens Island B on 30 June 2026 – any concern that a failure to complete PEC would have resulted in a reliability gap in South Australia was merely “*theoretical*”. The AER then goes on to suggest that there was no reasonable basis to expect that the delayed completion of PEC Stage 2 would have resulted in a reliability shortfall in South Australia “*given AEMO’s processes to forecast reliability gaps and elicit market responses*”.¹²¹
188. Insofar as the AER seeks to characterise the later postponement of Torrens Island B’s closure as a “market response”, it may be noted that this outcome occurred only through an agreement between AGL and the South Australian government, under which the extended operation of Torrens Island B appears to have been underwritten by government financial contributions of an undisclosed amount.¹²²

¹¹⁹ AGL submission, pp 6-7; AER, Consultation paper, p 22.

¹²⁰ AGL submission, p 7.

¹²¹ AER, Consultation paper, p 22.

¹²² South Australia, Department of Energy and Mining, *South Australian Electricity Development Plan 2025*, p 52:

Financial contributions from the State will ensure the [Torrens Island B] facility can be maintained and operated during this transition phase, though the specific commercial terms remain confidential between the Government and AGL.

189. In any event, the subsequent postponement of Torrens Island B's retirement is irrelevant to the AER's consideration of criterion (6), for at least the following reasons:

- a. The "base case" for the criterion (6) comparison is the reliability state of the relevant transmission system where the adverse consequences of Contract Failure have not been rectified at all.¹²³
- b. **Clause 3.9.3(b)(ii)** of the NER specifically requires delays to construction or commissioning of inter-regional transmission elements to be taken into account when calculating USE to determine whether the *reliability standard* or *interim reliability measure* will be met or exceeded.¹²⁴
- c. As AEMO's forecasts in the 2025 ESOO demonstrated,¹²⁵ it would not have been prudent or reasonable for Transgrid in late 2023 or 2024 to assume that the reliability shortfall caused by delayed completion of PEC would be resolved, as it later was for a finite period of two years, through an agreement with and financial assistance from the South Australian government.
- d. The subsequent agreement to postpone the retirement of Torrens Island B by 2 years was only a temporary amelioration of the reliability shortfall that would have continued indefinitely in the event that PEC Stage 2 was not completed at all – which is the "base case" counterfactual from which the AER must evaluate criterion (6). The substantial reduction in expected USE for South Australia between 2026/27 and 2027/28 that one sees in Figure 27 above was expressly attributed by AEMO to completion of PEC Stage 2 reducing reliability risks associated with Torrens Island B's retirement. If PEC Stage 2 were not completed, those reliability risks would remain, regardless of whether the retirement of Torrens Island B were to occur in 2026 or 2028.
- e. In any event, the temporary extension of Torrens Island B's operating life would not have addressed the real and substantial adverse security effect

¹²³ See paragraphs 152-157 above.

¹²⁴ See paragraph 127.e above.

¹²⁵ See paragraphs 183-184 above.

of failing to complete PEC Stage 2 – that is, the non-completion of a second AC interconnector between South Australia and the east coast NEM.

190. One need not descend further into debate about whether the AER's and AGL's emphasis on the subsequent extension of Torrens Island B's life involves impermissible use of hindsight or, indeed, whether the criterion (6) assessment must be analysed as at a particular date. The shorter and simpler point is that the Torrens Island B extension is irrelevant or inconsequential, for the reasons we have set out above.

Question 8B: How should “likely” be interpreted, in criterion (6)?

191. As to the meaning of “likely”, the AER states:

We have considered likelihood of submitted adverse reliability/security effects on a case-by-case basis, taking into account the individual likelihoods of each impact on the overall likelihood.¹²⁶

192. We consider that to be a reasonable description of how the AER should approach its assessment of whether a material adverse reliability and security effect is “likely”.
193. The weight of authority favours interpreting the word “likely” as meaning “a real chance or possibility”, rather than as meaning “more likely than not”: see, e.g., *Bouhey v The Queen* (1986) 161 CLR 10; *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49 at [243]-[246]; *Environment Council of Central Queensland Inc v Minister for the Environment and Water* (2023) 413 ALR 318 at [58]-[59]; *Save Our Strathbogie Forest Inc v Secretary to the Department of Energy, Environment and Climate Action* [2024] FCA 317 at [338].
194. The last two authorities are particularly relevant, as they address a closely analogous verbal formulation to that used in criterion (6) – namely, whether an action is “likely to have a significant impact” on a listed threatened species.

¹²⁶ AER, Consultation Paper, pp 20-21.

Question 10: Does criterion (6) require material adverse effects on reliability and security to be demonstrated cumulatively or disjunctively?

195. The AER is right to conclude that criterion (6) is satisfied if Transgrid establishes that a failure to rectify the adverse consequences of Contract Failure would be likely to materially adversely affect either the reliability or security of the relevant transmission system. To interpret criterion (6) literally, as requiring a TNSP to show a material adverse effect in relation to both reliability and security would not be the interpretation that best advances the purpose of the reopener mechanism: NEL, **Sch 2, cl 7**.
196. As the AER also rightly notes, when drafting cl 6A.7.1, the AEMC acknowledged that a reopener should be permitted where a TNSP is required to invest in a project in order to avoid compromising network reliability or system security.¹²⁷ Equally, there is nothing in the relevant rule extrinsic material that indicates that the AEMC had a positive intention to require a TNSP to demonstrate that additional capex is required in order to rectify a material adverse effect on both reliability and security.
197. In turn, the use of the conjunction “and” in criterion (6) is consonant with the way in which the NEO itself is formulated (see **paragraph 179.a** above) – using “and” not only in relation to the sub-considerations such as price, quality, safety, reliability and security of supply, but also between each of paragraphs (a), (b) and (c). It would be over-simplistic and wrong to interpret “and” as used in the NEO to assert that the AER is required to make economic regulatory decisions that give effect to achieving all of those sub-objectives simultaneously by each decision that the AER is required to make.¹²⁸
198. Ultimately, if a conjunctive interpretation of criterion (6) were to be insisted on, this would result in potentially arid debates where corrective action taken by a TNSP has avoided a material adverse effect on either reliability or security – either of which would manifestly be for the overall benefit of consumers – but

¹²⁷ AEMC, Economic regulation of transmission services, Final rule determination, 16 November 2006, p 61.

¹²⁸ The AER itself expressly acknowledges that it has a discretion to balance those competing, and often mutually-inconsistent sub-objectives, when it seeks to make a decision that advances the achievement of the NEO: see AER, *Guidance on amended national energy objectives*, July 2023, at p 6.

the TNSP is then compelled to strain to show that the avoided adverse effect was one that related to, and was material with respect to, both reliability and security of supply. There could be no sound reason, based on statutory purpose or principle, to insist on such a literal and aridly technical approach.

199. This is one of a well-recognised category of cases where the conjunction “and” is held, on its proper construction to mean “or”.¹²⁹

Question 11: For PEC, is the relevant transmission system the SA and NSW transmission systems, or only the NSW transmission system?

200. In the case of the PEC interconnector, the AER is correct to interpret “the relevant transmission system” as referring to material adverse effects on reliability or security that may occur in the NSW and/or South Australian regions.
201. It would be absurd, and contrary to the NEO objective of facilitating efficient investment in electricity services for the long-term interests of consumers in relation to matters including reliability and security of supply, if a capex reopener event:
- a. affecting the construction of a NSW section of the PEC interconnector were disallowed if failure to rectify the adverse consequences of the event materially affected reliability or security in South Australia, but not in New South Wales; or
 - b. affecting the construction of a South Australian section of the PEC interconnector were disallowed if failure to rectify the adverse consequences of the event materially affected reliability or security in New South Wales, but not in South Australia.
202. That absurdity is underscored even further when it is recalled that the **cl 3.9.3C** *reliability standard* and *interim reliability measure* are specified as measures of reliability relating to both generation and *inter-regional transmission elements*: see **paragraph 127.d** above.

¹²⁹ See, eg, *MyEnvironment Inc v VicForests* (2013) 42 VR 456 at [195]-[197] (Tate JA; Warren CJ and Garde AJA agreeing) (reference in a forest management plan to “mature and senescing trees” held to cover trees that were either mature or senescing).

Summary opinion

203. Based on our detailed responses to the AER's questions, we set out summary opinion as to the proper interpretation of criteria (1), (3) and (6) below.

Proper interpretation of criterion (1): "beyond reasonable control"

204. The question whether an event was beyond a TNSP's reasonable control must be assessed by the AER realistically, with regard to the contractual, commercial and regulatory context in which the TNSP was operating at the relevant time. In that regard, the adjective "reasonable" limits or qualifies the notion of "control".

205. This assessment requires a close and commercially-realistic analysis of the controls that may have been available to the TNSP as events unfolded during the relevant period, and whether exercising those controls would have prevented the event from occurring.

206. The relevant period over which the AER is required to make this assessment is from the date when the TNSP submits its revised regulatory proposal until the event occurs: see our detailed response to **Question 2** (paragraphs 63 to 92) above.

Proper interpretation of criterion (1): "could not reasonably have been foreseen ... at the time of the making of the *revenue determination*"

207. In order to maintain consistency with the incentive properties of the *ex ante* revenue cap, the test of reasonable foreseeability to be applied in criterion (1) must align with the *capital expenditure criteria* that the AER applies under NER cl 6A.6.7(c). That is: was the capex required to rectify the adverse consequences of the event (or an event of a similar kind) a cost that a prudent and efficient TNSP would realistically have expected to incur during the forthcoming 5-year regulatory period?

208. The reasonable foreseeability of an event is to be assessed as at the date when the TNSP submitted its revised revenue proposal, in the process of the AER making a revenue determination for the regulatory control period during which the event occurred: see our detailed response to **Questions 4 and 6** (paragraphs 32 to 62) above.

Proper interpretation of criterion (3): “proposes to undertake capital expenditure”

209. Criterion (3) is satisfied if a TNSP has undertaken, is undertaking or will undertake, capex during the regulatory control period to rectify the adverse reliability and security effect of a reopener event.
210. On its proper construction, criterion (3) neither disqualifies a TNSP from submitting a reopener application after it has begun incurring capex, nor prevents the AER from adjusting the TNSP’s forecast capex to accommodate capex undertaken before the TNSP submitted its reopener application: see our detailed response to **Question 12** (paragraphs 95 to 118) above.

Proper interpretation of criterion (6): “materially adversely affect the *reliability* and security of the relevant *transmission system*”

“A failure to rectify the adverse consequences of the event”

211. In assessing whether a failure to rectify the adverse consequences of an event would be likely to materially adversely affect reliability and security, the “base case” for the comparison that the AER is required to undertake is the reliability and security outcomes for the relevant transmission systems if the adverse consequences of the event were left unrectified: see **paragraphs 151 to 157** in our detailed responses above.

“Likely”

212. In criterion (6), “likely” is properly interpreted as meaning “a real chance or possibility”: see our detailed response to **Question 8B** (paragraphs 191 to 194) in our detailed responses above.

“Reliability”

213. In criterion (6), where the reopener event relates to an *inter-regional transmission element*, the reliability of the relevant transmission system should be assessed consistently with the way that AEMO is required to determine whether the *interim reliability measure* or *reliability standard* are satisfied for a given region in a given financial year, under NER **cl 3.9.3C**: see our detailed response to **Question 7A** (paragraphs 123 to 131) above.

“Security”

214. In criterion (6), the security of the relevant transmission system should be assessed consistently with the NER Ch 10 definition of *power system security*, and with the *power system security* principles stated in **cl 4.2.6**.
215. In assessing whether a material adverse effect on security would be likely if the adverse consequences of an event were not rectified, the AER is not confined only to considering how the relevant transmission system would respond to a single *credible contingency event*: see our detailed response to **Question 7B** (paragraphs 132 to 145) above.

“Reliability and security”

216. Despite the use of the conjunction “and”, criterion (6) is satisfied if a failure to rectify the adverse consequences of a reopener event would be likely to materially adversely affect either the reliability or the security (or both) of the relevant transmission systems: see our detailed response to **Question 10** (paragraphs 195 to 199) above.

“The relevant transmission system”

217. Where a reopener event relates to the construction of an *inter-regional transmission element* (i.e. an interconnector), then the two transmission systems connected by the interconnector are both “relevant transmission systems”: see our detailed response to **Question 11** (paragraphs 200 to 202) above.

“Materially adversely affect”

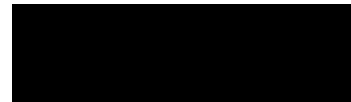
218. Assessing whether a failure to rectify the adverse consequences of the event would be likely to have a material adverse effect on reliability and security requires the AER to make a comparison between the reliability and security of the relevant transmission system:
- a. where the adverse consequences of the event are rectified; and
 - b. if the adverse consequences of the event were not rectified.

219. A material adverse effect does not arise only if a reliability or power system security standard would be met in the “with rectification” scenario, but would be breached in the “without rectification” scenario.
220. A material adverse effect on the reliability of a transmission system would occur, for example, if:
- a. rectifying the adverse consequences of the event would be likely to bring the expected unserved energy (USE) for a region in a financial year to below the *interim reliability measure* or the *reliability standard* (as applicable), where failing to rectify the adverse consequences would leave USE above the relevant threshold;
 - b. rectifying the adverse consequences of the event would not reduce the expected USE to below the relevant threshold, but would substantially reduce the reliability shortfall for that region in that financial year; or
 - c. expected USE would be below the relevant threshold even if the adverse consequences of the event were not rectified, but rectifying those consequences would materially increase the “headroom” between expected USE and the relevant threshold, thereby materially reducing the risk that the relevant threshold be accepted in that financial year.
221. A material adverse effect on the security of a transmission system would occur, for example, if:
- a. the transmission system becomes less likely to be able to restore key system parameters to within normal operational boundaries following any (credible or non-credible) contingency event, multiple contingency events, or a major supply disruption; or
 - b. the quantity of available *system restart ancillary services* or *inertia*, or the *three-phase fault level*, on the relevant transmission system is materially reduced.
222. A material adverse effect on reliability or security may also occur if comparable reliability and security outcomes might be realised even if the adverse

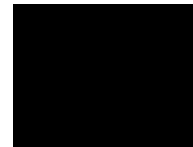
consequences of the event are not rectified, but only at a materially-increased cost to consumers.

223. If the AER were to address Criterion (6) without regard to the costs of alternative methods of rectifying or mitigating adverse reliability or security effects, that would disregard the AER's obligation under s 16(1)(a) of the NEL to make a decision on the capex reopener application in a manner that will or is likely to contribute to achievement of the NEO: see **paragraph 142** and our detailed response to **Question 8A** (paragraphs 146 to 190) above

1 October 2026



Neil Young



Tom Clarke