

# **Project EnergyConnect - An application to reopen the 2023- 2028 revenue determination**

28 April 2026

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## About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are marginalised and facing disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

## Energy and Water Justice

Our Energy and Water Justice work improves regulation and policy so all people can access the sustainable, dependable and affordable energy and water they need. We ensure consumer protections improve equity and limit disadvantage and support communities to play a meaningful role in decision-making. We help to accelerate a transition away from fossil fuels that also improves outcomes for people. We work collaboratively with community and consumer groups across the country, and our work receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

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**Contents**

- 1. Introduction and summary .....2**
- 2. The AER has no power to approve prior spending under the Reopener Rule ..6**
  - 2.1 Clause 6A.7.1 only enables reopening for proposed future capital expenditure. .... 6
  - 2.2 Transgrid has not proposed future capital expenditure ..... 7
  - 2.3 The reopener request is out of time..... 8
  - 2.4 The PEC overrun on prior spending should be dealt with using the ex post review process and application of the CESS ..... 9
- 3. There has not been a relevant ‘event’.....10**
  - 3.1 The event was within the reasonable control of Transgrid ..... 11
  - 3.2 The occurrence of the event, or an event of a similar kind, was foreseeable..... 13
- 4. The amount requested is not capital expenditure to rectify the adverse consequences of the event.....16**
- 5. The additional capital expenditure sought is not appropriate .....18**

# 1. Introduction and summary

The Justice and Equity Centre (JEC) welcomes the opportunity to provide a submission to Project EnergyConnect (PEC) - An application to reopen the 2023-2028 revenue determination, submitted by Transgrid on 13 February 2026 (Reopener Application).<sup>1</sup>

The Reopener Application is fundamentally misconceived and must be rejected.

The Reopener Rule is engaged only where a Transmission Network Service Provider 'proposes to undertake capital expenditure': cl 6A.7.1(a)(3). It does not apply where expenditure has already been undertaken. In these circumstances, the Australian Energy Regulator's (AER) power to revoke a revenue determination is not enlivened: cl 6A.7.1(d).

It remains open to Transgrid to request additional costs via the appropriate ex post review process developed by the AER in the Capital Expenditure Incentive Guidelines, where it can be properly assessed according to the consumer interest, and the Capital Expenditure Sharing Scheme (CESS) can be applied.<sup>2</sup>

The prospective nature of the Reopener Rule is clear on its face and the case we make for this in our submission is also supported by the intent and purpose of the Reopener Rule. The rules provide appropriate mechanisms to deal with cost overruns, either as they are anticipated (reopeners) or after they have occurred (ex post review process and CESS). In each case, the mechanisms are designed to enable the protection and promotion of the consumer interest through AER assessment and approval. They are intended to operate to ensure businesses appropriately manage costs and minimise the risks of cost overruns on consumers.

Allowing this Reopener Application, contrary to the clear language of the Reopener Rule, would undermine the carefully balanced regulatory system, and could incentivise Transmission Network Service Providers (TNSPs) to act imprudently with respect to the management of risks and costs of major transmission projects.

The AER should reject the Reopener Application on this basis, without the need to consider the Application further.

In any case, for the reasons we detail in our submission, Transgrid is unable to demonstrate that there has been an event that meets the requirements of cl 6A.7.1(a)(1). In the absence of such an event, the AER does not have the power to revoke the 2023-2028 revenue determination: cl 6A.7.1(d). Nor does the amount requested represent the amount required to rectify the adverse consequences of the event as required for a reopener. Further, in all the circumstances, the AER

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<sup>1</sup> Transgrid, *Project EnergyConnect - An application to reopen the 2023-2028 revenue determination*, 13 February 2026, <https://www.aer.gov.au/industry/registers/determinations/Transgrid-determination-2023-28/update-application-reopen-capex-project-energyconnect>.

<sup>2</sup> See AER, *Capital Expenditure Incentive Guidelines for Electricity Network Service Providers*, August 2025, <https://www.aer.gov.au/industry/registers/resources/guidelines/expenditure-incentives-guideline/capital-expenditure-incentive-guidelines-review-2025> (AER Capital Expenditure Incentive Guidelines). See in particular, section 2.2 and section 4.2.

cannot determine it is appropriate to approve the amount requested, based on the manner in which Transgrid has proceeded throughout.

## 1.1 Timeline of events

We provide the following summary of the timeline of events for PEC – as drawn from material provided by Transgrid – as evidence supporting the arguments and assessments we detail in this submission.

- 24-Jan-2020 The AER approves the RIT-T.<sup>3</sup>
- Feb-2020 Transgrid begins the tender process.<sup>4</sup>
- Mar-2020 COVID-19 pandemic declared.<sup>5</sup>
- 29-Jun-2020 Transgrid submits the PEC contingent project assessment (CPA).<sup>6</sup>
- Sept-2020 Transgrid selects Secure Energy Joint Venture (SEJV) as the preferred tender partner.<sup>7</sup>

SEJV is a joint venture between Clough Project Australia and Elecnor Australia. The two parent companies were Clough Limited, Elecnor S.A. respectively, and stood as guarantors.<sup>8</sup>
- 28-May-2021 The AER issues the CPA Final Decision.<sup>9</sup>
- Jun-2021 Transgrid and SEJV execute an Engineering, Procurement and Construction contract (EPC Contract).<sup>10</sup>
- 2022 Construction EnergyConnect NSW–Western Section commences.<sup>11</sup>
- 31-Jan-2022 Transgrid submits 2023-28 Revenue Proposal.<sup>12</sup>
- 14-Sep-2022 Flooding in regional NSW and natural disaster declared.<sup>13</sup>

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<sup>3</sup> Reopener Application, Attachment 2, p.3; <https://www.aer.gov.au/industry/networks/contingent-projects/electranet-sa-energy-transformation-regulatory-investment-test-transmission-rit-t/final-decision>  
<sup>4</sup> Reopener Application, Attachment 2, p.9.

<sup>5</sup> <https://www.health.gov.au/topics/covid-19/about/what-we-did>;  
<https://www.parliament.nsw.gov.au/researchpapers/Documents/NSW%20public%20health%20restrictions%20o%20deal%20with%20the%20COVID-19%20pandemic.pdf>.

<sup>6</sup> *Transgrid Letter to AER*, 30 September 2020; <https://www.aer.gov.au/system/files/TransGrid%20-%20Project%20-%20EnergyConnect%20-%20Principal%20Application%20-%2029%20June%202020.pdf>.

<sup>7</sup> Reopener Application, Attachment 2, p.6

<sup>8</sup> See Figure 3, Reopener Application, Attachment 2, p.7.

<sup>9</sup> Reopener Application, Attachment 2, p.6; *AER letter to TransGrid*, 28 May 2021,

<https://www.aer.gov.au/documents/letter-transgrid-project-energyconnect-final-decision-28-may-2021>.

<sup>10</sup> Reopener Application, Attachment 2, pp.2, 7, 10; Reopener Application, Appendix 2A, *Elecnor Australia letter of support*, 13 November 2025.

<sup>11</sup> <https://www.transgrid.com.au/projects-innovation/energyconnect/>

<sup>12</sup> <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/proposal>.

<sup>13</sup> Reopener Application, Attachment 2, p.14.

- 30-Sep-2022 AER Draft Decision Transgrid 2023-28 Transmission Determination.<sup>14</sup>
- Oct-2022 Transgrid becomes aware of Clough Limited's potential insolvency.<sup>15</sup>
- 02-Dec-2022 Transgrid files revised 2023-28 Revenue Proposal.<sup>16</sup>
- 05-Dec-2022 Clough Limited enters voluntary administration.<sup>17</sup>
- Mid-Dec 2022 Elecnor Australia gives notice it will fulfil SEJV's obligations under the EPC, taking full operational and financial control of SEJV.<sup>18</sup>
- 20-Jan-2023 Elecnor Australia writes to the AER. This references high inflation, and the likelihood that the PEC costs will be higher than the CPA. It requests a meeting with the AER to secure the project's future.<sup>19</sup>
- 03-Apr-2023 TransGrid provides the AER with a detailed breakdown of PEC CAPEX costs.<sup>20</sup>
- 24-Apr-2023 Elecnor S.A. informs Transgrid that Elecnor Australia has \$400 million in expected losses, and it will not support Elecnor Australia financially.<sup>21</sup>
- 28-Apr-2023 AER Final Decision Transgrid 2023-28 Transmission Determination.<sup>22</sup>
- Mid-2023 Construction EnergyConnect NSW–Eastern Section commences.<sup>23</sup>
- Aug-2023 Transgrid Forecast Final Cost of Elecnor Australia's costs – forecast cost overrun of \$429 to \$893 million.<sup>24</sup>
- Aug-2023 Transgrid commission Fission to do a Forecast final Cost of Elecnor Australia's costs - forecast cost overrun of \$678 to \$1,415 million.<sup>25</sup>

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<sup>14</sup> <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/draft-decision>

<sup>15</sup> Reopener Application, Attachment 2, p.14.

<sup>16</sup> Reopener Application, Attachment 2, p.14; Transgrid, *2023-28 Revised Revenue Proposal*, 2 December 2022, <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/revised-proposal>.

<sup>17</sup> Reopener Application, Attachment 2, p.7.

<sup>18</sup> Reopener Application, Attachment 2, p.14.

<sup>19</sup> *SEJV Letter to AER*, 20 January 2023, [https://www.aer.gov.au/system/files/SecureEnergy%20-%20Submission%20-%2020%20January%202023\\_0.pdf](https://www.aer.gov.au/system/files/SecureEnergy%20-%20Submission%20-%2020%20January%202023_0.pdf).

<sup>20</sup> *TransGrid letter to the AER*, 3 April 2023, [https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%20203%20April%202023\\_0.pdf](https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%20203%20April%202023_0.pdf).

<sup>21</sup> Reopener Application, Attachment 2, p.18.

<sup>22</sup> <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/final-decision>.

<sup>23</sup> <https://www.transgrid.com.au/projects-innovation/energyconnect/>.

<sup>24</sup> Reopener Application, Attachment 2, p.21.

<sup>25</sup> Reopener Application, Attachment 2, p.21.

- 02-Sep-2023 Transgrid executives report to Transgrid Board on Madrid meetings with Elecnor S.A., and that while the meetings have been helpful a commercial resolution outside the EPC will be critical.<sup>26</sup>
- 25-Oct-2023 The Transgrid Board determines that PEC cannot be delivered by Elecnor Australia under the EPC Contract.<sup>27</sup>
- Dec-2023 Transgrid and Eleanor Australia enter into a staged payment deed providing cash flow relief. This operates from Dec 2023-May 2024.<sup>28</sup>
- May-2024 Alternative contract tender commences.<sup>29</sup>
- Jul-2024 From July to Oct 2024 multiple cost benefit analyses of different options being considered were conducted, and Transgrid reviewed the new price proposed by Elecnor Australia.<sup>30</sup>
- 24-Aug-2024 NSW Western Section of PEC energised.<sup>31</sup>
- 25-Sep-2024 Transgrid informs the TAC it is exploring a potential capex reopener.<sup>32</sup>
- 07-Nov-2024 Net benefit analysis of options to rectify the contract failure presented to the Transgrid Board.<sup>33</sup>
- Dec-2024 Incentivised Completion Cost Contract (ICC Contract) executed with Elecnor Australia.<sup>34</sup>
- 13-Feb-2026 Transgrid submits Reopener Application.<sup>35</sup>

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<sup>26</sup> Reopener Application, Attachment 2, p.22.

<sup>27</sup> Reopener Application, Attachment 6, pp.2, 4-6. See also Reopener Application, pp.15-18, and Reopener Application, Attachment 2, p.24.

<sup>28</sup> Reopener Application, Attachment 2, p.6, 22; Reopener Application, Attachment 3, p.5.

<sup>29</sup> Reopener Application, Attachment 3, p.9.

<sup>30</sup> Reopener Application, p.22, Reopener Application, Attachment 3, pp.12-17.

<sup>31</sup> Reopener Application, Attachment 2, p.4.

<sup>32</sup> Reopener Application, Attachment 1, p.12.

<sup>33</sup> Reopener Application, Appendix 3A, Table 10, p.22.

<sup>34</sup> Reopener Application, p.2; Reopener Application, Attachment 2, p.6.

<sup>35</sup> <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/update-application-reopen-capex-project-energyconnect>.

## 2. The AER has no power to approve prior spending under the Reopener Rule

The AER should reject the Reopener Application because it is not permitted by the Reopener Rule to reopen a revenue determination to add capital expenditure which has already been incurred.

If Transgrid wishes to have the PEC overspend assessed and added to the regulated asset base (RAB), it should do so using the ex post review process and the CESS intended for this purpose. The reopener mechanism is not contemplated by the National Electricity Rules (NER) for the purpose of assessing and allocating overspend on capital expenditure.

### 2.1 Clause 6A.7.1 only enables reopening for proposed future capital expenditure

The Reopener Rule only allows the AER to reopen a revenue determination for proposed future capital expenditure, not prior spending (including cost overruns).

The AER's power to revoke a revenue determination and substitute a new revenue determination is provided in NER Clause 6A.7.1 titled 'Reopening of revenue determination for capital expenditure.'<sup>36</sup>

NER Clause 6A.7.1(d) states –

The AER **must, and must only**, revoke a revenue determination following an application made in accordance with paragraphs (a) and (b) if the AER is satisfied of each of the matters referred to in paragraph (a).

NER Clause 6A.7.1(a) sets out the matters a Transmission Network Service Provider must satisfy when making an application to revoke and substitute a revenue determination. Critically, all requirements must be met.

NER Clause 6A.7.1(a) *inter alia* states –

(a) [...] a transmission Network Service Provider may, during a regulatory control period, apply to the AER to revoke and substitute a revenue determination that applies to it where:

[...]

(3) the Transmission Network Service Provider proposes to undertake capital expenditure to rectify the adverse consequences of the event;

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<sup>36</sup> NER, clause 6A.7.1.

NER Clause 6A.7.1(a)(3) and the words ‘proposes to undertake’ makes clear that the application must concern future expenditure proposed to respond to the event. It does not concern expenditure that has already taken place.

Further consideration of the criteria requires assessment of that future looking expenditure – Clause 6A.7.1(a)(4) requires an assessment of the ‘likely’ impact of the required additional expenditure ‘if undertaken’. Clauses 6A.7.1(a)(5) and (6) also explicitly look forward in time, not backwards.

This operation of the Reopener Rule is consistent with the broader regulatory framework. The revenue determination process allows networks to make projections of their anticipated spending over the following 5 year period and seek prior AER approval for this forecast spending and their proposed tariff structures. This is forward looking to ensure there is a robust check on proposed spending before consumers are expected to bear the cost.

Reopening a revenue determination to substitute it with a new revenue determination for the remainder of the period (per NER clause 6A.7.1(e)) should similarly occur where a network needs (because of an event beyond their control which was not reasonably foreseeable) to revise that projection of anticipated spending and obtain prior approval from the AER to add that liability to the total amount consumers will ultimately pay.

Allowing prior spending on cost overruns to be approved under the Reopener Rule would be contrary to the intent and purpose of the rule, and against consumers’ interests. It deprives the AER of the opportunity to properly interrogate the proposed spending. Further, it would mean there is no scope for proper assessment of a fair sharing of the PEC overrun costs between consumers and Transgrid. Unlike the assessment under the ex post review process and then Capital Expenditure Sharing Scheme (CESS), where the network may have to bear 30% of any overrun costs.

Given the request relates to prior, rather than proposed future expenditure, it should be rejected as it is not within the power of the AER to allow this under the Reopener Rule.

## **2.2 Transgrid has not proposed future capital expenditure**

Transgrid has not set out what capital expenditure it proposes to undertake which could enliven the application of the Reopener Rule.

The Reopener Application sets out the costs claimed in Section 3.1.<sup>37</sup> This is not capital expenditure Transgrid proposes to undertake, but rather is capital expenditure already incurred. The request is for the majority of the cost difference between the original EPC contract price and the ICC Contract price. Specifically, Transgrid requests \$1,122 million (in \$2022-23) in additional contract costs, and \$20 million (in \$2022-23) in its own costs.

Everything indicates that construction by SEJV under the ICC Contract is now complete, or very near to completion. Transgrid has detailed in the Reopener Application that PEC is 95%

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<sup>37</sup> The breakdown of cost Transgrid claims in the Reopener are summarised in Table 3 of the Reopener Application, see Reopener Application, p. 26.

complete. It states that 100% of the tower construction is complete, and 100% of the 700km of line have been strung. In the absence of any other evidence, it must therefore be assumed the vast majority, if not all, of the costs for the construction contract, have already been incurred.<sup>38</sup>

Of Transgrid's other costs of \$20 million, \$6 million claimed for contract analysis and negotiation costs is an expense related to past negotiation prior to the ICC Contract being signed. Other costs include insurance, which can be assumed has already been incurred – there is no breakdown which shows costs anticipated after the date of the application.<sup>39</sup>

Transgrid may owe outstanding amounts under the ICC Contract, but these are not proposed capital expenditure, rather they are already committed or expended costs.

Transgrid has not sought a revised revenue determination to cover proposed expenditure to rectify the adverse consequences of the alleged event on 25 October 2023 – it has sought belated approval of over \$1 billion of cost overruns on a project already materially complete.

The CEO of Transgrid in the cover letter to the Reopener Application acknowledges an intentional choice was made not to apply for prior AER approval for the increased capital expenditure. He states:

[...] Transgrid's Board (with the support of the shareholders) committed to the increased project costs of delivering PEC without first seeking assurance from the AER in relation to the cost recovery arrangements. Transgrid's Board and shareholders adopted that approach because to do otherwise would have led to avoidable delays in the project, higher project costs and appreciably reduced net benefits for consumers.<sup>40</sup>

Having chosen to not approach the AER prior to incurring the spending, Transgrid cannot now rely on a mechanism designed solely for allowing prospective costs.

In absence of any demonstrated proposed future capital expenditure to be undertaken – as required under the Reopener Rule - the AER must reject this application.

## 2.3 The reopener request is out of time

The AER should reject this application on the basis that it was not filed at the appropriate time, in advance of the expenditure.

Assuming an Event within the meaning of clause 6A.7.1(a)(1) has occurred, Transgrid should have filed the application for a reopener **prior** to incurring the anticipated additional expense of rectifying the alleged Event, the contract failure, of 25 October 2023.

By mid-2024, Transgrid had identified and assessed 8 possible remediation options, which fell into three broad categories – abandon the project, engage a new contractor, or renegotiate with

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<sup>38</sup> See Reopener Application, p.5; Transgrid states the NSW portion of PEC is 700km. See Reopener Application, p.3. See also Transgrid press release from February 17 2026 claiming it is 97.5% complete, <https://www.Transgrid.com.au/media-publications/news-articles/investment-safeguard-ensures-delivery-of-nation-critical-energyconnect-project>.

<sup>39</sup> See Reopener Application, pp.28-30.

<sup>40</sup> See Reopener Application, p.iii.

the existing contractor Elecnor. It ultimately chose option 4 – a new contract with Elecnor as the option by which it would seek to remediate the contract failure.

The possibility of filing a reopener was being discussed by Transgrid, from at least September 2024. Transgrid record that at the Transgrid Advisory Committee (TAC) meeting on 25 September 2024, a key issue discussed was, ‘the options being explored by Transgrid to determine the best way forward, include a potential capex reopener’.<sup>41</sup> The Transgrid Board met on 7 November 2024 and executed the ICC Contract in December 2024.

The Transgrid Board was responsible for delivery of the PEC project, and it decided the remedial action after determining PEC could not be completed using the EPC Contract. Despite the contract failure and need to rectify being known for a considerable period, Transgrid chose not to apply for a reopener prior to undertaking the additional expenditure, when their proposed course could have been validly considered by the AER under the Reopener Rule. Instead, Transgrid elected to incur additional capital expenditure on PEC without prior AER approval. Consumers should not now have to face additional costs which have not been subject to the proper regulatory oversight.

## **2.4 The PEC overrun on prior spending should be dealt with using the ex post review process and application of the CESS**

The overrun in expenditure on PEC detailed in Transgrid’s Reopener Application should be dealt with through the ex post review process and application of the CESS as intended, not through a reopener of the revenue determination.

Cost overruns in major capital expenditure projects like PEC are expected.

The ex post review and the CESS are the appropriate and intended mechanism to assess and fairly share cost overruns which have already occurred, such as those outlined in the Reopener Application, between consumers and networks while retaining incentives for efficient capital expenditure.<sup>42</sup>

Under the rules, there is both incentive sharing for underspends and provisions to ensure any overspends are not automatically recovered in full. This is a critical measure to protect the consumer interest. In ex post review the AER has the opportunity to identify spending which is not prudent and efficient. In the CESS, the AER can require the business to absorb up to 30% of overrun costs. The AER can choose to lower the percentage of cost sharing of the TNSP to below 30% where this is deemed appropriate.<sup>43</sup>

Only in exceptional circumstances, where there is an unforeseeable event beyond the network’s control, and which has such a significant financial impact it cannot otherwise be managed, will a reopener of the revenue determination be appropriate. As we have outlined, a reopener must be sought prospectively to allow the AER to approve future spending.

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<sup>41</sup> See Reopener Application, Attachment 1, p12.

<sup>42</sup> See AER, Capital Expenditure Incentive Guidelines. See in particular, section 2.2 and section 4.2.

<sup>43</sup> See AER, Capital Expenditure Incentive Guidelines. See in particular, section 2.6.2 and section 4.3.4.

Allowing prior spending on cost overruns to be approved under the reopener rule undermines ex post review and the appropriate application of the CESS in the consumer interest. It deprives the AER of the opportunity to appropriately interrogate the proposed spending to rectify the event, and where appropriate reject the spending.

By applying under the Reopener Rule, Transgrid, having already undertaken the spending, stands to benefit at the expense of consumers from its failure to seek earlier approval or wait, and proceed as intended via ex post review and CESS. Transgrid is requesting \$1,122 million (in \$2022-23) in additional contract costs, and \$20 million (in \$2022-23) in its own costs. Transgrid records that it plans to request a further approximately \$365 million (in \$2022-23) as cost overruns. The total cost overrun for PEC is \$1507 million (in \$2022-23).<sup>44</sup> The JEC calculates this represents approximately a 71% cost overrun relative to the \$2121 million (in \$2022-23) estimated cost in the 2 December 2022 revised revenue proposal.

The long-term consumer interest is best protected through the rules by maintaining a strict delineation between the reopener rule, and ex post review process and CESS, and ensuring they are applied as designed.

This is not a semantic issue. By applying for all costs in a reopener, rather than sharing excess costs as enabled through ex post review and CESS, the potential disadvantage to consumers could be hundreds of millions of dollars. This is a substantial and unacceptable cost to consumers and the AER should reject Transgrid's application accordingly.

### **3. There has not been a relevant 'event'**

As set out above, the AER should reject this application outright because the AER has no power under the Reopener Rule to approve the addition of costs already incurred. In the alternative, should the AER choose to undertake a full evaluation of all remaining elements of the requirements of the Reopener Rule, then the AER should reject the request as no event within the meaning of Reopener Rule has occurred.

The contract failure was not beyond the reasonable control of Transgrid, and the contract failure – and its contributing factors - or an event of a similar kind, could reasonably have been foreseen by Transgrid.

The AER must only approve a reopener where it is *inter alia* satisfied that an event consistent with the requirement of clause 6A.7.1(a)(1) has occurred. Clause 6A.7.1(a)(1) states –

- (1) an event that is beyond the reasonable control of the Transmission Network Service Provider has occurred during that regulatory control period and the occurrence of that event during that period (or of an event of a similar kind) could not reasonably have been foreseen by the provider at the time of the making of the revenue determination ('the event');

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<sup>44</sup> Reopener Application, pp. 26-27.

Transgrid describes the event as contract failure. Specifically, it says that on 25 October 2023, the Transgrid Board recognised and accepted that, without intervention from Transgrid, Elecnor Australia would not be able to deliver the project under the EPC Contract.<sup>45</sup>

Therefore, the AER should reject the Reopener Application on the basis that –

- **Transgrid had reasonable control of the event** (the contract failure) as it unilaterally decided to continue with the project after it lost both guarantors to the EPC Contract and chose to proceed to incur costs under the existing contract nonetheless.
- **The event, or an event of a similar nature, could have been foreseen by Transgrid at the time of the making of the revenue determination.** This includes the foreseeability of the event as it transpired, but also the foreseeability of an event of a similar kind.

### 3.1 The event was within the reasonable control of Transgrid

Transgrid describes the event as an accumulation of circumstances adversely impacting the contractor’s ability to deliver PEC, which placed Elecnor Australia in a precarious financial position such that the project could not be delivered under the EPC Contract (which had guaranteed project overrun costs would be met by the contractor SEJV).<sup>46</sup>

While various factors cited by Transgrid in their application, including COVID-19, inflation, materials and labour increases, labour shortages, and flooding, may have contributed to PEC cost overruns, they were not the cause of Elecnor Australia’s inability to deliver the project under the EPC Contract.

Rather, it was caused by Transgrid’s series of decisions to ignore the changes in circumstance at the heart of the contract, including the failures of both guarantees to the project, advice from the Project Director to the AER that the project could not be delivered on the terms of the EPC Contract, and that substantial losses that had already been incurred by April 2023. Despite these, Transgrid continued construction, including commencing the Eastern section of the project in mid-2023. Most pertinently, Transgrid chose to continue incurring costs under the EPC Contract, despite these costs not being guaranteed and risks of overruns now being held by Transgrid and consumers.

There were multiple occasions where events should have triggered reassessment of the risks involved in continuing, and which parties held those risks. Instead of pausing the project, and discussing cost and risk allocation with the AER, Transgrid chose to proceed. The choice to assume these risks was Transgrid’s alone, and one over which it exercised control.

#### 3.1.1 Failure to respond to contractor financial concerns

A key feature of the EPC Contract – and Transgrid’s management of the risks and costs involved - was that the parent companies stood behind each of their subsidiaries, providing financial

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<sup>45</sup> Reopener Application, Attachment 6, pp.2, 4-6. See also Reopener Application, pp.15-18, and Reopener Application, Attachment 2, p.24.

<sup>46</sup> *Ibid.*

backing to the subsidies, and guaranteeing the contract. As the guarantors fell away from 5 December 2022 onwards, there were multiple occasions where it must have been clear to Transgrid that the project could not be completed under the EPC Contract.

When, on 5 December 2022, Clough Limited became insolvent, the remaining entity comprising SEJV was Elecnor Australia.<sup>47</sup> Transgrid asserts that after the Clough Limited insolvency, in December 2022, Elecnor Australia gave notice it would fulfil SEJV's obligations under the EPC contract, taking full operational and financial control of SEJV and sole liability and responsibility for project delivery.<sup>48</sup> No further detail of the form of this assurance from Elecnor Australia appears to have been provided in TransGrid's' Reopener Application.

There is also no evidence provided that Transgrid undertook appropriate due diligence at this point to ensure Elecnor Australia could complete the project for the agreed price, or that its guarantor (Elecnor S.A.) would stand behind its original guarantees if it could not. Nor does Transgrid appear to have asked Elecnor S.A. to provide any additional guarantees, which may have been prudent, particularly if the now absent Clough Limited guarantee represented a substantial proportion of the total guarantee.<sup>49</sup>

In contrast, at around this time, the SEJV was so alarmed at the possibility of the cost escalations that on 20 January 2023 it elected to make a public submission to the AER's Draft Revenue Determination independently of Transgrid. This submission, authored by the Project Director EnergyConnect, Samuel Basanta Lopez, set out the contractor's concerns, and suggested the cost estimates for PEC should be revised. The contractor suggested a meeting between the AER and contractor to discuss the matters raised in the submission, 'with the intention to reach an amicable resolution on a new way forward to secure the Project.'<sup>50</sup>

It is inconceivable that Elecnor Australia, including through its Project Director for the PEC project, was not updating Transgrid on a regular basis and raising similar concerns with Transgrid during late 2022 - early 2023. The fact that SEJV felt compelled to make a submission to the AER and request a direct meeting with the AER suggests Transgrid may have chosen to ignore these concerns. It also demonstrates a failure by Transgrid to exercise sufficient due diligence in December 2022, and January 2023 as to whether the guarantee by Elecnor S.A. would continue to be honoured.

When Transgrid met with Elecnor S.A. on 24 April 2023, it learnt not only that Elecnor Australia's expected losses on the project were \$400 million, but also that Elecnor S.A. would not support Elecnor Australia financially and therefore the remaining guarantee under the EPC contract was under threat.<sup>51</sup>

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<sup>47</sup> Reopener Application, Attachment 2, p.7.

<sup>48</sup> Reopener Application, Attachment 2, p.14.

<sup>49</sup> Reopener Application, Attachment 2, page 11; Reopener Application, Confidentiality Claim, pp.4-5. The values and proportions of the guarantees are redacted, but have been provided to the AER.

<sup>50</sup> SEJV Letter to AER, 20 Jan 2023, , [https://www.aer.gov.au/system/files/SecureEnergy%20-%20Submission%20-%202020%20January%202023\\_0.pdf](https://www.aer.gov.au/system/files/SecureEnergy%20-%20Submission%20-%202020%20January%202023_0.pdf).

<sup>51</sup> Reopener Application, Attachment 2, p.18.

Knowing the project contractor Elecnor Australia was facing large losses, and the only remaining guarantor Elecnor S.A. had asserted it no longer stood by its financial support to Elecnor Australia, Transgrid chose to start building the Eastern Section of the project.<sup>52</sup>

Transgrid decided to proceed despite knowing Elecnor S.A. no longer stood behind Elecnor Australia and there was likely no guarantor for any prior or future losses. At this point, the risk of cost overruns passed to Transgrid and in turn consumers without assessment or approval by the AER. This is a fundamental change of circumstances. It is not clear Transgrid took prudent remedial steps to mitigate these heightened risks - for example, it did not seek alternative guarantors to the contract, or apply for a reopener at this point. Transgrid took an active decision to risk future cost overruns, and the failure of the EPC Contract.

### **3.1.2 Contractual terms were within Transgrid's control**

Transgrid was in control of the initial contract terms it agreed to and continued construction under the EPC Contract despite the series of events outlined. It cannot use the contract and its terms to support the contention it lacked control of events.

Transgrid claims it entered into a sound contract and exercised appropriate management of the contract once executed, within the limits of the contract.<sup>53</sup> Transgrid elected to enter into the EPC Contract on the terms agreed. It cannot now claim its earlier deficient actions as evidence the alleged event – the inability of Elecnor Australia to deliver PEC under the EPC Contract – was beyond their reasonable control.

Notwithstanding any contractual terms, once it became apparent there were substantial cost overruns and the guarantors of the contract had fallen away, the fundamental nature of the risk allocation had changed. Transgrid should have taken appropriate action at that time, but chose not to.

### **The occurrence of the event, or an event of a similar kind, was foreseeable**

At the time of making of the revenue determination, Transgrid could reasonably have foreseen:

- the alleged event as described by Transgrid in their application, namely the EPC Contract failure caused by a culmination of factors, including the flooding, labour and material costs, inflation, and Clough insolvency, or
- an event of a similar kind.

### **3.1.3 The test to be applied**

Transgrid argues the relevant date to assess foreseeability is the date it submitted the revised revenue proposal, 2 December 2022. We disagree with this interpretation. Clause 6A.7.1(a)(1)

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<sup>52</sup> <https://www.Transgrid.com.au/projects-innovation/energyconnect/>.

<sup>53</sup> Reopener Application, Attachment 6 – Section 2.2 pp.6-8.

requires that the event (or of an event of a similar kind) ‘could not reasonably have been foreseen by the provider at the time of the making of the revenue determination [...]’.

The phrase ‘at the time of the making of the revenue determination’ could refer to the time from when the revenue determination application was filed to when the AER made its final decision, i.e. up to 28 April 2023.

Transgrid seeks to shorten the time period to 2 December 2022, the date of the revised proposal, arguing that this was the last date when it could have amended its application. We do not agree that Transgrid could not have raised a potential event of this kind with the AER after this date. In fact, as late as 3 April 2023, Transgrid was requesting the AER amend the way in which PEC costs were detailed in the revenue determination to correct errors made in their application.<sup>54</sup>

We contend the AER should apply 28 April 2023 – the date of the final decision - as the foreseeability date.

We also note that the test for foreseeability is not confined to the exact event which occurred (in this case, the failure of the EPC Contract). If Transgrid could reasonably have foreseen an event of a similar kind, then a matter referred to clause 6A.7.1(a) has not been satisfied, and the Reopener Application must be rejected.

### **3.1.4 The risk of contract failure was foreseeable**

The various risks identified by Transgrid in the Reopener Application were known and ongoing, or foreseeable to Transgrid at the time of the making of the revenue determination. This includes the risk of a culmination of events which led to cost overruns, financial problems for the contractor and ultimately the EPC Contract failure.

The occurrence of cost overruns, contractor financial difficulties and disputes, and the ultimate halting and renegotiation of construction contracts in major infrastructure projects is not uncommon. The possibility that a series of factors causing cost overruns, would have a cumulative impact on the delivery of ISP Actionable Projects was foreseeable to others. These concerns were made known to Transgrid, as recorded in the Transgrid Revised Revenue Proposal on 2 December 2022.<sup>55</sup>

At the time the revenue determination was under consideration, Transgrid already knew of Clough’s financial difficulties and the existence of multiple factors which were causing, or could

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<sup>54</sup> *Transgrid letter to the AER*, 3 April 2023, [https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%203%20April%202023\\_0.pdf](https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%203%20April%202023_0.pdf)

<sup>55</sup> See Transgrid, *2023-28 Revised Revenue Proposal*, 2 December 2022, <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/revised-proposal>, p.12. See also *Consumer Challenge Panel letter*, 20 Jan 2022, p.12, <https://www.aer.gov.au/system/files/Consumer%20Challenge%20Panel%20%28CCP25%29%20-%20Submission%20-%202020%20January%202023.pdf>. This which records that the AER and TAC had been expressing concern about the cumulative effects of risks on major projects prior 2 Dec 2022.

cause, cost increases. These include many of the specific cost pressures referred to by Transgrid in the Reopener Application and in Attachment 6, including.<sup>56</sup>

- Flooding
- Labour shortages
- Low productivity
- Market conditions driven by inflation
- Clough Limited's voluntary administration.

Transgrid acknowledges in the Reopener Application that from 2021 the construction and energy sectors in Australia had faced sharp rises in the cost of materials, labour, and logistics, with inflation peaking in 2022.<sup>57</sup> Transgrid also notes that PEC construction sites were impacted by flooding from November 2022, and that productivity (i.e. the pace of construction), was slow in the initial stage of the project compounded by labour shortages and flooding.<sup>58</sup> The likelihood of PEC costs continuing to increase was raised by Transgrid in its Revised Revenue Proposal on 2 December 2022, which highlighted risks of inflation, material shortages, and labour shortages.<sup>59</sup>

Transgrid acknowledges in the Reopener Application that it became aware that Clough Limited (the parent company) was facing financial issues prior to December 2022, and took steps in response to potential insolvency.<sup>60</sup> The potential insolvency of one of the two SEJV partners was therefore already known to Transgrid on 2 December 2022. Clough Limited entered voluntary administration only 3 days later on 5 December 2022.<sup>61</sup>

Given Transgrid's knowledge of the cost pressures facing the project, together with the potential insolvency of one of the contractors, it was foreseeable that the EPC Contract was under threat at this time, or at least that the commercial risk allocation for PEC would need to be reconsidered.

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<sup>56</sup> See section 2.2 Reopener Application, and section 2.1.1 Reopener Application, Attachment 6. Note, a number of additional items are listed in Figure 5 of the Reopener Application at page 17. It is unclear which if any of these factors Transgrid relies on to assert the event was not foreseeable. To the extent it relies on any of these factors, the JEC's position is all could have reasonably been foreseen by Transgrid. The factors listed include - late planning proposals, limited ability to expand camp sizes, impact of local stakeholders including restricting site access, the concentration of infrastructure projects in Australia, competition for raw materials and components, and disruption to freight routes and subsequent supply chain issues.

<sup>57</sup> See Reopener Application, pp.16-18. Note the COVID-19 emergency began in mid-March 2020, with a general lockdown and travel restrictions following shortly after, see <https://www.health.gov.au/topics/covid-19/about/what-we-did>,

<https://www.parliament.nsw.gov.au/researchpapers/Documents/NSW%20public%20health%20restrictions%20o%20deal%20with%20the%20COVID-19%20pandemic.pdf>.

<sup>58</sup> Reopener Application, Attachment 2, p.14, referencing NSW Severe Weather and Flooding AGRN 1034. In addition, there had been severe flooding in the LGAs through which the PEC passed in 5 out of the prior 10 years, prior to 2022 and flooding earlier in 2022 (specifically 2010, 2011, 2012, and 2016, 2021), see <https://www.disasterassist.gov.au/find-a-disaster/australian-disasters?state=nsw>, and events numbered AGRN 417, 421, 430, 479, 731, 987, 1001, and 1030.

<sup>59</sup> See Transgrid, *Revised Revenue Proposal*, 2 December 2022, pp. 139-142, Transgrid request to suspend the CESS. See also the *AER Draft decision on revenue determination 2023-2028*, 30 September 2022. The AER raises the impact of high inflation throughout its draft determination, see in particular AER Draft Determination, Overview, p.4, <https://www.aer.gov.au/industry/registers/determinations/Transgrid-determination-2023-28/draft-decision>. The EUAA 20/01/2023 submission to AER – referenced high inflation, and likelihood Transgrid contingent project costs will be higher than forecast [https://www.aer.gov.au/system/files/Energy%20Users%20Association%20of%20Australia%20%28EUAA%29%20-%20Submission%20-%2020%20January%202023\\_0.pdf](https://www.aer.gov.au/system/files/Energy%20Users%20Association%20of%20Australia%20%28EUAA%29%20-%20Submission%20-%2020%20January%202023_0.pdf)

<sup>60</sup> Reopener Application, Attachment 2, p.14.

<sup>61</sup> Reopener Application, p.18.

That the remaining SEJV partner raised concerns about the future of the project directly with the AER in January 2023 confirms the foreseeability of these risks.

Then, on 24 April 2023, Transgrid heard from Elecnor S.A that losses on the project were \$400 million, and that it would not support Elecnor Australia financially.<sup>62</sup> By this point, it should have been even clearer to Transgrid that the project risks had materially changed. Therefore, at the time of the making of the revenue determination, the potential collapse of the EPC Contract could have reasonably been foreseen by Transgrid.

Transgrid asserts that, as of 28 April 2023, Transgrid believed that Elecnor S.A. had sufficient incentive to remain committed to the project, and Transgrid had no information to suggest Elecnor S.A. would not stand behind its Performance Security.<sup>63</sup> This assertion stands in contrast to the description of the Transgrid and Elecnor S.A. meeting on 24 April 2023.

Given the reliance by Transgrid on the performance of the contract by Elecnor Australia, and the guarantee of Elecnor S.A., if the AER see any potential ambiguity on issue of foreseeability, further information should be sought from Transgrid to clarify Transgrid's understanding of the status of arrangements between Transgrid, Elecnor Australia and Elecnor S.A. in the period prior to 2 December 2022 and up to 28 April 2023.

#### **4. The amount requested is not capital expenditure to rectify the adverse consequences of the event**

Should the AER decide to consider the specifics of Transgrid's Reopener Application, and consider the possibility of approving prior spending using the Reopener Rule, the amount requested by Transgrid should be rejected because the AER cannot be satisfied the amount requested is spending to rectify the adverse consequence of the alleged event.<sup>64</sup>

Firstly, Transgrid failed to update the cost estimate of the PEC project at the time of the revenue determination to reflect the actual forecast costs at that time. That is, it failed to establish an updated baseline.

The absence of an accurate cost estimate for the project at the time of the revenue determination - based on the knowledge that Transgrid had at that time - means it is not possible to distinguish costs associated with an unforeseeable and uncontrollable event (subsequent to the determination) from increases to the cost of the project which Transgrid was already aware of at the time of the making of the determination.

As discussed above, the causes of cost overruns put forward by Transgrid were all known at the time of making the determination. At no point did Transgrid increase the cost estimates of the project, notwithstanding these changes in circumstances.

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<sup>62</sup> Reopener Application, Attachment 2, p.18.

<sup>63</sup> Reopener Application, Attachment 6, p. 12.

<sup>64</sup> See NER, clause 6A.7.1(a)(3).

In their Revised Revenue Determination Proposal of 2 December 2022, Transgrid did not update the estimate of the project cost from that used in the contingent project assessment in 2020/2021. This is despite Transgrid being required to provide the total forecast capex amount it considers necessary.<sup>65</sup> At the time of the Proposal, various increased costs were already clearly visible to Transgrid and the costs for construction were already likely to be higher than those submitted and approved in the CPA process.

A revision of the estimate for the total costs project in the Revised Revenue Determination Proposal of 2 December 2022 was possible, as evidenced by Transgrid's own letter to the AER on 3 April 2022, seeking to amend the way in which PEC costs were detailed in the revenue determination to correct errors made in their application.<sup>66</sup>

Second, Transgrid has not sought to accurately identify the costs associated with rectifying the alleged event in the Reopener Application. The starting point in the calculation is the full difference between the final project costs and the final cost estimate. For the Reopener Application of \$1,142 million, Transgrid isolates the source of the amount requested to the increased contractor costs (some \$1,122 million with the exception of \$20 million other costs). It says the difference of the EPC Contract and ICC Contract is forecast to be \$1,333 million.<sup>67</sup>

Transgrid has not clearly identified what proportion of the additional \$1,333 million is attributable to the alleged event.

To the extent that a breakdown in costs is provided in section 3.2 of the Reopener Application, the difference between amount requested and the final estimated contractor costs has been derived by making deductions related to various contract claims and variations under the EPC Contract.<sup>68</sup> What is not clear is what other drivers of the cost increase between the two contracts have been considered, and what corresponding reductions in the amount requested in the Reopener Application have been made (if any). It seems to us unlikely that all of the difference in the contract price between the EPC Contract and ICC Contract as claimed is attributable to the alleged event.

Indeed, Transgrid says that the exact apportionment of additional costs specific to the event is something which will be examined by the AER in the ex post process.<sup>69</sup> This underlines that this is not the appropriate use of the reopener process. It demonstrates that this is clearly a request for approval of spending under a construction contract that has been all but fulfilled and was undertaken absent AER prior approval. It is clearly not a request for prior approval to incur spending on behalf of consumers – based on an estimate of future expenditure to be undertaken – as required under the Reopener Rule.

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<sup>65</sup> See NER, clause 6A.6.7.

<sup>66</sup> *Transgrid Letter to AER*, 3 April 2023, [https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%203%20April%202023\\_0.pdf](https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%203%20April%202023_0.pdf)

<sup>67</sup> The breakdown of cost Transgrid claims in the Reopener are summarised in Table 3 of the Reopener Application, see Reopener Application, p. 26.

<sup>68</sup> Reopener Application, pp.27-28.

<sup>69</sup> Reopener Application, pp.26-27.

## 5. The additional capital expenditure sought is not appropriate

For the reasons set out above, , there are multiple bases on which the Reopener Application fails to meet the requirements for assessment under the Reopener Rule and should be rejected without further consideration.

However, if further consideration is undertaken, the AER is required to determine the appropriateness of the 'proposed' additional expenditure.<sup>70</sup> The AER should determine that the capital expenditure requested by Transgrid in the Reopener Application is not appropriate.

The way in which Transgrid has acted with respect to managing risks and costs ultimately incurred by consumers – as detailed throughout this submission – means adding the associated capital expenditure using the Reopener Rule is not appropriate.

In April 2023, Transgrid found itself in a difficult position. It had lost one half of the SEJV contractor consortium in December 2022. In January 2023, the remaining party had publicly advised the AER that the project could not be completed at the approved cost. It had sought a meeting with the AER, and advised a reassessment of the project costs was necessary.

Transgrid was then advised by Elecnor S.A. on 24 April 2023, that the project had already run up cost overruns of \$400 million, or approximately 20% of the total approved project costs, despite not even having started construction on the more difficult Eastern section of the project.

Further, it was told that Elecnor S.A. would not stand by its financial commitments to its subsidiary, likely leaving the project with no guarantee to cover overruns.

At this time there was also a set of established inflationary pressures, all of which fell on the sole remaining contractor.

In this situation, to continue with the project without mitigating actions, cannot be deemed appropriate. The decision by Transgrid amounts to a bet, with consumers money, that the project would be delivered at the original cost, despite all evidence to the contrary.

Transgrid is responsible for appropriately managing risks on behalf of consumers. In this case the evidence indicates Transgrid was not fulfilling this requirement and was committing consumer money it did not have 'permission' to spend in a way that would not have been approved by a reasonable regulator if appropriately assessed in advance.

In the face of the actions of Transgrid, the AER cannot determine the approval of the additional spending is appropriate as required by the rules. The AER should reject this request accordingly.

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<sup>70</sup> See NER, clause 6A.7.1(f).