

Determination on jurisdictional scheme application

Electricity Infrastructure Investment Act
2020 (NSW)

December 2021

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Inquiries about this publication should be addressed to:

Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001
Tel: 1300 585 165

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Shortened forms

Shortened Form	Extended Form
AER	Australian Energy Regulator
DNSP	Distribution Network Service Provider
DPIE	NSW Department of Planning, Industry and Environment
EII Act	<i>Electricity Infrastructure Investment Act 2020 (NSW)</i>
NER	National Electricity Rules

1 Background

On 11 November 2021, the NSW Department of Planning, Industry and Environment (DPIE) submitted a request to the Australian Energy Regulator (AER) to:

1. determine that the scheme established by section 58(1) of the *Electricity Infrastructure Investment Act 2020 (NSW)* (EII Act) is a jurisdictional scheme pursuant to clause 6.18.7A of the National Electricity Rules (NER); and
2. decide how the NSW distribution network service providers (DNSPs) are to report to the AER on the recovery of the jurisdictional scheme amounts for each regulatory year, as well as the adjustments for over or under recovery as part of their regulatory determinations.

The NER require us to publish a request for a jurisdictional scheme determination as soon as practicable after its receipt.¹ We published DPIE's request and letter of acknowledgement from the NSW DNSPs on our website on 15 November 2021.

2 Determination

We have determined that the scheme established under section 58(1) of the EII Act (the Scheme) is a jurisdictional scheme,² as it meets the jurisdictional scheme eligibility criteria under the NER.³ The jurisdictional scheme applies to all NSW DNSPs.

We have not decided on DPIE's request at item 2 above. We consider that the most appropriate juncture for the AER to decide on DNSP reporting requirements is part of its usual pricing proposal process.⁴

3 Reasons for determination

We are satisfied that NSW DPIE's request was made in accordance with NER requirements. Specifically, it included:⁵

- the name and address of the person making the request.
- details of the law of a participating jurisdiction under which the Scheme is established.
- the commencement date of the Scheme. The EII Act commenced on 1 July 2021. However, operationally the first contribution order to be made by the Scheme Financial Vehicle under the EII Act is currentted scheduled to apply to the NSW DNSPs on 1 July 2023.
- an explanation of how the Scheme meets the jurisdictional scheme eligibility criteria as set out in the NER.

¹ NER, cl. 6.18.7A(h).

² NER, cl. 6.18.7A(d) defines a jurisdictional scheme as

(d) A scheme is a jurisdictional scheme if:

(1) the scheme is specified in paragraph (e); or

(2) the AER has determined under paragraph (l) that the scheme is a jurisdictional scheme,

and the AER has not determined under paragraph (u) that the scheme has ceased to be a jurisdictional scheme.

³ The eligibility criteria are set out in sub-clause 6.18.7A(x) of the NER.

⁴ NER, cll. 6.18.7 and 6.18.7A.

⁵ NER, cl. 6.18.7A(g).

The following table sets out our assessment of how the Scheme meets the relevant eligibility criteria.

Table 1: Assessment of the Scheme against jurisdictional scheme eligibility criteria in clause 6.18.7A(x) of the NER

Jurisdictional scheme eligibility criteria	AER assessment
<p>(1) the jurisdictional scheme obligations⁶ require a DNSP to:</p> <ul style="list-style-type: none"> (i) pay a person; (ii) pay into a fund established under an Act of a participating jurisdiction; (iii) credit against charges payable by a person; or (iv) reimburse a person, <p>an amount specified in, or determined in accordance with, the jurisdictional scheme obligations;</p>	<p>We are satisfied this criterion is met.</p> <p>Section 58(1) of the EII Act permits the Scheme Financial Vehicle to make an order requiring DNSPs to pay a specified amount into the Fund established under that EII Act. NSW is a participating jurisdiction as defined in the NER, and so the EII Act is an Act of a participating jurisdiction. The obligation imposed on NSW DNSPs by an order under section 58(1) of the EII Act is an obligation imposed on a DNSP by an order under an Act of a participating jurisdiction and accordingly, is a 'jurisdictional scheme obligation'.</p>
<p>(2) the jurisdictional scheme obligations are imposed on a DNSP in its capacity as a DNSP;</p>	<p>We are satisfied this criterion is met.</p> <p>Section 58(1) of the EII Act expressly applies to DNSPs as defined in Chapter 10 of the NER.</p>
<p>(3) the amount referred to in subparagraph (1) is not in the nature of a fine, penalty or incentive payment for the DNSP; and</p>	<p>We are satisfied this criterion is met.</p> <p>The amounts to be paid by DNSPs under section 58(1) of the EII Act are those specified in a contribution order. The amounts will not be in the nature of a fine, penalty or incentive payment for DNSPs.</p>
<p>(4) except as provided in the NER, the DNSP has no right to recover the amount referred to in subparagraph (1) from any person.</p>	<p>We are satisfied this criterion is met.</p> <p>The EII Act does not provide any avenues for the DNSPs to recover the amounts.⁷</p>

⁶ These are defined in Chapter 10 of the NER as: 'Obligations imposed on a Distribution Network Service Provider under: (a) an Act of a participating jurisdiction or an instrument, direction or order made under an Act of a participating jurisdiction (other than the NEL and the Rules); or (b) a condition of a distribution licence or authority held by a Distribution Network Service Provider in a participating jurisdiction.'

⁷ We note that section 58(6) of the EIIA provides that: 'the regulations may make provision for or with respect to the circumstances in which a distribution network service provider is or is not authorised to recover part of the amount payable under a contribution order from a person who is exempt from the energy savings scheme under clause 22 of Schedule 4A to the Electricity Supply Act 1995 or from a person who buys electricity to use in the production of hydrogen energy.' However, no such regulations currently exist.