



Draft decision
TransGrid transmission determination
2015–16 to 2017–18
Attachment 13: Pass through events

November 2014

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Inquiries about this document should be addressed to:

Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001
Tel: (03) 9290 1444
Fax: (03) 9290 1457
Email: AERInquiry@aer.gov.au

AER reference: 53444

Note

This attachment forms part of the AER's draft decision on TransGrid's revenue proposal 2015–18. It should be read with other parts of the draft decision.

The draft decision includes the following documents:

Overview

Attachment 1 – maximum allowed revenue

Attachment 2 – regulatory asset base

Attachment 3 – rate of return

Attachment 4 – value of imputation credits

Attachment 5 – regulatory depreciation

Attachment 6 – capital expenditure

Attachment 7 – operating expenditure

Attachment 8 – corporate income tax

Attachment 9 – efficiency benefit sharing scheme

Attachment 10 – capital expenditure sharing scheme

Attachment 11 – service target performance incentive scheme

Attachment 12 – pricing methodology

Attachment 13 – pass through events

Attachment 14 – negotiated services

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Shortened forms

Shortened form	Extended form
AARR	aggregate annual revenue requirement
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ASRR	aggregate service revenue requirement
augex	augmentation expenditure
capex	capital expenditure
CCP	Consumer Challenge Panel
CESS	capital expenditure sharing scheme
CPI	consumer price index
DRP	debt risk premium
EBSS	efficiency benefit sharing scheme
ERP	equity risk premium
MAR	maximum allowed revenue
MRP	market risk premium
NEL	national electricity law
NEM	national electricity market
NEO	national electricity objective
NER	national electricity rules
NSP	network service provider
NTSC	negotiated transmission service criteria

Shortened form	Extended form
opex	operating expenditure
PPI	partial performance indicators
PTRM	post-tax revenue model
RAB	regulatory asset base
RBA	Reserve Bank of Australia
repx	replacement expenditure
RFM	roll forward model
RIN	regulatory information notice
RPP	revenue pricing principles
SLCAPM	Sharpe-Lintner capital asset pricing model
STPIS	service target performance incentive scheme
TNSP	transmission network service provider
TUoS	transmission use of system
WACC	weighted average cost of capital

13 Cost pass throughs

The pass through mechanism of the National Electricity Rules (NER) recognises that a transmission network service provider (TNSP) can be exposed to risks beyond its control, which may have a material impact on its costs. A cost pass through enables a TNSP to recover (or pass through) the costs of defined unpredictable, high cost events that are not built into our transmission determination. The NER includes the following prescribed pass through events for all TNSPs:

- a regulatory change event
- a service standard event
- a tax change event
- an insurance event
- in addition to those defined events, an event specified in a determination for a regulatory control period (nominated pass through event).¹

This attachment sets out our draft decision about which of TransGrid's nominated pass through events we will accept as an additional pass through event for the regulatory control period.

13.1 Draft decision

We accept that, in certain circumstances, a pass through of costs may be justifiable. However, we do not accept these nominated pass through events as drafted by TransGrid. Instead, we substituted our own definitions for the following events:

- insurance cap event
- terrorism event.

We do not accept the following proposed pass through events:

- insurer default event
- cyber-related external attack
- gradual environmental contamination event.

13.2 TransGrid's proposal

TransGrid's proposed nominated pass through events and definitions are set out in table 13.1.

¹ NER, cl. 6A.7.3(a1).

Table 13.1 TransGrid's proposed pass through events

Proposed event	Proposed definition
Insurance cap event	<p>An insurance cap event occurs if:</p> <ol style="list-style-type: none"> 1. TransGrid makes a claim or claims and receives a payment or payments under a relevant insurance policy; 2. TransGrid incurs costs beyond the relevant policy limit; and 3. the cost beyond the relevant policy limit materially increases the cost to TransGrid of providing prescribed transmission services.
Terrorism event	<p>An act (including, but not limited to, the use of force or violence or the threat of force or violence) of any person or group of persons (whether acting alone or on behalf of in connection with any organisation or government), which from its nature or context is done for, or in connection with, political, religious, ideological, ethnic or similar purposes or reasons (including the intention to influence or intimidate any government and/or put the public, or any section of the public, in fear) and which materially increases the costs to TransGrid of providing prescribed transmission services or the costs of providing direct control services.</p>
Insurer default	<p>Default of an insurer from which TransGrid is unable to recover its outstanding insurance claims.</p>
Cyber-related external attack	<p>Cyber-related external attack resulting in direct or third party losses to TransGrid.</p>
Gradual environmental contamination event	<p>TransGrid is exposed to a number of environmental risks, each of which could lead to a range of legal and financial consequences for TransGrid. This may include settlement of claims by an individual or group of individuals who have suffered health effects or financial losses, legal costs associated with negotiating that settlement, and the cost of remediation of any contaminated site.</p>

Source: TransGrid, *Revenue proposal*, pp. 229–230.

13.3 AER's assessment approach

We must decide which of TransGrid's proposed nominated pass through events will apply for the 2015–19 regulatory control period. Pass through events transfer financial risks from the network service providers (NSPs) to consumers. If one of the nominated events occurs, the costs of the event that we assess as meeting the factors set out in the NER are passed through to consumers and network charges increase.²

Our approach has been guided by the National Electricity Objective (NEO) and the Revenue and Pricing Principles. It provides the NSP with a reasonable opportunity to recover at least the efficient costs the operator incurs³, while also providing effective incentives to promote economic efficiency.⁴ It promotes a balance between the economic costs and risks for promoting efficient investment.⁵

The NER includes the following nominated pass through event considerations which we must have regard to when assessing nominated pass through events.⁶

The *nominated pass through event considerations* are:

² NER, cl. 6A.7.3(d),(g) and (j).

³ NEL, s.7A(2).

⁴ NEL, s.7A(3).

⁵ NEL, s.7A(6).

⁶ NER, cl. 6A.6.9; NER glossary, definition of 'nominated pass through event considerations'.

- (a) whether the event proposed is an event covered by a category of *pass through event* specified in clause 6.6.1(a1)(1) to(4) (in the case of a distribution determination) or clause 6A.7.3(a1)(1) to(4) (in the case of a *transmission determination*);
- (b) whether the nature or type of event can be clearly identified at the time the determination is made for the service provider;
- (c) whether a prudent service provider could reasonably prevent an event of that nature or type from occurring or substantially mitigate the cost impact of such an event;
- (d) whether the relevant service provider could insure against the event, having regard to:
 - (1) the availability (including the extent of availability in terms of liability limits) of insurance against the event on reasonable commercial terms; or
 - (2) whether the event can be self-insured on the basis that:
 - (i) it is possible to calculate the self-insurance premium; and
 - (ii) the potential cost to the relevant service provider would not have a significant impact on the service provider's ability to provide *network services*; and.
- (e) any other matter the *AER* considers relevant and which the *AER* has notified *Network Service Providers* is a nominated pass through event consideration.

These considerations involve an assessment of the incentives on NSPs to manage their risks efficiently.

For systemic risks, NSPs are compensated through the allowed rate of return. NSPs also face business-specific, or residual, risks. These activities are generally compensated through the opex and capex allowances. Beyond this an NSP may manage other risks through a number of other strategies, including:

- prevention (avoiding the risk)
- mitigation (reducing the negative effect or probability of the risk)
- insurance (transferring the risk to another party)
- self-insurance (putting aside funds to manage the likely costs associated with a risky event).

An efficient business will manage its risk by employing the most cost effective combination of these strategies. For example, if a cost is reasonably predictable a business should factor it into its opex and capex proposed expenditure. In addition, an NSP may invest in its networks to mitigate the impact of certain events occurring. Alternatively, if the probability of events occurring can be readily estimated then the event should be insurable.

Pass through events cover those limited circumstances for which the risks cannot be managed efficiently in these ways and for which the NSP should be able to recover its efficient costs.

A factor for us to consider, which is reflected in the pass through event considerations, is who is best placed to manage risk. Generally the party who is in the best position to manage the risk should bear the risk. If the NSP, or customers, are fully exposed to a risk this may lead to adverse outcomes.

For example, where it is not possible for an NSP to insure against a risk, NSPs may need to share that risk with customers, to ensure that the service can continue to be provided if the event happens. The uninsurable risk may be outside the control of the NSP and have a low probability of occurring, but it might also have a significant cost impact. The most efficient and prudent solution to manage that

type of risk may be to require customers to accept some of the burden of that risk, by allowing a pass through in the unlikely event that the risk eventuates. On the other hand, if the NSP is able to pass through all the costs of such an event, this may reduce the NSP's incentive to take prudent actions to prevent or mitigate the potential cost impact of the risk. Accordingly, while customers may need to accept some of the burden of the risk, the NSP will need to share some of the risk too. That might be achieved, for example, by making a pass through conditional on the NSP demonstrating that it has acted prudently and efficiently in managing the potential impact of the event.

We consider all of these issues when assessing a nominated pass through event with the aim of achieving the right balance, in the long term interests of consumers, in accordance with the nominated pass through event considerations.

As a matter of good regulatory practice, an additional factor we take into account is consistency in our approach to assessing nominated pass through events across our determinations where possible.⁷

13.3.1 Interrelationships

As we mentioned above, pass through events are not the only mechanism in this determination by which TransGrid can manage its risks. The nominated pass through events are interrelated with other parts of this determination, in particular with the proposed opex and capex allowances and the rate of return. These interrelationships require us to balance the incentives in the various parts of our decision.

13.4 Reasons for draft decision

This section sets out our reasons for:

- proposing amendments to the insurance cap event and the terrorism event
- not accepting the insurer default event, the cyber-related external attack event, or the gradual environmental contamination event.

13.4.1 Insurance cap event—propose new definition

We do not accept the proposed definition of an insurance cap event. We have amended the proposed definition to incorporate factors that we will have regard to when assessing a claim for a pass through.

The insurance cap event would allow TransGrid to recover material costs incurred which exceed its insurance claim limit.⁸ It is funded through its opex allowance to obtain an appropriate level of insurance for these types of risks. We accept that the insurance cap event would protect it from high cost impact events which would be uneconomical to insure against. We consider consumers benefit because they are not required to fund excessive premiums where insurance, if available, would be uneconomic. Consumers then only bear the risk should an insurance cap event occur.

We expect that TransGrid will obtain efficient levels of insurance cover commensurate with its business risk as reflected in its opex allowance and note the following:

- The extent to which TransGrid is able to reasonably prevent costs being incurred which exceed its insurance cap, or take steps to mitigate incurring costs above the cap is limited

⁷ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations' Paragraph (e).

⁸ TransGrid, *Revenue proposal*, p. 230.

- The coverage of insurance should be capped at a level beyond which it is unable or uneconomic to insure, having regard to the cost of premiums and the likelihood of the event.

TransGrid advised that it has transferred its external insurance cover to SICorp, the NSW Government self insurer, during the 2009–14 regulatory control period.⁹ While TransGrid is able to continue to access the NSW Government self insurer, SICorp, then TransGrid has uncapped insurance coverage for most events.¹⁰ Accordingly, TransGrid advised that, under these circumstances, the insurance cap event could not be triggered.¹¹ However, should TransGrid lose access to SICorp and be required to purchase insurance in the general insurance market, then the insurance cap event will become applicable.¹²

We note that if a pass through event of this kind were to occur, in assessing TransGrid's application to pass through costs, we will consider the efficiency of TransGrid's decisions and actions. We would consider whether it failed to take reasonable action to reduce the magnitude of the amount being claimed and whether any act or omission it took in response to the event increased the magnitude of the amount claimed.¹³ This gives TransGrid an incentive to mitigate the risks associated with the event including through acquiring an appropriate level of insurance and implementing other practical risk minimisation strategies in its operations.

The definition proposed should be amended to clarify some factors to which we will have regard when assessing a claim. Accordingly, we have proposed a new definition as set out at section 13.5.

After making this amendment we consider that including the insurance cap event provides an incentive for TransGrid to obtain an efficient level of insurance.¹⁴

13.4.2 Terrorism event—propose new definition

We do not accept the proposed definition of a terrorism event. We have amended the proposed definition to incorporate factors that we will have regard to when assessing a claim for a pass through.

For the 2009–14 regulatory control period, this was a prescribed pass through event. A rule change removed the terrorism event from the prescribed list of pass through events. The decision whether to accept this event is now to be made by us as part of the determination process, considering the circumstances of each network business.¹⁵

In relation to the this event, we note:

⁹ TransGrid, *Revenue proposal*, pp. 9, 23 and 136.

¹⁰ TransGrid, *Revenue Proposal*, p. 229.

¹¹ TransGrid, *Revenue Proposal*, p. 229.

¹² TransGrid, *Revenue Proposal*, p. 229.

¹³ NER, cl. 6A.7.3(j)(3).

¹⁴ We note that we have not explicitly excluded insurance cap events that arise due to a finding of negligence. Negligence suggests the NSP may have some control over the event or some opportunity to limit the magnitude of the event. This may be a factor that we would have regard to in assessing such a pass through application. However, we do not consider it would be appropriate to exclude all events where the suggestion of negligence on behalf of the business has been raised. We further note that unlawful conduct and gross negligence would not be covered by an insurer and that acts or omissions resulting from such unlawful conduct or gross negligence would be relevant considerations when assessing a pass through event application, having regard to the relevant factors set out in the NER.

¹⁵ Under the transitional rules, the terrorism event is a prescribed pass through event for the transitional regulatory control period: NER, cl. 11.49.2, 11.58.3(a)(4).

- TransGrid has a range of measures in place to prevent acts of terrorism affecting its operations, or mitigate the impacts of an event should one occur.¹⁶ TransGrid has expanded monitoring of strategic assets¹⁷ and has made improvements to site security.¹⁸
- TransGrid does have commercial insurance which would be triggered if a terrorism event occurred.¹⁹ TransGrid also advised that the costs to TransGrid considered in this event should be net of any recoveries from either relevant insurance policies and / or the Australian Reinsurance Pool Corporation (ARPC) under the *Terrorism Insurance Act 2003*.²⁰ However, this may not cover all the costs associated with a terrorism event.
- TransGrid stated it has self insurance for costs below its deductible.²¹ However, taking out further insurance would likely be inefficient and result in an unnecessary cost increase to customers.

TransGrid also advised that the costs to TransGrid considered in this event should be net of any recoveries from either relevant insurance policies and/or the Australian Reinsurance Pool Corporation (ARPC) under the *Terrorism Insurance Act 2003*.²²

We consider that there may be some overlap between an insurance cap event and the terrorism event, but accept the need to have both because TransGrid may incur costs which an insurance policy would not ordinarily cover. The amendment to the pass through event definition will assist in avoiding the overlap.

We also consider that a terrorism event should be more clearly defined so that the event can be clearly identified and assessed.²³ We note that TransGrid's opex allowance includes funding for insurance and self-insurance yet it may have an incentive to keep that allowance (and not insure the risk) while managing this risk through the pass through mechanism. We consider that this disincentive to insure against terrorism can be reduced by clarifying the pass through event definition. Accordingly, we have proposed a new definition as set out at section 13.5.

13.4.3 Insurer default

We do not accept the insurer default event as a pass through event because a prudent service provider could reasonably prevent an event of that nature from occurring.²⁴

The proposed insurer default event is an event for which an insurance allowance is provided but as a result of the insolvency of an insurance provider, TransGrid is unable to recover outstanding insurance claims.²⁵

In determining whether to accept this event, we considered whether this event meets the pass through event considerations. We consider that a prudent service provider should have appropriate incentives to use an insurance provider that has the capacity to satisfy any claims under a policy.

¹⁶ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (c).

¹⁷ TransGrid, *Revenue proposal, Attachment T Insurance and Self Insurance Market Estimate, Appendix C - Analysis of Risks*, p. 6.

¹⁸ TransGrid, *Revenue proposal, Attachment T Insurance and Self Insurance Market Estimate, Appendix C - Analysis of Risks*, p. 3.

¹⁹ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (d)(1). TransGrid, *Revenue proposal, Attachment T Insurance and Self Insurance Market Estimate, Appendix C - Analysis of Risks*, p. 3.

²⁰ TransGrid, *Revenue proposal, Attachment T Insurance and Self Insurance Market Estimate*, p. 34.

²¹ NER, glossary, definition of 'nominated pass through event considerations', paragraph (d)(1). TransGrid, *Revenue proposal, Attachment T Insurance and Self Insurance Market Estimate, Appendix C - Analysis of Risks*, p. 3.

²² TransGrid, *Revenue proposal, Attachment T Insurance and Self Insurance Market Estimate*, p. 34.

²³ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (b).

²⁴ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (c).

²⁵ TransGrid, *Revenue proposal*, p. 230.

NSPs can assess the viability of an insurer by reviewing its track record, size, credit rating and reputation. If we allow an insurer default event we may encourage NSPs to obtain insurance from providers who are not capable of paying large claims. Under this scenario, in the event that the insurance provider fails and a claim is made, the NSP may simply seek a pass through of the costs.

Including the insurer default event removes the incentive for TransGrid to obtain insurance from a reputable provider who is able to pay a claim. TransGrid will be able to take steps to mitigate or prevent this event from occurring. Accordingly, we do not accept the insurer default event.

13.4.4 Cyber-related external attack

We do not accept the cyber-related external attack event as a pass through event because:

- The event proposed by TransGrid is not clearly and sufficiently defined.²⁶ A broad range of events could fall within the description of the proposed event.
- TransGrid did not provide detailed explanation of steps it has taken to prevent or mitigate such an attack from occurring.²⁷ Many organisations have been, and are subject to cyber related attacks. Given the risk of cyber-attacks, prudent firms would invest in securing their assets from such attacks. TransGrid is provided with an allowance for IT expenditure that should be used, in part, for securing its assets from events such as cyber-attacks. TransGrid did not explain why this allowance would be insufficient and why it would need a nominated pass through event as well. In our view, TransGrid is in a better position than consumers to bear the risk of this type of event.
- TransGrid has not satisfactorily explained why insurance would not be available.²⁸ It has provided some explanation as to principles which it would use to consider events to be nominated for pass throughs.²⁹ However, it has not explained why it could not insure against the event. As set out in section 13.5 we consider that where the NSP can take actions to limit the magnitude of the event then it should have incentives to manage the risk. If there is too much reliance on ex post measures the NSP has disincentives to take prudent actions to manage these risks. The potential to recover costs by way of a pass through should not form the basis of any risk management decision by the NSP.

Accordingly, we do not accept the cyber-related external attack pass through event.

13.4.5 Gradual environmental contamination event

We do not accept the gradual environmental contamination event as a pass through event in our draft determination because:

- The event proposed by TransGrid is not clearly defined.³⁰ A broad range of events could fall within the description of the event.
- TransGrid did not provide detailed explanation of steps it has taken to prevent or mitigate such an event from occurring.³¹ In our view, TransGrid is in a better position than consumers to bear the risk of this type of event.

²⁶ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (b).

²⁷ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (c).

²⁸ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (d).

²⁹ TransGrid, *Revenue proposal Appendix T Insurance and Self Insurance Market Estimate*, p. 8.

³⁰ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (b).

³¹ NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (c).

- The proposed event would allow TransGrid to recover the costs of events caused by TransGrid. There may be situations where we would allow a pass through for events caused by TransGrid, for example, past practices may have been commonly accepted practice at the time but are not acceptable today. However, the event proposed could allow TransGrid to have disregard for the consequences of its actions today. As noted in section 13.3, if the NSP has a degree of control, a pass through can remove or dilute the incentive to manage the risk.
- Many organisations have been, and are subject to environmental issues. Given the risks of environmental issues, prudent firms would be actively seeking out and identifying potential risks. TransGrid has not demonstrated any such processes it has implemented to make itself aware of these events and mitigate the risks of these events.
- TransGrid has not satisfactorily explained why it does not consider insurance would be available.³² It has provided some explanation as to principles which it would use to consider events to be nominated for pass throughs.³³ However, it has not explained why it could not insure against the event. A prudent operator should take out an appropriate level of insurance, including public liability insurance, to cover claims resulting from these types of events. If there is too much reliance on ex post measures the NSP has disincentives to take prudent actions to manage these risks. The potential to recover costs by way of a pass through should not form the basis of any risk management decision by the NSP.

Accordingly, we do not accept the gradual environmental contamination pass through event.

13.5 Revisions

We propose an amendment to the definition of the insurance cap event.

An insurance cap event occurs if:

1. TransGrid makes a claim or claims and receives the benefit of a payment or payments under a relevant insurance policy,
2. TransGrid incurs costs beyond the relevant policy limit, and
3. the costs beyond the relevant policy limit materially increase the costs to TransGrid in providing direct control

For this insurance cap event:

4. the relevant policy limit is the greater of:
 - a. TransGrid's actual policy limit at the time of the event that gives, or would have given rise to a claim, and
 - b. the policy limit that is explicitly or implicitly commensurate with the allowance for insurance premiums that is included in the forecast operating expenditure allowance approved in the AER's final decision for the regulatory control period in which the insurance policy is issued.
5. A relevant insurance policy is an insurance policy held during the 2015-19 regulatory control period or a previous regulatory control period in which TransGrid was regulated.

Note for the avoidance of doubt, in assessing an insurance cap event cost pass through application under rule 6A.7.3, the AER will have regard to:

- i. the insurance policy for the event,

³² NER Chapter 10 (glossary), definition of 'nominated pass through event considerations', paragraph (d).
³³ TransGrid, *Revenue proposal Appendix T Insurance and Self Insurance Market Estimate*, p. 8.

- ii. the level of insurance that an efficient and prudent NSP would obtain in respect of the event, and
- iv. the extent to which a prudent provider could reasonably mitigate the impact of the event.

We propose an amendment to the definition of the terrorism event.

A terrorism event occurs if:

An act (including, but not limited to, the use of force or violence or the threat of force or violence) of any person or group of persons (whether acting alone or on behalf of or in connection with any organisation or government), which from its nature or context is done for, or in connection with, political, religious, ideological, ethnic or similar purposes or reasons (including the intention to influence or intimidate any government and/or put the public, or any section of the public, in fear) and which materially increases the costs to TransGrid in providing direct control services.

Note: In assessing a terrorism event pass through application, the AER will have regard to, amongst other things:

- i. whether TransGrid has insurance against the event,
- ii. the level of insurance that an efficient and prudent NSP would obtain in respect of the event,
- iii. whether a declaration has been made by a relevant government authority that a terrorism event has occurred, and
- iv. the extent to which a prudent provider could reasonably mitigate the impact of the event.

We do not accept:

- insurer default event
- cyber-related external attack event
- gradual environmental contamination event.