

Office of Energy and Climate Change

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NSW ELECTRICITY INFRASTRUCTURE ROADMAP

Request for Jurisdictional Scheme Determination for the NSW Electricity Infrastructure Investment Act 2020

July 2022



Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Introduction

The purpose of this submission is for the Office of Energy and Climate Change (**OECC**) to request the Australian Energy Regulator (**AER**) determine that circumstances in which a NSW distribution network service provider (**DNSP**) is authorised to recover part of an amount payable by the DNSP to an exempt customer, and the DNSP provides the exempt customer with a credit against the charges payable is a jurisdictional scheme in accordance with rule 6.18.7A of the National Electricity Rules (**NER**).

The proposed scheme is set out under clause 37 of the *Electricity Infrastructure Investment Regulation 2021* (NSW) (**EII Regulation**) (**proposed Scheme**). The proposed Scheme authorises a DNSP to recover from exempt customers an amount (representing their allocation of costs payable by the DNSP under the *Electricity Infrastructure Investment Act 2020* (NSW) (**EII Act**)). DNSPs then credit that amount against a charge otherwise payable by that exempt customer on its invoice. Details of the law giving effect to the proposed Scheme are described in this submission.

This submission sets out the following information as required by rule 6.18.7A(g) of the NER:

- (1) the name and address of the person making the request;
- (2) details of the law of the participating jurisdiction under which the relevant scheme is established, being NSW;
- (3) the commencement date of the relevant scheme; and
- (4) an explanation of how the relevant scheme meets the jurisdictional scheme eligibility criteria.

The AER is required to determine a scheme is a jurisdictional scheme under rule 6.18.7A(n) of the NER if it considers that the proposed scheme meets the jurisdictional scheme eligibility criteria set out in rule 6.18.7A(x) of the NER. The NER do not provide the AER with any residual discretion to determine that a scheme is not a jurisdictional scheme if the criteria are satisfied.

As illustrated in this submission, OECC considers that the eligibility criteria are satisfied by the proposed scheme. Accordingly, we request that the AER determine the proposed scheme to be a jurisdictional scheme pursuant to clause 6.18.7A of the NER.

OECC requests that the AER determine whether the proposed scheme is a jurisdictional scheme.

OECC considers the assessment of whether the proposed Scheme is a jurisdictional scheme is straight-forward and does not give rise to complex issues. In addition, each NSW DNSP is supportive of this jurisdictional scheme application as evidenced by the letter of acknowledgement at **Attachment 1**.

Should the AER determine that the proposed Scheme is a jurisdictional scheme, NSW DNSPs will incorporate jurisdictional scheme amounts into their annual pricing proposals commencing with the 2023-24 regulatory year in accordance with rules 6.18.2(b)(6A) and 6.18.7A of the NER.

Person making the request

Rule 6.18.7A(g)(1) of the NER requires the name and address of the persons requesting the AER to determine that a scheme is a jurisdictional scheme. These details are provided as follows:

Contain Details	
Persons making the request	Office of Energy and Climate Change, NSW Treasury
Contact person	[REDACTED]
Address	4 Parramatta Square 12 Darcy Street Parramatta NSW 2150
Postal address	Office of Energy and Climate Change Locked Bag 5022 Parramatta NSW 2124
Telephone	[REDACTED]
Email	[REDACTED]

Details of the law establishing the scheme

NER Rule 6.18.7A(g)(2) requires that a request to determine whether a scheme is a jurisdictional scheme must include details of the law of the participating jurisdiction under which the relevant scheme is established.

The EII Act has an existing jurisdictional scheme

The Electricity Infrastructure Roadmap (the **Roadmap**) is the NSW Government's plan to transform the NSW electricity sector into one that is cheap, clean and reliable. It is enabled by the EII Act which passed into law in December 2020. The Roadmap will facilitate the declaration of Renewable Energy Zones, authorise new network infrastructure, and encourage private investment in new generation, long duration storage and firming infrastructure.

In December 2021, the AER determined that a scheme established under section 58(1) of the EII Act is a 'jurisdictional scheme' in accordance with clause 6.18.7A of the NER. This scheme allows DNSPs to pass on their respective contribution order amounts (being a 'jurisdictional scheme amount' under the NER) to customers, via retailers. DNSPs must include jurisdictional scheme amounts in their annual pricing proposals. This cost recovery mechanism is consistent with other jurisdictional schemes such as the NSW Climate Change Fund.

The proposed scheme is established under the EII Regulation

The proposed Scheme is set out in section 37 of the EII Regulation.

Clause 37 of the EII Regulation is made using the regulation making power under section 58(6) of the EII Act. Section 58(6) of the EII Act permits regulations to be made for or with respect to the circumstances in which a DNSP is or is not authorised to recover part of its contribution order from certain exempt persons, being:

- a person exempt from the energy savings scheme under clause 22 of Schedule 4A of the *Electricity Supply Act 1995* (NSW) (**ESA**); or
- a person who buys electricity to use in the production of hydrogen energy.

Under clause 37(3) of the EII Regulation, an **exempt customer** is defined as 'a person who, under the ESA Schedule 4A, clause 22 is, for an electricity load, exempt from the energy savings scheme established by that Schedule'. This definition incorporates both categories of exempt persons described in section 58(6) of the EII Act, including persons exempt from the energy savings scheme and persons who buy electricity to use in the production of hydrogen energy.

Clause 37(1) of the EII Regulation requires that a DNSP is to first calculate the part of the amount payable under a contribution order that is attributable to each exempt customer, being the **relevant component**.

Clause 37(2) of the EII Regulation provides that a DNSP is authorised to recover the relevant component from an exempt customer if the DNSP gives the exempt customer the following credit against the charges the exempt customer would otherwise pay –

- (a) for an exempt customer who uses electricity supplied by the DNSP to produce green hydrogen –
 - i. if the applicable reference year is before 2029 – 90% of the relevant component, or
 - ii. if the applicable reference year is 2029 – 60% of the relevant component, or
 - iii. if the applicable reference year is 2030 – 30% of the relevant component,
- (b) for an exempt customer who uses electricity supplied by the DNSP in an industry that is both emissions intensive and trade exposed – 90% of the part of the relevant component that is attributable to LTES agreements for generation infrastructure.

Please note that clause 37 of the EII Regulation does not state that the exemption for an exempt customer who uses electricity to produce green hydrogen applies for a period of 10 years from the first reference year (see s 37(2)(a) of the EII Regulation). OECC is preparing an amendment to the EII Regulation to address this requirement. The amended EII Regulation will state that clause 37(2)(a) ceases to apply to an exempt customer 10 years after the beginning of the reference year and is proposed to be made by mid-August 2022. The intention is for the proposed Scheme to apply to clause 37 of the EII Regulation, as amended from time to time.

Commencement date

Rule 6.18.7A(g)(3) of the NER requires that a request for the AER to determine whether a scheme is a jurisdictional scheme must specify the commencement date of the relevant scheme.

Clause 37 the EII Regulation commenced on 8 July 2022. The first contribution determination will be made by the AER by 28 February 2023, with the first contribution order for DNSPs to apply from 1 July 2023. The obligation under the proposed Scheme to begin crediting against charges payable will, in practice, also commence on 1 July 2023 as the amount to be credited is referable to the contribution order for a DNSP.

Eligibility criteria

Rule 6.18.7A(g)(4) of the NER requires that a request for the AER to determine whether a scheme is a jurisdictional scheme should provide an explanation of how the proposed Scheme meets the jurisdictional scheme eligibility criteria.

Rule 6.18.7A(x) of the NER sets out the jurisdictional scheme eligibility criteria:

(x) *The following are the jurisdictional scheme eligibility criteria:*

- (1) *the jurisdictional scheme obligations require a Distribution Network Service Provider to:*
 - (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, an amount specified in, or determined in accordance with, the jurisdictional scheme obligations;*
- (2) *the jurisdictional scheme obligations are imposed on a Distribution Network Service Provider in its capacity as a Distribution Network Service Provider;*
- (3) *the amount referred to in subparagraph (1) is not in the nature of a fine, penalty or incentive payment for the Distribution Network Service Provider; and*
- (4) *except as provided in these Rules, the Distribution Network Service Provider has no right to recover the amount referred to in subparagraph (1) from any person.*

The proposed Scheme satisfies each of the jurisdictional scheme eligibility criteria for the reasons set out in Table 1. On this basis, the AER should determine the proposed Scheme to be a jurisdictional scheme under the NER.

Table 1: Assessment of proposed Scheme as a jurisdictional scheme

Criteria	How the proposed Scheme satisfies the criteria
<p>The jurisdictional scheme obligations require a DNSP to: (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, an amount specified in, or determined in accordance with, the jurisdictional scheme obligations.</p>	<p>Under Chapter 10 of the NER, the definition of 'jurisdictional scheme obligations' includes obligations imposed on a DNSP under an act of a participating jurisdiction (other than the National Electricity Law (NEL) and the NER).</p> <p>The 'jurisdictional scheme obligation' for the purpose of the NER is established under section 37 of the EII Regulation.</p> <p>The proposed Scheme satisfies limb (iii) in the jurisdictional scheme criteria.</p> <p>Section 58(6) of the EII Act permits regulations to be made about the circumstances in which a DNSP is or is not authorised to recover part of the amount payable under a contribution order from exempt persons.</p> <p>Section 37(2) of the EII Regulation provides that a DNSP is authorised to recover the relevant component of a DNSP's contribution order that is payable by an exempt customer if the DNSP gives the exempt customer a credit against the charges payable by that person in the percentages specified.</p>

Criteria	How the proposed Scheme satisfies the criteria
<p>The jurisdictional scheme obligations are imposed on a DNSP in its capacity as a DNSP.</p>	<p>The proposed Scheme applies to each DNSP in NSW in its capacity as a DNSP.</p> <p>The EII Act only applies to DNSPs in NSW. The obligation in section 37 of the EII Regulation expressly applies to a ‘distribution network service provider’.</p> <p>The EII Act defines a ‘distribution network service provider’ to have the same meaning as in the NER. Part 10 of the NER defines 'Distribution Network Service Provider' as 'a person who engages in the activity of owning, controlling, or operating a distribution system'.</p> <p>Each of the NSW DNSPs is such a person and is a 'Distribution Network Service Provider' for the purposes of rule 6.18.7A(x)(2).</p>
<p>The amounts are not in the nature of a fine, penalty or incentive payment for the DNSP.</p>	<p>The amounts to be credited to exempt customers under clause 37 of the EII Regulation are not in the nature of a fine, penalty or incentive payment for a DNSP.</p> <p>Each financial year the regulator for Part 7 of the EII Act (being the AER) will make a contribution determination for the amount required to make payments from and meet liabilities of the Electricity Infrastructure Fund (Fund) (see section 56 of the EII Act).</p> <p>Following gazettal of the contribution determination, the scheme financial vehicle under the EII Act serves a contribution order to NSW DNSPs requiring payment of a specified amount into the Fund (see section 58 of the EII Act). The amount set out in a contribution order is the amount of the regulator's contribution determination allocated to each NSW DNSP.</p> <p>The proposed Scheme (as set out in section 37 of the EII Regulation) deals with the circumstances in which a DNSP is authorised to recover part of the amount payable under a contribution order from specified exempt customers. This is not a fine, penalty or incentive payment.</p>
<p>Except as provided in the NER, the DNSP has no right to recover the amounts from any person.</p>	<p>There are no alternative pathways or legal rights which allow DNSPs to recover contribution order amounts from any person.</p> <p>Section 37(2) of the EII Regulation authorises DNSPs to recover relevant components from an exempt customer and credit them back only via their pricing proposal. Section 37 is not dealing with the ‘contribution order’ amounts per se – it is dealing with a subset of those amounts allocated to the exempt persons.</p>