

Confidentiality Guideline – *Electricity Infrastructure Investment Act* Draft

August 2023

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Inquiries about this publication should be addressed to:

Australian Energy Regulator
GPO Box 3131
Canberra ACT 2601
Tel: 1300 585 165

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Invitation to make submissions

We invite interested parties to make written submissions in response to this draft Guideline, and the other draft supporting guidelines for the Electricity Infrastructure Investment Act released by the AER, by close of business 23 August 2023.

Please contact us if you would like to meet with AER staff during this consultation period. Submissions should be sent electronically to REZ@aer.gov.au with the title 'Submission – Draft Guidelines EII Act' We ask that all submissions sent in an electronic format are in Microsoft Word or another text-readable document form.

Alternatively, submissions may be sent to:

Kami Kaur
Acting General Manager,
NSW REZ Branch
Australian Energy Regulator
GPO Box 3131 Canberra ACT 2601

Enquiries about this paper, or about lodging submissions, should be directed to REZ@aer.gov.au.

Confidentiality

The AER prefers that all submissions be publicly available to facilitate informed and transparent consultation. Submissions will be treated as public documents unless otherwise requested.

Parties wishing to submit confidential information are requested to:

- clearly identify the information that is the subject of the confidentiality claim, and
- provide a non-confidential version of the submission in a form suitable for publication.

All non-confidential submissions will be placed on the [AER's website](#). For further information regarding the AER's use and disclosure of information provided to it, please see the [ACCC/AER Information Policy](#) available on our website.

Public forum

The AER will host an online public forum to allow stakeholders the opportunity to ask questions about our draft Guidelines before submissions close.

The public forum will be held from 10 am to 11 am (AEST) on 14 August 2023. To register your interest in the public forum, please email REZ@aer.gov.au by close of business on 11 August 2023.

Next steps

We will consider submissions received and feedback from the public forum before we publish a final Guideline in early September 2023.

1 Introduction

The AER is the independent regulator of electricity networks in all jurisdictions except Western Australia. We are empowered to regulate electricity networks by the National Electricity Law (NEL) and the National Electricity Rules (NER). We are also a Regulator appointed under the *Electricity Infrastructure Investment Act 2020* (EII Act). The AER's responsibilities under the EII Act are:

- determining the amount payable to Network Operators for undertaking network infrastructure projects (revenue determinations),
- determining annual contributions to the Electricity Infrastructure Fund (contribution determinations),
- approving risk management frameworks developed by the Consumer Trustee, and
- being consulted with on tender rules for long-term energy service agreements.

Each of these functions involves receiving and assessing information from entities delivering the NSW Roadmap and the publication of our regulatory decisions. Each function has different information requirements and different publication requirements.

As an independent regulator, we endeavour to publish information used in performing our regulatory functions to ensure consumers are informed of the costs and benefits of the projects they ultimately pay for. We consider there to be a discipline that transparency imposes and that NSW electricity consumers expect our decisions to provide transparency of decisions and how they were made. This is best practise for an independent regulator and essential to maintaining public confidence and trust. Consequently, the AER's preference is to publish relevant information used in making our regulatory decisions. This includes publication of information for the purposes of consultation (in our draft decisions) as well as final decisions.

This Guideline outlines how entities under the EII Act and *Electricity Infrastructure Investment Regulation 2021* (the EII Regulation) may submit confidential information to us and claim confidentiality over it, and how we will consider these claims.

1.1 Background

In 2020, the NSW Government passed the EII Act, which underpins the NSW Electricity Infrastructure Roadmap. The Roadmap is a NSW-specific plan to transition the electricity grid from a reliance on coal-fired generation to renewable energy generation. The Roadmap coordinates and promotes investment in electricity transmission, generation, and storage infrastructure.

The Roadmap includes a series of network infrastructure projects which are authorised by the Consumer Trustee or the NSW Minister for Energy under the EII Act. These projects are delivered by Network Operators (or persons assisting Network Operators).

The costs of delivering the Roadmap are funded by annual contributions to the Electricity Infrastructure Fund by NSW Distribution Network Service Providers (DNSPs). The Electricity Infrastructure Fund is administered by the Scheme Financial Vehicle, and covers:

- Payments to Network Operators for undertaking network infrastructure projects,

- Underwriting Long-Term Energy Service Agreements, and
- Payments for administrative costs of entities administering the Roadmap.

The Roadmap introduced Long-Term Energy Service Agreements (LTESAs), contracts providing a minimum price guarantee for investors, backed by the NSW Government. LTESAs encourage investment by reducing risks for investors, and are awarded following a competitive tender exercise, where entities submit confidential and competing bids to purchase a limited number of available LTESAs.

The creation of LTESAs introduces new risks for NSW electricity customers which need to be managed and understood. The EII Act requires the development of a Risk Management Framework to govern the management of these risks, protecting the financial interests of NSW electricity consumers in connection with the risks associated with LTESAs.

Legislative Requirements

Under the Competition and Consumer Act 2010 (Cth) (CCA), the AER has an obligation to protect information provided to it for the exercise of its functions, from unauthorised use or disclosure.¹ This includes information provided to the AER under or in connection with its functions or powers under the EII Act and Regulations. The Privacy Act also prohibits the AER from disclosing personal information for a purpose other than the purpose for which it was collected.²

Under the CCA, there are situations where the use or disclosure of this information is authorised. These include (among other things) disclosure and use by the AER staff in performing their functions and disclosures required or permitted under state law.

The EII Act allows us to disclose information, where the disclosure is in connection with the administration or execution of the Act.³ Our legislative requirements are supported by the EII regulation that describes our functions and are detailed in section 3 of this guideline.

1.2 Scope of this guideline

This guideline applies to information obtained from entities in connection with our functions under the EII Act and EII Regulation (the EII framework). This includes information received for the purposes of:

1. Making revenue determinations (for contestable and non-contestable projects),
2. Making contribution determinations,
3. Approving risk management frameworks, and
4. Consulting on tender rules for LTESAs.

The guideline will be particularly relevant for the NSW Roadmap entities such as Network Operators, the Scheme Financial Vehicle, the Consumer Trustee, the Financial Trustee, the Infrastructure Planner and the Regulators under the EII Act.

¹ Competition and Consumer Act 2010, s. 44AAF.

² Exceptions may apply. See Australian Privacy Principle 6 set out in Schedule 1 of the Privacy Act.

³ EII Act, s. 75(1)(b)

1.3 Relationship between this guideline, the NER Confidentiality Guideline and other guidelines

The AER has a Confidentiality Guideline that applies to revenue determinations under the National Electricity Rules (NER). Conceptually, this guideline is like the NER Confidentiality Guideline with respect to the making of revenue determinations. This reflects that under both frameworks we are required to publish information in making a revenue determination and that Network Operators may request information provided be kept confidential.

Additionally, references to how entities may request information they provide to the AER be kept confidential are made in other guidelines published by the AER:

- Revenue determination guideline for NSW contestable network projects.
- Transmission Efficiency Test and Revenue Determination Guideline for Non-contestable network infrastructure projects.
- NSW Electricity Infrastructure Fund – Contribution Determination Guideline.

In the event of any inconsistency between this guideline and the guidelines mentioned above, this guideline will take precedent. This guideline should be read in conjunction with other relevant guidelines, when submitting information to the AER.

1.4 Process for revision

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

2 Overview of Process

The process of preparing and providing information to the AER, making a confidentiality claim, and how the AER approaches these claims consists of the same four elements regardless of the regulatory function the information is related to. These are:

1. Pre-lodgement discussions,
2. Submission of information and making a confidentiality claim,
3. Making the regulatory decision and considering the confidentiality claim, and
4. Communication of the AER's decision and publication.

2.1 Pre-lodgement discussions

NSW Roadmap entities are expected to engage in pre-lodgement discussions with the AER when preparing information to be provided to the AER. These discussions will concern the content and format of the information to be provided, and any confidentiality concerns the submitting entity may have.

The AER will work with the submitting entity to understand the nature of the confidentiality concerns to clarify and refine them as much as practicable and resolve concerns before a formal submission and confidentiality claim is made.

2.2 Submission of information and confidentiality claim

When providing information for us in an AER regulatory decision, that the providing entity considers confidential, the submission should be made in accordance with the relevant section of this guideline (section 4) and include a confidentiality request.

The request should clearly identify what information is to be considered confidential and why, along with any supporting material.

2.3 Making regulatory decisions and considering the confidentiality claim

When making regulatory decisions (draft or final) the AER will consider all confidentiality claims made by a submitting entity. Where the confidentiality claim relates to information that the AER intends to publish, we will consider whether it is appropriate to publish the information having regard to the matters listed in EII Regulation 53(4). These matters will be used to test appropriateness for all decisions to disclose confidential information, not limited to revenue determinations.

Where we form the view that the information should be published, we will discuss with the submitting entity and provide our reasons. We will give the submitting entity an opportunity to comment and respond to any proposed disclosure of information over which it has claimed confidentiality.

2.4 Communication and publication

Once the AER has made the regulatory decision (draft or final), the relevant entities will be provided with an embargoed copy of the decision, including the version to be published, prior to publication. We will not publish material we agree is confidential.

In the event of any doubt the AER will engage with relevant entities throughout the regulatory decision process to resolve and clarify confidentiality claims.

3 Regulatory Processes

The information obligations of Roadmap entities and the publication requirements of the AER vary with the regulatory process being performed. Further information on each regulatory process is described below.

3.1 Revenue Determinations

Under the EII framework, Network Operators are required to provide the AER with information we consider necessary to enable us to make a revenue determination.⁴ The AER will formally request this information using information notices as well as other methods.

Network Operators must prepare and provide the information in accordance with any written notice or requirements described in our published guidelines:⁵

- Revenue determination guideline for NSW contestable network projects.
- Transmission Efficiency Test and Revenue Determination Guideline for Non-contestable network infrastructure projects.

The content of a revenue determination is specified in the EII framework. We will request information from Network Operators that will allow us to make a revenue determination in accordance with these requirements.

3.1.1 Information to be included in a revenue determination

Under the EII framework, revenue determinations are required to include the information in Table 1.

⁴ EII Act, s. 38(7) and EII Reg, cl. 48(1).

⁵ EII Act, s. 38(9) & EII Reg, cl. 48(1).

Table 1. Information to be included in a revenue determination

All Revenue Determinations	
Description of Information to be included	EII References
<ul style="list-style-type: none"> • Repayment of capital costs as determined under the transmission efficiency test, • The return on capital costs that have not been repaid, • An allowance for operating costs, • Other components prescribed by the regulations. 	EII Act, s. 38(2)
<ul style="list-style-type: none"> • A schedule of the amounts required to be paid to the Network Operator (The schedule), • The schedule must set out each amount to be paid and the date on which the amount must be paid. 	EII Reg, cl. 52(1) EII Reg, cl. 52(2)(a).
<ul style="list-style-type: none"> • May include provisions for the adjustments of any amount included in the revenue determination. 	EII Reg, cl. 51.
Contestable Revenue Determinations	
<ul style="list-style-type: none"> • The schedule must correspond with the term of the contractual arrangements that the Network Operator enters into including the service period. 	EII Reg, cl. 52(2)(b).
Non-Contestable Revenue Determinations	
<ul style="list-style-type: none"> • The schedule must set out the amounts required to be paid for the following five years. 	EII Reg, cl. 52(2)(c).
<p>Allowances for the following prescribed components:</p> <ul style="list-style-type: none"> • The indexation of the regulatory asset base, • The estimated cost of corporate tax of the Network Operator, • An increase or decrease in the Network Operator's revenue resulting from the operation of schemes included in the regulator's guidelines, • The repayment of prudent, efficient, and reasonable capital costs not included in the component specific in clause 38(2)(1) of the EII Act, • Other risks for which the Network Operator is not already compensated under the component specified in clause 38(2)(b). 	EII Reg, cl. 50A.

A non-contestable revenue determination may also include other information we consider appropriate, taking into account our guidelines.

3.1.2 Publication of revenue determinations

Under the EII Regulations, the AER must publish a revenue determination and the reasons for making the determination on its website.⁶ This includes publishing the information described in Table 1.

- Where an adjustment is made to a revenue determination, that did not require the revenue determination to be reviewed and remade, we are only required to publish an updated schedule of amounts required to be paid to the Network Operator.⁷

Under EII Regulation 53(4), the AER has the discretion to not publish part of a revenue determination, if satisfied it is not appropriate, taking into account the following:⁸

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

We also have the discretion under EII 53(5) to publish information provided to us about the proposed amounts payable that relate to a non-contestable revenue determination. However, we will not publish this information, if we are satisfied that the information is confidential or commercially sensitive.⁹

Confidentiality claims should make reference to these matters, as described in section 4.

3.2 Contribution Determination

Under the EII framework, NSW Roadmap entities are required to provide us with the information we consider necessary to make contribution determinations.¹⁰

3.2.1 Information to be included in a contribution determination

The AER will formally request information from NSW Roadmap entities, including the Scheme Financial Vehicle, Consumer Trustee, Financial Trustee, Infrastructure Planner, and Regulators (the AER and the Independent Pricing and Regulatory Tribunal and others as appointed). This information is provided in Excel-based templates issued by the AER and collated by the Scheme Financial Vehicle.

The information requested in the templates includes:

- Actual and forecast costs of network infrastructure projects, long-term energy service agreements (i.e., underwriting contracts) and the administration costs of scheme entities.
- Volumetric energy and peak demand data.

⁶ EII Reg, cl. 53(1).

⁷ EII Reg, cl. 53(1)(b) & cl. 51.

⁸ EII Reg, cl. 53(4).

⁹ EII Reg, cl. 53(6).

¹⁰ EII Act, s. 56(7) & EII Reg, cl. 39

- Financial parameters.

The input templates provide the scheme entities and Scheme Financial Vehicle with the option to identify information over which they wish to claim confidentiality. Further details on the information requested in these templates is available in our published guideline:

- NSW Electricity Infrastructure Fund – Contribution Determination Guideline.

3.2.2 Information to be published in a contribution determination

The information we are required to include in a contribution determination is specified in the EII framework (see Table 2).

Table 2. Information to be included in a contribution determination

Description of Information to be included	EII References
<ul style="list-style-type: none"> • A minimum prudent cash balance for the Electricity Infrastructure Fund, and • The amount required to be paid by each distribution network service provider. 	EII Act, s. 56(3).
<ul style="list-style-type: none"> • Details of how the contribution determination was made, and • Other information prescribed by the regulations. 	EII Act, s. 56(4).

We consider ‘details of how the contribution determination was made’ may include information provided in the templates, either as provided or an aggregate or summary.

EII Regulation 53(4) refers to matters for consideration when publishing information with respect to a revenue determination. Although not required, we may have regard to matters when considering publishing information in a contribution determination. We will also have regard to our ability to disclose information, where the disclosure is in connection with the administration or execution of the EII Act.¹¹

Our general approach is to accept confidentiality requests related to data where the case is made that it will impact competitive procurement processes currently underway. Once the processes are completed and the data or information becomes historical, we expect to then publish it.

Scheme entities wishing to claim confidentiality over the information they provide in their input templates to the Scheme Financial Vehicle should mark the information as confidential when submitting the information and justify the claim in supporting documentation in accordance with section 4 of this guideline.

Confidentiality claims should refer to these requirements when making a confidentiality claim, as described in section 4 of this guideline.

¹¹ EII Act, s. 75(1)(b).

3.3 Risk Management Frameworks

The Consumer Trustee is required to prepare a risk management framework to protect the financial interests of NSW electricity customers in connection with the risks associated with Long Term Energy Service Agreements.¹² The risk management framework must be approved by the AER in its role as a regulator.¹³

The approved risk management framework is to be published on the Consumer Trustee's website.¹⁴ Under the EII Act, the Consumer Trustee is not required to publish part of the risk management framework if it considers it is in the public interest not to do so, and has the approval of the AER to not publish the part.¹⁵

The Consumer Trustee should make this request when submitting its risk management framework to the AER for approval. We will assess the Consumer Trustee's request and inform it of the outcome. When assessing the request, we will have regard to the reasons why the Consumer Trustee considers that not publishing part of the risk management framework is in the public interest.

Once the Consumer Trustee has published the approved risk management framework on its website, we will publish the approved risk management framework along with our approval on our website. We will only publish the approved risk management framework as published on the Consumer Trustee website and will consult with the Consumer Trustee prior to publishing.

3.4 Consultations on tender rules for Long Term Energy Service Agreements

The Consumer Trustee is required to consult with us in our role as regulator, on tender rules for long-term energy service agreements.¹⁶ Our role is limited to providing comment on draft tender rules provided to us by the Consumer Trustee.

Once the tender rules are published in the NSW Government Gazette, in consultation with the Consumer Trustee, we will publish the draft tender rules submitted to us for feedback, our feedback and any response from the Consumer Trustee, on our website.¹⁷

¹² EII Act, s. 51(1).

¹³ EII Act, s. 51(3).

¹⁴ EII Act, s. 51(4).

¹⁵ EII Act, s. 51(5).

¹⁶ EII Act, s. 47(6).

¹⁷ EII Act, s. 47(7).

4 Confidentiality Claim template

Entities providing information to the AER must specify the information they wish to claim confidentiality over and provide reasons. When providing reasons, entities should address the matters below:

- The public interest,
- The extent to which publishing the information would disclose information that is confidential or commercially sensitive, and
- The effect of publishing will impact future competitive assessment processes.¹⁸

The information identified should be as specific and narrow as possible (that is, individual figures or words), with reasons provided for each identified element.

Confidentiality claims must be set out in a table and include all the items in Table 1, for all information subject to a confidentiality claim and should be provided in the same format, unless a different template is provided in a request from the AER. This may be provided within documents accompanying the submission, or as a separate document.

Table 1. Information required in confidentiality claim

Item	Definition
Title, page, and paragraph number of the document containing the confidential information	Information required to identify where the information over which confidentiality is claimed, is located.
Description of the confidential information	A description of the information, providing enough detail for stakeholders to understand the nature of the confidential information.
Topic confidential information relates to	The topic that the confidential information relates to. For example, capital expenditure, operating expenditure, or the rate of return.
Confidential information category	The confidentiality category that the information relates to. Definitions of confidentiality categories are described in Table 2.
Reasons for confidentiality claim	Provide reason as to why the information is confidential and should not be published in the AER's revenue determination. This may include having regard to the matters in EII Regulation 53(4).

¹⁸ EII Reg, cl. 53(4).

Supporting evidence	Provide any evidence that supports the reasons for the confidentiality claim.
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Table 2. Confidential information categories

Confidentiality category	Definition
Information affecting the security of the network	Information which, if made public, may jeopardise security of the network or a Network Operator's ability to effectively plan and operate its network.
Market sensitive cost inputs	Information such as supplier prices, internal labour costs, and information which would affect the Network Operator's ability to obtain competitive prices in future infrastructure transactions. This could include information derived from a competitive procurement process that the Infrastructure Planner has indicated may impact a future competitive procurement process.
Market intelligence	Information which may provide an advantage to a Network Operator's competitors for non-regulated activities.
Strategic information	Information such as the acquisition of land and easements, where the release of this information might adversely impact the Network Operator's ability to negotiate a fair market price for these items.
Personal information	Information about an individual or customer whose identity is apparent or can reasonably be ascertained from the information which raises privacy considerations.
Other	Information which the Network Operator claims is confidential but does not fit into one of the above categories.

5 Confidentiality Claim Considerations

When assessing confidentiality claims, we will consider each claim on its merits on a case-by-case basis.

The EII Regulation 53(4) includes matters we must take into account in deciding whether to publish a revenue determination, namely:

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

For confidentiality claims not related to revenue determinations, we will take into account the above matters where relevant.

In doing so, we will consider the following:

- Whether the public benefit in disclosing the information would outweigh any detriment to the information provider or any other person,
- Whether the information would promote open discussion, enhance accountability, contribute to informed debate, or enable stakeholders to have a greater understanding of issues affecting their interests,
- Whether the information is commercially sensitive or confidential,
- Whether disclosing the information may have a negative impact on future competitive assessment processes, and
- Any other matters the AER considers relevant.