

# **NOTICE OF CONSULTATION ON CONFIDENTIALITY GUIDELINES**

## **1. Background**

The Australian Energy Regulator (AER) is required under the National Electricity Rules (the Rules) to develop and issue guidelines relating to the confidentiality of information obtained, used and disclosed for the purposes of resolving a dispute under the dispute resolution process established by Chapter 8 the Rules.

The AER has prepared the attached consultation draft of the guidelines, and seeks submissions from interested parties to assist the AER in development of the guidelines.

### **Previous consultation on National Electricity Code confidentiality matters**

Under the National Electricity Code (the predecessor of the Rules) it was the National Electricity Code Administrator's (NECA) task to develop and issue the confidentiality guidelines.

NECA commenced consultation in accordance with chapter 8 of the National Electricity Code (the Code) with the assistance of the Dispute Resolution Adviser. NECA released two issues papers (in November 2003 and April 2004) developed by the Dispute Resolution Adviser, which invited submissions on the proposed guidelines. The second issues paper set out proposals for the guidelines. As part of the consultative process, a steering committee of Dispute Management System Contacts developed a template confidentiality agreement that can be tailored or adapted by parties to a dispute in drafting their own agreement. The confidentiality agreement and relevant documents from the NECA consultation process are available on the AER's website (<http://www.aer.gov.au/content/index.phtml/itemId/658631>).

On 1 July 2005, NECA's administrative functions under chapter 8 of the Rules were transferred to the AER. Due to the transition to the new National Electricity Law regime, NECA ceased its consultation on the confidentiality guidelines. Clause 8.2.10(c) of the Rules now assigns responsibility for the development of the guidelines to the AER.

In initiating this process, the AER has taken into account the previous consultation process and the submissions NECA received. The AER has also proposed a minor amendment to the confidentiality agreement developed by NECA, to align the definition of confidential information in the template agreement with the definition in the Rules. Participants who made submissions to the NECA process are not required to re-submit that material, but are encouraged to provide any additional comments in response to the AER's proposals.

## **Public consultation process**

The AER is required under clause 8.2.10(c) of the Rules to follow the consultation procedures set out in clause 8.9 of the Rules in developing and issuing the confidentiality guidelines.

The process followed by the AER will be as follows:

- |   |            |
|---|------------|
| 1. Notice of commencement of consultation, inviting submissions on consultation draft | March 2006 |
| 2. Publication of AER's Draft Confidentiality Guidelines and call for submissions     | April 2006 |
| 3. Publication of AER's Final Confidentiality Guidelines                              | June 2006  |

This notice and the attached consultation draft, including the amended confidentiality agreement, constitute the first step in the AER's consultation process.

To assist the AER in developing Draft Confidentiality Guidelines, interested parties are invited to comment on the consultation draft. Submissions should indicate whether the proponent considers that a meeting is necessary or desirable in connection with the development of the confidentiality guidelines and, if so, the reasons why a meeting is necessary or desirable. If, on the basis of submissions, the AER concludes that it is necessary or desirable to hold any meetings, they will be convened before the AER publishes its draft guidelines.

Submissions can be sent electronically to: [aer inquiry@aer.gov.au](mailto:aer inquiry@aer.gov.au). Alternatively, written submissions or submissions on disk, in Word 7.0 compatible format, can be sent to:

Mr Sebastian Roberts  
General Manager  
AER – Transition Branch  
GPO Box 520  
MELBOURNE VIC 3001

The AER prefers that all submissions be publicly available, to facilitate an informed and transparent consultative process. The AER is required by clause 8.9(g) of the Rules to make available to all consulted persons, on request, copies of any material submitted. Submissions received will be made available on the AER's website. Therefore submissions must identify any confidential material.

A copy of the consultation draft is available from the AER's web site ([www.aer.gov.au](http://www.aer.gov.au)).


The closing date for submissions is Thursday 6 April 2006.

If you require further information please contact the AER's Transition Branch on (03) 9290 1436.

# **Consultation Draft:**

## **Confidentiality Guidelines**

March 2006

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# 1 Introduction

Clause 8.2 of the National Electricity Rules (the Rules) sets out a dispute resolution regime which applies to disputes involving registered participants, NEMMCO and Connection Applicants who are not otherwise registered participants, about a range of matters relating to or arising out of the Rules.

Under clause 8.2.10(c) of the Rules, the AER must develop and issue guidelines relating to the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute to which clause 8.2 of the Rules applies.

Clause 8.6 of the Rules sets out confidentiality provisions governing registered participants and NEMMCO that apply for the purposes of information exchanged under the Rules, including information that is obtained, used or disclosed for the purposes of resolving a dispute to which clause 8.2 applies.

The dispute resolution regime set out in clause 8.2 of the Rules establishes procedures for the exchange of information between parties to a dispute. As the subject matter of any dispute under the Rules will, in many cases, be commercially sensitive, it is important to recognise that informed resolution of a dispute may necessitate the exchange of confidential information. It is therefore necessary that parties are aware of the provisions in the Rules governing the treatment of confidential information. These provisions are integral to the success of the dispute resolution process as they are the basis for an agreement between parties to a dispute as to the appropriate treatment of confidential information.

These confidentiality guidelines provide general guidance relating to the Rules provisions governing the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute under the dispute resolution framework established by the Rules.

These guidelines do not constitute legal advice, and should not be taken to limit or otherwise infringe any existing rights or obligations under law that a person may have in relation to information. Parties to a dispute should inform themselves, and where necessary seek independent legal advice as appropriate before exchanging confidential information.

## 2 Confidentiality under the Rules

### 2.1 Definition of ‘confidential information’ in the Rules

The Rules define ‘confidential information’, in relation to a registered participant or NEMMCO, as information which is or has been provided to a registered participant or NEMMCO under or in connection with the Rules, and which is either:

- stated under the Rules, or by NEMMCO, the AER or the AEMC, to be confidential information; or
- is otherwise confidential or commercially sensitive.<sup>1</sup>

Information that is derived from such information is also confidential for the purposes of the Rules.<sup>2</sup>

While the definition of confidential information provided by the Rules is broad, parties should note that exemptions to the confidentiality requirements in the Rules have the effect of limiting the nature of information over which a claim of confidentiality will be upheld. For example, the Rules do not prevent:

- the disclosure, use or reproduction of information that is generally and publicly available (other than as a result of breach of confidence by the Recipient or any person to whom the Recipient has disclosed the information)<sup>3</sup>; or
- the disclosure, use or reproduction of trivial information.<sup>4</sup>

While recognising the commercial sensitivity of information that may be exchanged between parties to a dispute, the Rules will not support a claim of confidentiality that is not warranted. Parties should not claim confidentiality unnecessarily, in relation to information or documents that are not commercially sensitive or otherwise recognised by law as confidential.

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<sup>1</sup> Rules, chapter 10, glossary.

<sup>2</sup> Ibid.

<sup>3</sup> Rules, cl 8.6.2(a).

<sup>4</sup> Rules, cl 8.6.2(f).



## 3 Obtaining, using and disclosing confidential information

### 3.1 General provisions

Clause 8.6.1 of the Rules imposes obligations on registered participants and NEMMCO, where they are a recipient of confidential information.<sup>5</sup>

A recipient of confidential information:

- must not disclose the confidential information to any person except as permitted by the Rules;<sup>6</sup>
- must only use or reproduce the confidential information for the purpose for which it was disclosed or another purpose contemplated by the Rules;<sup>7</sup> and
- must not permit unauthorised persons to have access to the confidential information.<sup>8</sup>

In addition, a recipient must use all reasonable endeavours:

- to keep confidential any confidential information which comes into the possession or control of the recipient, or of which that recipient becomes aware;<sup>9</sup>
- to prevent unauthorised access to confidential information which is in the possession or control of that recipient,<sup>10</sup> and
- to ensure that any person to whom it discloses confidential information observes the provisions of clause 8.6 in relation to that information.<sup>11</sup>

Parties should note that the provisions of clause 8.6 apply to NEMMCO and registered participants, but do not apply to the Adviser, members of a Dispute Resolution Panel (DRP) established under clause 8.2.6A, or the AER. Where the Rules require, authorise or permit the disclosure of confidential information to the Adviser, a DRP or the AER, these parties will be subject to general law confidentiality obligations. The AER is subject to specific legislative requirements set out in section 44AAF of the *Trade Practices Act 1974*.

#### 3.1.1 Exceptions

Clause 8.6.2 provides a number of ‘exceptions’ to the obligations in clause 8.6. In particular, parties to a dispute should be aware that clause 8.6 does not prevent:

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<sup>5</sup> The Rules also impose additional obligations in relation to confidentiality on Transmission Network Service Providers (cl 8.6.1(d), 8.6.1(e), 6.9.2) and NEMMCO (cl 8.6.6, 8.6.7).

<sup>6</sup> Rules, cl 8.6.1(b)(1).

<sup>7</sup> Rules, cl 8.6.1(b)(2).

<sup>8</sup> Rules, cl 8.6.1(b)(3).

<sup>9</sup> Rules, cl 8.6.1(a).

<sup>10</sup> Rules, cl 8.6.1(c)(1).

<sup>11</sup> Rules, cl 8.6.1(c)(2).

- the disclosure, use or reproduction of information to the extent required by law or by lawful requirement of any government (including agencies) or stock exchange with jurisdiction over the Recipient<sup>12</sup>;
- the disclosure, use or reproduction of information if required in connection with legal proceedings, arbitration, expert determination or other dispute resolution mechanism relating to the Rules, or for advising a person in relation thereto<sup>13</sup>; or
- the disclosure of information to the AER, AEMC, ACCC or any other regulatory authority with jurisdiction over the Recipient, pursuant to the Rules or otherwise.<sup>14</sup>

## 4 Dispute resolution process

The appropriate exchange of confidential information is vital to ensure the efficient resolution of the dispute.

Parties to a dispute should not make use of confidentiality provisions or agreements to hinder or otherwise prevent effective operation of the dispute resolution process set out in clause 8.2. Treatment of confidential information in resolution of a dispute under clause 8.2 should be consistent with the provisions of clause 8.6, and in particular should not attempt to limit the operation of the exceptions in clause 8.6.2. Where disclosure of information is required or authorised by the Rules, parties to a dispute can not act to prevent disclosure on grounds of confidentiality.

### 4.1 Stage 1

Stage 1 of the dispute resolution process involves an internal, consensual, dispute resolution process within the disputants' organisations, using the dispute management systems (DMS) adopted by registered participants in accordance with clause 8.2.3 of the Rules.<sup>15</sup> Parties to a dispute may request from one another the provision of information that is relevant to the matter under dispute.

The Rules recognise that information that is relevant to, or indeed the subject of, a dispute under the Rules may be commercially sensitive. In Stage 1 of the dispute resolution process, unless NEMMCO is involved in the dispute, parties to a dispute can agree to keep confidential:

- the fact that a dispute exists between them; and

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<sup>12</sup> *Rules*, cl 8.6.2(d).

<sup>13</sup> *Rules*, cl 8.6.2(e).

<sup>14</sup> *Rules*, cl 8.6.2(i).

<sup>15</sup> The Dispute Resolution Adviser is required by the Rules to issue guidance notes relating to the form and content of a Dispute Management System. These are available on the AER's website at: <http://intranet.accc.gov.au/content/index.phtml/itemId/658631>

- any information exchanged between them for the purposes of attempting to resolve the dispute.<sup>16</sup>

The nature of any agreement to keep these matters confidential is for the parties to determine. A template ‘Mutual Confidentiality Deed’, which provides sample clauses which parties can tailor or adapt in drafting their own agreement, is attached to these guidelines. Parties to a dispute should seek their own advice as necessary before entering into such an agreement, and are not required to adopt the template agreement.

In entering into a confidentiality agreement in relation to a Stage 1 dispute, parties should ensure that the terms of the agreement are consistent with the provisions of clause 8.6 of the Rules, and do not purport to obstruct or hinder the effective operation of the dispute resolution process set out in clause 8.2. In particular, clause 8.2 imposes specific rights and obligations on disputants to provide information to the Adviser, including:

- the requirement that NEMMCO immediately notify the Adviser if it serves, or is served with a DMS referral notice under clause 8.2.4. Where NEMMCO is not a party to a dispute, the parties are not required to notify the Adviser that a dispute exists;<sup>17</sup> and
- the right of any party to a dispute to refer the dispute to the Adviser if a dispute has not, or can not, be resolved in Stage 1.<sup>18</sup>

The terms of any confidentiality agreement should not be used to limit or otherwise prevent parties to a dispute from exercising their rights under, or meeting the requirements of, the Rules. Where parties to a dispute are unable to reach agreement in relation to the exchange, treatment and disclosure of confidential information in Stage 1, Stage 2 of the dispute resolution process provides formal mechanisms through which such issues can be resolved.

## **4.2 Stage 2**

If parties are unable to resolve a dispute in Stage 1, the dispute can be progressed to Stage 2 of the dispute resolution process at the instigation of any party. In Stage 2, parties to the dispute have the opportunity for the dispute to be decided by a DRP (DRP) established under clause 8.2.6A or, by consent, under a process designed by the Adviser (for example, engagement of an independent mediator).

Parties should note that there is no provision in Stage 2 of the dispute resolution process to keep the fact of a dispute confidential once it has been referred to a DRP.

On referring a dispute to a DRP, the Rules require the Adviser to promptly notify all registered participants, NEMMCO, the AER, and the AEMC that the referral has been made.<sup>19</sup>

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<sup>16</sup> Rules, cl 8.2.4(f).

<sup>17</sup> Rules, cl 8.2.4(g)

<sup>18</sup> Rules, cl 8.2.4(i-k)

<sup>19</sup> Rules, cl 8.2.5(e)

Where the DRP considers that a registered participant or NEMMCO should become a party to the dispute<sup>20</sup>, or where a registered participant or NEMMCO that has an interest in the dispute opts to become a party<sup>21</sup>, the DRP must provide the relevant DMS contact with the names of the parties to the dispute, a brief history of the dispute and the circumstances giving rise to it, and the results of any previous dispute resolution processes undertaken pursuant to the Rules in respect of the dispute.

#### **4.2.1 Powers of the DRP to direct the exchange of information**

While Stage 1 of the dispute resolution process provides a procedure for parties to formally request the provision of information relevant to a dispute, it requires the parties themselves to negotiate the terms of any exchange of confidential information between them. Failure by the parties to agree to the exchange of information can itself have the effect of preventing resolution of a dispute in Stage 1, and may form the basis of referral of a dispute to Stage 2.

The Rules provide the DRP with significant directive powers in relation to the exchange of information in resolution of a dispute. A DRP can, where it considers it necessary for the proper conduct of the proceedings, issue a direction requiring the parties to a dispute to exchange information.<sup>22</sup> Where protection of the information is warranted, the DRP is empowered to give to the parties such directions relating to the use and disclosure of information obtained from parties to the dispute as it considers necessary in the circumstances, including a direction to keep information confidential.<sup>23</sup> Parties to a dispute must comply with such directions from the DRP. Failure to comply is a breach of the Rules in respect of which the AER may take action in accordance with the National Electricity Law.<sup>24</sup>

#### **4.2.2 Publication of DRP determinations**

The dispute resolution process can ultimately lead to a binding determination by the DRP. The Rules require that copies of its determination be provided to the Adviser.

The Rules also require the DRP to provide a copy of its determination to the AER for publication. Except where otherwise authorised by the Rules, the copy of any determination provided to, and published by, the AER will exclude any confidential information that is included in the determination.<sup>25</sup>

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<sup>20</sup> Rules, cl 8.2.6B(b)

<sup>21</sup> Rules, cl 8.2.6B(c)

<sup>22</sup> Rules, cl 8.2.6C(a)(3)

<sup>23</sup> Rules, cl 8.2.6C(c)

<sup>24</sup> Rules, cl 8.2.9(d)

<sup>25</sup> Rules, cl 8.2.10(a) and (b)

## **Attachment – Template Confidentiality Agreement**

## **Mutual Confidentiality Deed**

[Insert party name] [Insert party name]



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## Parties

[Insert party name] ABN [insert ABN] of [insert address]

[Insert party name] ABN [insert ABN] of [insert address]

## Background

- A The parties have entered into a dispute resolution process in accordance with Chapter 8 of the National Electricity Rules, for the purposes of resolving a dispute between them (**Dispute**).
- B This Deed sets out the terms and conditions on which Confidential Information is provided by each party for the purposes of resolving the Dispute.

## Operative provisions

### **1 Confidentiality**

#### **Acknowledgement**

- 1.1 The Recipient acknowledges that the Confidential Information is valuable to the Provider.
- 1.2 In consideration for the Provider providing the Confidential Information to the Recipient, the Recipient accepts and agrees to be bound by the terms and conditions set out in this Deed.

#### **Confidential Information**

- 1.3 Subject to the terms set out in this Deed and any conditions imposed by the Provider in accordance with clause 1.4, the Recipient:
  - 1.3.1 must keep the Confidential Information confidential;
  - 1.3.2 must not use Confidential Information for any purpose other than the Express Purpose;
  - 1.3.3 must not disclose or permit the disclosure of Confidential Information to any person other than as permitted under clause 1.5;
  - 1.3.4 must not reverse engineer, decompile or disassemble any Confidential Information; and
  - 1.3.5 may only copy or reproduce Confidential Information with the written consent of the Provider and subject to any conditions the Provider imposes on that consent.

## Conditions

- 1.4 The Provider may provide all or specified parts of the Confidential Information to the Recipient in accordance with clause 1.3, subject to any conditions or restrictions that the Provider thinks necessary and that are specified in Schedule 1, which conditions and restrictions may include:
- 1.4.1 a condition that the confidential information may be inspected but not copied;
  - 1.4.2 the time and location at which the Confidential Information may be inspected;
  - 1.4.3 whether, how and to what extent, copies or notes of the Confidential Information may be made;
  - 1.4.4 the period for which the Confidential Information is provided;
  - 1.4.5 whether, when and how the Confidential Information is to be returned or destroyed by the Recipient.

## Permitted disclosures

- 1.5 This Deed permits the disclosure of all or specified parts of the Confidential Information by the Recipient in accordance with Clause 2 in any of the following circumstances:
- 1.5.1 the Provider has consented in writing to the disclosure, the disclosure is made in accordance with clause 2 and any condition imposed by the Provider, and is made to either or both of the following:
    - (a) a Representative or Representatives of the Recipient specified in Schedule 2 to this Deed; or
    - (b) a member of a class of Representatives of the Recipient, specified in Schedule 3 to this Deed; or
  - 1.5.2 the disclosure is required by law; or
  - 1.5.3 the disclosure is directed by a Dispute Resolution Panel ('DRP') in accordance with Clause 8.2.6C(c) of the National Electricity Rules, subject to any conditions imposed by that DRP.

## Limitation on disclosure required by law

- 1.6 If the Recipient considers that disclosure is required by clause 1.5.2, it must:
- 1.6.1 immediately notify the Provider of the requirement;
  - 1.6.2 assist and co-operate with the Provider if the Provider seeks to limit or resist the requirement for the Confidential Information to be disclosed;
  - 1.6.3 at the time that the Confidential Information is disclosed, state to the person to whom the Confidential Information is disclosed that it is of a confidential or commercially-sensitive nature; and
  - 1.6.4 prior to disclosing the Confidential Information, use its best endeavours to require the person to whom the Confidential Information is to be disclosed to enter into a confidentiality deed with the Provider in similar terms to this Deed.

## **2      *Disclosure to Representatives***

### **Provision of Confidential Information**

- 2.1      The Recipient must ensure that, before any of its Representatives are provided with or have access to Confidential Information, the Representatives are made aware of the confidential nature of the Confidential Information and the terms and conditions set out in this Deed.

### **Confidentiality undertaking**

- 2.2      The Recipient must ensure that its Representatives, who will be provided with or have access to Confidential Information, execute an undertaking in the form contained in Schedule 4 to this Deed and deliver the executed undertaking to the Provider before the information is provided to or accessed by the Representative.

### **Compliance by Representatives**

- 2.3      The Recipient must take reasonable steps to ensure that its Representatives do not do or fail to do anything that, if done or not done by the Recipient, would amount to a breach of the Recipient's obligations set out in this Deed.

### **Recipient must maintain register**

- 2.4      The Recipient must at all times maintain an up to date register of all of its Representatives to whom Confidential Information has been disclosed. On request, the Recipient must promptly provide a copy of the register to the Provider.

## **3      *Protection and security***

### **Security measures**

- 3.1      The Recipient must establish and maintain appropriate security measures to protect the Confidential Information against unauthorised access, use or disclosure.

### **Unauthorised access, use or disclosure**

- 3.2      If the Recipient becomes aware of any unauthorised access to, use or disclosure of Confidential Information, or any suspected or possible breach of this Deed, the Recipient must:
- 3.2.1      immediately notify the Provider in writing;
  - 3.2.2      do everything necessary to remedy the unauthorised access to, use or disclosure of the Confidential Information, or to prevent the suspected or possible breach of this Deed;
  - 3.2.3      comply with all written directions from the Provider in relation to the actual suspected or possible breach of this Deed; and,
  - 3.2.4      give the Provider all assistance required in connection with proceedings which the Provider may institute against any person for breach of confidence or otherwise.

## **4      *Ownership of Confidential Information***

- 4.1      The Recipient acknowledges that the Confidential Information remains the property of the Provider at all times and that this deed does not convey to the Recipient or any of its Representatives any proprietary or other interest in the Confidential Information.

## **5      *Return of Confidential Information***

### **Return of Confidential Information**

- 5.1      If the Provider requests the return of the Confidential Information at any time or if the Confidential Information is no longer required by the Recipient for the Express Purpose, the Recipient must immediately return to the Provider all material containing Confidential Information in the possession, power or control of the Recipient or any of its Representatives.

### **Destruction of Confidential Information**

- 5.2      If requested by the Provider, the Recipient must destroy all material containing Confidential Information in the possession, power or control of the Recipient or any of its Representatives.

### **Material containing Confidential Information**

- 5.3      For the purposes of clauses 5.1, 5.2 and 5.3, material containing Confidential Information includes:
- 5.3.1    any material created or generated by the Recipient which contains Confidential Information;
  - 5.3.2    material in any form of storage from which the Confidential Information can be reproduced; and
  - 5.3.3    material in any form in which the Confidential Information is embodied or encoded.

### **Confirmation**

- 5.4      If requested by the Provider, the Recipient must give the Provider a written statement confirming that all material containing Confidential Information has been returned to the Provider or destroyed in accordance with this Deed.

## **6      *Breach of obligations***

### **Injunctive relief**

- 6.1      The Recipient acknowledges that damages may not be an adequate remedy for any breach of this Deed.
- 6.2      The Recipient agrees to consent to:
- 6.2.1    the grant of any injunctive relief sought by the Provider to restrain any conduct or threatened conduct which is or will be a breach of this Deed; or
  - 6.2.2    specific performance to compel the Recipient to perform its obligations under this Deed,

as a remedy for any breach or threatened breach and in addition to any other remedies available to the Provider.

## **Indemnity**

- 6.3 The Recipient continually indemnifies the Provider against any claim, liability, loss, damage or expense (including legal costs on a full indemnity basis) that the Provider incurs or suffers directly or indirectly as a result of:
- 6.3.1 a breach of this Deed by the Recipient;
  - 6.3.2 anything done or not done by a Representative of the Recipient which, if done or not done by the Recipient, would be a breach of this Deed; or
  - 6.3.3 an unauthorised disclosure by a person who received the Confidential Information from the Recipient or any of its Representatives.

## **7 *Continuing obligations***

### **Survival of obligations**

- 7.1 The Recipient's obligations set out in this deed continue to apply:
- 7.1.1 other than to the extent that the Provider specifically releases the Recipient in writing from any such obligations; or
  - 7.1.2 to the extent that any information is no longer confidential.

## **8 Notices**

### **Giving notices**

8.1 A notice, consent, information, application or request that must or may be given or made to a party under this Deed is only given or made if it is in writing and is:

8.1.1 delivered or posted to that party at its address set out below; or

8.1.2 faxed to that party at its fax number set out below.

8.1.3 emailed to that party at the address set out below

#### **[insert party's details]**

Name:

Address:

Fax number:

Attention:

Email:

#### **[insert party's details]**

Name:

Address:

Fax number:

Attention:

Email:

### **Change of address, email or fax number**

8.2 If a party gives the other party 3 business days notice of a change of its address, email or fax number, a notice, consent, information, application or request is only given or made by that other party if it is delivered, posted, emailed or faxed to the latest address or fax number.

### **Time notice is given**

8.3 A notice, consent, information, application or request is to be treated as given or made at the following times:

8.3.1 if it is delivered, when it is left at the relevant address;

8.3.2 if it is sent by post, 2 business days after it is posted;

8.3.3 if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number;  
or

8.3.4 if it is sent by email, as soon as its receipt is acknowledged by the party to whom it is sent.

- 8.4 A notice must be received by 5pm on a business day in the place of the party to whom it is sent, or it is to be treated as having served at the beginning of the next business day.

### **Costs**

- 8.5 Except as otherwise set out in this Deed, each party must pay its own costs in relation to preparing, negotiating and executing this Deed and any document related to this Deed.

### **Deed to benefit and bind successors**

- 8.6 This Deed continues for the benefit of, and binds, a successor in title of a party, including a third party to whom a party's rights and obligations are assigned in accordance with this Deed.

### **Entire agreement**

- 8.7 This Deed contains everything the parties have agreed in relation to the matters it deals with.
- 8.8 No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Deed was executed, except as permitted by law.

### **Execution of separate Deeds**

- 8.9 This Deed is properly executed if each party executes either this Deed or an identical Deed.
- 8.10 If the parties execute identical Deeds, this Deed takes effect when the separately executed Deeds are exchanged between the parties.

### **Further acts**

- 8.11 Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

### **Governing law and jurisdiction**

- 8.12 This Deed is governed by the law of [New South Wales]. The parties submit to the non-exclusive jurisdiction of the courts of [New South Wales] and courts of appeal from them. The parties will not object to the exercise of jurisdiction by the courts of [New South Wales] on any basis.

### **Joint and individual liability and benefits**

- 8.13 Except as otherwise set out in this Deed, any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

### **Remedies cumulative**

- 8.14 The rights, powers and remedies set out in this Deed are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this Deed.

### **Severability**

- 8.15 If a clause or part of a clause of this Deed can be read in a way that makes

it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.

- 8.16 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

## Variation

- 8.17 No variation of this Deed will be of any force or effect unless it is in writing and signed by the parties to this Deed.

## Waiver

- 8.18 The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another party.
- 8.19 A waiver by a party is only effective if it is in writing.
- 8.20 A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given and it is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

## 9 Definitions and interpretation

### Definitions

- 9.1 In this Deed the following definitions apply:

**confidential information means:**

(a) information which:

- i. is commercially sensitive or valuable in nature, including (without limitation) financial information, reports, product specifications, technical information and forecasts relating to the Provider or its Related Entities or their businesses, products or processes; and
- ii. will be or has been provided by the Provider or any of its Representatives to the Recipients or any of its Representatives in such circumstances or in such a manner as to indicate to a reasonable person that the information is commercially sensitive and valuable; and

(b) information derived from such information; and

(c) the fact that such information will be or has been provided;

but does not include:

- (d) information which is in or becomes part of the public domain, other than through a breach of this Deed or an obligation of confidence owed to the Provider or any Representative of the Provider;
- (e) information which the Recipient can prove by contemporaneous written documentation was independently acquired or developed without breaching any of the Recipient's obligations set out in this Deed.

**Dispute Resolution Panel** means a panel established under clause 8.2.6A of the National Electricity Rules.



**Express Purpose** means the purpose for which the Provider is disclosing the information as described in Schedule 1B.

**National Electricity Rules** means the rules as approved by the Ministers of the States of South Australia, Victoria, New South Wales, Queensland and the Australian Capital Territory for the purposes of the National Electricity Law, as amended and in operation for the time being.

**Provider** means the party providing Confidential Information to the other party.

**Recipient** means the party receiving Confidential Information from the other party.

**Related Entity** has the same meaning as under the Corporations Act 2001 (Cth).

**Representative** means any director, officer, employee or partner of a party or of any agent, contractor, financier, legal adviser or professional adviser of a party.

## Interpretation

9.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 9.2.1 a reference in this Deed to a business day means a day other than a Saturday or Sunday on which all banks are open for business generally in Sydney, New South Wales;
- 9.2.2 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day;
- 9.2.3 an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- 9.2.4 where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 9.2.5 references to the word 'include' or 'including' are to be construed without limitation;
- 9.2.6 a reference to this Deed includes the agreement recorded in this Deed; and
- 9.2.7 any schedules and attachments form part of this Deed.

## ***Execution and date***

Executed as a Deed by

Signed sealed and delivered for and on behalf  
of [                      ] in the presence of:

.....  
Signature of witness

.....  
Signature of authorised person

.....  
Name of witness (print)

.....  
Name of authorised person (print)

## ***Schedule 1A***

### **Conditions and restrictions on disclosure**

(Insert any conditions or restrictions that apply to the time, manner or form in which disclosure will be given. See clause 1.4)

Tick as appropriate

- ☐ a condition that the confidential information may be inspected but not copied
- ☐ the time and location at which the Confidential Information may be inspected
- ☐ whether, how and to what extent, copies or notes of the Confidential Information may be made
- ☐ the period for which the Confidential Information is provided
- ☐ whether the Confidential Information must be returned or destroyed by the Recipient, and if so where and how
- ☐ any other conditions (specify below).

***Schedule 1B***

List the purpose for which the Confidential Information is disclosed.

## ***Schedule 2***

### **Representatives**

[List named Representatives to whom Confidential Information may be disclosed by the Recipient (See clause 1.5.2)]

### ***Schedule 3***

#### **Class of Representatives**

[List class or classes of Representatives to whom Confidential Information may be disclosed by the Recipient (See clause 1.5.2)]

## **Schedule 4**

### **Confidentiality Undertaking**

#### **Parties**

By:

[name of Representative] of [address of Representative]

In favour of: [name of Provider] of [address of Provider]

#### **Background**

- A The Provider and the Recipient have executed the Confidentiality Deed relating to the provision of Confidential Information by the Provider to the Recipient in connection with the Express Purpose.
- B The Provider has agreed to the Recipient disclosing Confidential Information to the Representative on the condition that the Representative executes this Deed and delivers it to the Provider.

#### **Operative provisions**

##### **1 Acknowledgement**

- 1.1 The Representative acknowledges having received a copy of the Confidentiality Deed and having read the Confidentiality Deed in full.
- 1.2 The Representative confirms that he or she understands each of the obligations of the Recipient set out in the Confidentiality Deed and the restrictions on the disclosure and use of Confidential Information.

##### **2 Undertaking**

- 2.1 The Representative undertakes to observe all of the provisions set out in the Confidentiality Deed in all respects as if the Representative was named as the Recipient in the Confidentiality Deed in place of the Recipient.
- 2.2 The Representative undertakes to observe any conditions specified by the Provider in accordance with the Confidentiality Deed.

##### **3 Terms reproduced**

- 3.1 To give effect to clause 2.1, all provisions of the Confidentiality Deed are deemed to be set out in full in this Deed on the basis that all references to the Recipient in the Confidentiality Deed are, for the purposes of this Deed, deemed to be references to the Representative.

## 4 Definitions

4.1 In this Deed the following definitions apply:

**Confidentiality Deed** means the mutual confidentiality deed between the Provider and the Recipient pursuant to which the parties have disclosed or intend to disclose Confidential Information to each other for the Express Purpose.

**Confidential Information** has meaning set out in the Confidentiality Deed.

**Express Purpose** has meaning set out in the Confidentiality Deed.

**Recipient** means:

.....

.....

[name, ABN and address of Recipient]

### Execution and date

Executed as a deed by

Date:

The Representative

.....

Signature of Representative

.....

Name of witness

.....

Signature of witness