



Better Regulation

Explanatory Statement Draft Confidentiality Guideline

August 2013

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Shortened forms

Shortened term	Full title
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Confidentiality Guideline	Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines
Consultation Procedures	Distribution Consultation Procedures and Transmission Consultation Procedures
COSBOA	Council of Small Business Australia
CRG	Customer reference group
DNSP	Distribution Network Service Provider
EBSS	Efficiency Benefit Sharing Scheme
ENA	Energy Networks Association
EUAA	Energy Users Association of Australia
MEU	Major Energy Users
NEL	National Electricity Law
NER	National Electricity Rules
NSP	Network Service Provider
Regulatory Proposal	Includes the following: Initial regulatory proposal, revised regulatory proposal, initial revenue proposal, revised revenue proposal, proposed negotiating framework, revised proposed negotiating framework, proposed pricing methodology and revised proposed pricing methodology.
RIN	Regulatory Information Notice
SSROC	Southern Sydney Regional Organisation of Councils
Stakeholder	Includes the following: NSPs, consumer/customer groups and other persons who interests may be adversely affected by an AER decision.
TNSP	Transmission Network Service Provider
28ZB Test	The test for disclosing information set out in section 28ZB of the NEL

Request for submissions

This Explanatory Statement is part of the Australian Energy Regulator's (AER) Better Regulation program of work. The Better Regulation program follows from changes to the National Electricity and Gas Rules announced in November 2012 by the Australian Energy Market Commission (AEMC). The AER's approach to regulation under the new framework will be set out in a series of guidelines to be published by the end of November 2013.¹

Interested parties are invited to make written submissions to the AER regarding this issues paper by close of business, 20 September 2013.

Submissions should be sent electronically to: [confidentiality@aer.gov.au](mailto:confidentiality@ aer.gov.au). We prefer that all submissions sent in an electronic format are in Microsoft Word or other text readable document form.

Alternatively, submissions can be sent to:

Chris Pattas
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The AER prefers that all submissions be publicly available to facilitate an informed and transparent consultative process. Submissions will be treated as public documents unless otherwise requested. Parties wishing to submit confidential information are requested to:

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

All non-confidential submissions will be placed on the AER's website at www.aer.gov.au. For further information regarding the AER's use and disclosure of information provided to it, see the ACCC/AER Information Policy, October 2008 available on the AER website.

Enquires about this paper, or about lodging submissions, should be directed to the Network Operations and Development Branch of the AER on (03) 9290 1444 or via email to: [confidentiality@aer.gov.au](mailto:confidentiality@ aer.gov.au).

¹ Further details on the consultation processes and other guidelines are available at <http://www.aer.gov.au/node/18824>.

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1 Executive Summary

The Australian Energy Regulator (AER) is Australia's independent national energy market regulator. Our role is to promote the national electricity and gas objectives. Enshrined in the Electricity and Gas Laws, these objectives focus us on promoting the long term interests of consumers.

A major part of our work is regulating the energy networks that transport energy to consumers (electricity poles and wires, and gas pipelines). In 2012, the Australian Energy Market Commission (AEMC) announced important changes to the electricity and gas rules, affecting our role in regulation. Our role is also changed by the energy market reforms that the Prime Minister announced on 7 December 2012.

We initiated the Better Regulation program to draw together these important reforms and our work in developing our regulatory processes and systems. The Better Regulation program involves us:

- extensively consulting on seven new guidelines that outline our approach to receiving and assessing network businesses' expenditure proposals and determining electricity network revenues and prices
- establishing a consumer reference group specially for our guideline development work, to help consumers engage across the broad spectrum of issues that we are considering
- forming an ongoing Consumer Challenge Panel (appointed 1 July 2013) to ensure our network regulatory determinations properly incorporate consumers' interests
- improving our internal technical expertise and systems, and our engagement and communication with all our stakeholders.

This Explanatory Statement outlines our approach to the development and publication of the Distribution Confidentiality Guidelines and the Transmission Confidentiality Guidelines (the Confidentiality Guideline). It is the second part of our consultation in developing the Confidentiality Guideline. It forms part of our Better Regulation program of work following from the AEMC's changes to the National Electricity Rules (NER) and National Gas Rules (NGR) made on 29 November 2012. The aim of these reforms is to deliver an improved regulatory framework focused on the long-term interests of energy consumers.

In particular we have outlined the manner in which Network Service Providers (NSPs) must make confidentiality claims. We will require NSPs to justify all confidentiality claims and to classify them into specific categories.

We aim to balance protecting confidential information with disclosing information for an open and transparent regulatory decision making process. We consider this balance involves all stakeholders having access to sufficient information to understand and assess the substance of issues affecting their interests. Stakeholders, including NSPs and consumer groups should work together to develop and implement measures that both disclose the substance of issues and appropriately maintain confidentiality in the long term interests of consumers.

National electricity and gas objectives

The objective of the Electricity and Gas Laws is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to—

(a) price, quality, safety, reliability and security of supply of energy; and

(b) the reliability, safety and security of the national energy systems.

We propose a two stage process for dealing with confidential information. First, we will have discussions with each NSP prior to receiving its Regulatory Proposal. Our aim is to reach agreement on as many confidentiality claims as possible during this pre-lodgement phase. We call this pre-lodgement phase stage one.

After stage one, NSPs will need to claim confidentiality using our template. For those confidentiality claims that we disagree with, we will use our information disclosure powers. We call using these measures stage two.

Our information disclosure powers are formal and resource intensive. However, we consider they are a necessary backstop to provide incentives for NSPs and other stakeholders to reach agreement with each other and develop their own methods for sharing information. We will take into account NSPs and other stakeholders actions in relation to confidentiality issues when determining whether to use our information disclosure powers. We consider this provides a balanced incentive for all parties to act reasonably in trying to reach agreement, minimising the need for us to use our powers. Also, to make the Confidentiality Guideline as useful as possible we have included a list of documents that we generally consider should be in the public domain.

We intend our consultations in the lead up to the final Confidentiality Guideline to focus on developing our stage one processes. Specifically, the methods that NSPs and stakeholders can put in place to ensure all stakeholders can access sufficient information, minimising the need for us to use our information disclosure powers. Also, discussions between now and the final Confidentiality Guideline should focus on developing a shared practical understanding of options NSPs and other stakeholders can implement to make stage one work best.

2 Introduction

We are responsible for the economic regulation of electricity transmission and distribution services in eastern and southern Australia under chapters 6 and 6A of the NER. We also monitor the wholesale electricity market and are responsible for compliance with and enforcement of the NER. We have similar roles for gas distribution and transmission under the NGR.

Under the *Competition and Consumer Act 2010* we have an obligation to protect from unauthorised use or disclosure of information given to us in confidence or obtained by compulsion.² This obligation arises out of the manner in which we receive information, not its content. However, we also have information disclosure powers under the NEL.³ These powers authorise us to disclose confidential information where the information:

- is already in the public domain⁴ or the information provider gives written consent;⁵
- will afford a person affected by our decision natural justice;⁶
- is for the purpose of court or tribunal proceedings;⁷
- does not identify the information provider;⁸ or
- would not cause detriment to the information provider; or the public benefit in disclosing the information outweighs any detriment.⁹

Our experience with confidentiality claims to date has been mixed. We agree with NSPs regarding many confidentiality claims. However, in the past some NSPs have claimed confidentiality over entire documents or entire submissions. Also, some NSPs have not explained why the information should be protected. These types of claims may prevent stakeholders accessing large amounts of information. In turn, this limits their ability to participate effectively in the regulatory process. For example, all stakeholders need the opportunity to comment on and scrutinise a NSP's proposal. Also, it is appropriate that all stakeholders can fully understand the efficiency of a NSP's proposal and expenditure allowances.

In November 2012, the AEMC made changes to the NER that set out the process for regulating electricity network businesses. These changes included new rules regarding the process for NSPs to make confidentiality claims over information they submit during the regulatory determination process. The new rules require us to make and publish Distribution Confidentiality Guidelines and a Transmission Confidentiality Guidelines. We have decided to deal with both guidelines together in a single set of guidelines (the Confidentiality Guideline).¹⁰ The Confidentiality Guideline must specify the manner in which NSPs may make confidentiality claims.¹¹ They may also include categories of confidential information by which NSPs must classify any claims of confidentiality in their Regulatory Proposals. There must be a guideline in force at all times after the date on which we first publish the

² *Competition and Consumer Act 2010* s.44AAF

³ NEL, ss.28W - 28ZB.

⁴ NEL, s.28ZAB,

⁵ NEL, s.28X.

⁶ NEL, s.28Y(c).

⁷ NEL, s.28Y(a)-(b).

⁸ NEL, s.28ZA.

⁹ NEL, s.28ZB.

¹⁰ NER, cl.6.2.8(a)(1) & cl.6A.2.3(a)(1).

¹¹ NER, cl.6.14A(b) & cl.6A.16A(b).

guideline.¹² The Confidentiality Guideline will be binding on us and NSPs.¹³ The new rules do not change our existing obligations to protect information and our information disclosure powers.

An intended outcome of the AEMC's rule changes was to facilitate more timely and meaningful engagement between the AER, consumer representatives and NSPs.¹⁴ Our first step in consulting on the Confidentiality Guideline was to publish a Confidentiality Guideline issues paper on 18 March 2013.¹⁵ This issues paper outlined our experience in dealing with confidentiality claims and using our information disclosure powers. We also held a workshop with stakeholders to discuss aspects of our issues paper on 4 April 2013. A summary of discussions from the workshop are available on our website.¹⁶

We received a total of 17 submissions from stakeholders on our issues paper. We also offered to have a one on one meeting with each stakeholder. Ten stakeholders took up this offer. We also received a number of submissions from consumer representatives through our consumer reference group (CRG) meetings.

In accordance with clauses 6.16(b)(2) and 6A.20(b)(2) of the NER we have published this Explanatory Statement. It sets out the relevant NER provisions under which the Confidentiality Guideline is proposed to be made. However, we have also used this Explanatory Statement as an opportunity to outline our overall policy objective and approach to dealing with confidential information. In developing the draft Confidentiality Guideline and Explanatory Statement, we have considered the views of stakeholders in detail.

¹² NER, cl.6.14A(c) & cl.6A.16A(c).

¹³ NER, cl.6.14A(d) & cl.6A.16A(d).

¹⁴ AEMC, Final rule change determination, 29 November 2012, p.32.

¹⁵ <http://www.aer.gov.au/node/18888>

¹⁶ <http://www.aer.gov.au/node/18888>

3 Overview of our policy position

We seek to balance protecting confidential information with disclosing information for an open and transparent regulatory decision making process. We consider this balance involves all stakeholders having access to sufficient information to understand and assess the substance of all issues affecting their interests. This is not equivalent to public disclosure of every piece of information NSPs provide, especially where public disclosure is likely to harm the long term interests of consumers.¹⁷ However, the complexity of economic regulation means understanding and assessing the substance of issues requires access to detailed information.

For these reasons, we are keen to see stakeholders work together. Stakeholders should develop and implement a range of options that both disclose the substance of issues and appropriately maintain confidentiality where this is in the long term interests of consumers. In particular, we hope these discussions can focus on developing a shared practical understanding of the detailed information and access necessary to strike the balance we seek. For example, these options might include any mix of the following:

- narrower confidentiality claims
- limited redactions in public versions of documents
- provision of detailed information adjusted to protect sensitive elements
- limited release of confidential information to particular parties, such as through confidentiality undertakings.

We strongly encourage NSPs and other stakeholders to develop their own arrangements facilitating proper assessment of the NSP's Regulatory Proposal. This should occur before the NSP submits its proposal. Where this does not occur, we may need to use our powers under the NEL and NGL to authorise disclosure. As is clear from our issues paper,¹⁸ this is not our preference. These powers are formal, resource and time intensive and tend to lead to “one size fits all” solutions. Therefore, they are unlikely to be satisfactory to stakeholders. But if no agreement is reached, we will rely on these powers.

With this policy position in mind we developed the draft Confidentiality Guideline and this draft Explanatory Statement. They fundamentally guide our views on what information should be protected/disclosed and set out a clear process focussed on collaboration.

¹⁷ For example, where it is likely that disclosure would result in higher prices for consumers over the short or long term.
¹⁸ <http://www.aer.gov.au/sites/default/files/AER%20Issues%20paper%20-%20Confidentiality%20guidelines%20-%2018%20March%202013.pdf>

4 Scope and coverage

The Confidentiality Guideline is binding on NSPs and the AER for all Regulatory Proposals. In our issues paper we proposed, as a matter of policy, to apply the Confidentiality Guideline to all information we receive from NSPs. This included responses to Regulatory Information Notices (RINs) and submissions on Regulatory Proposals. We also proposed to apply this policy to all information we receive from gas service providers. We considered that having in place a clear policy as to how to make confidentiality claims to the AER should be consistent for both electricity and gas.

4.1 Proposed approach

As policy, we propose to extend the scope of the Confidentiality Guideline and Explanatory Statement. They would also apply to submissions on electricity Regulatory Proposals and gas access arrangement proposals.

We can also issue regulatory information instruments, such as a RIN, to require a NSP or gas service provider to provide information in a particular form. We propose to use this power to apply the confidentiality template to all regulatory information instrument responses for gas and electricity. This would include requiring gas service providers to make confidentiality claims using our confidentiality template for access arrangement proposals (including additions or amendments) and access arrangement information.

4.2 Reasons for proposed approach

The majority of NSPs are supportive of our proposed approach. The ENA submitted that it accepts, in principle, applying the Confidentiality Guideline as a policy to formal submissions the AER receives from NSPs (including gas service providers).¹⁹

We clarify that the Confidentiality Guideline would generally not apply to informal communication such as Q&A correspondence during a reset. Also, other informal ad hoc communication between us and a NSP would not be subject to the requirements of the Confidentiality Guideline. We consider this clarification should address NSP concerns that applying the Confidentiality Guideline to all information may impose an unreasonable compliance burden on businesses.²⁰

¹⁹ ENA, submission in response to the AER issues paper, May 2013, p. 14.

²⁰ APA Group, submission in response to the AER issues paper, 14 May 2013, pp 3-4.

5 Confidential information categories

The overview of our policy position in section 3 presents the conceptual foundation for our approach to the Confidentiality Guideline and confidentiality issues more broadly. It focuses on content rather than the format in which information is presented, who provided the information and under what conditions. This is consistent with submissions from NSPs that we should focus on the actual information contained in documents.²¹

At the same time, the overview of our policy position will have limited usefulness without additional practical guidance. The Draft Expenditure Forecast Assessment Guideline and its Explanatory Statement provide²² much of this guidance. They include detailed descriptions of the information we consider would enable stakeholders to understand and assess the substance of issues affecting their interests.

This section aims to complement and add to that guidance. It specifies categories into which NSPs must classify confidentiality claims. It also includes an indicative list of the types of documents NSPs often submit with Regulatory Proposals that we generally consider should be in the public domain.

5.1 Categories NSPs must classify any confidentiality claims

Under clauses 6A.14(b) and 6A.16(b) of the NER we may include categories of confidential information by reference to which NSPs must classify any claims of confidentiality in their Regulatory Proposals.

In the issues paper we proposed the Confidentiality Guideline not specify categories into which NSPs must classify confidentiality claims. We were particularly concerned as to their usefulness. We were also concerned that any given category might be so broad as to include both information we should protect and disclose. However, we also thought providing clarity to NSPs was a key objective. Therefore, we proposed the Confidentiality Guideline include a list of items which will provide this guidance.

5.1.1 Proposed approach

NSPs must classify confidentiality claims into the following categories:

- *Information affecting the security of the network* - information which, if made public, may jeopardise security of the network or a NSP's ability to effectively plan and operate its network.
- *Market sensitive cost inputs* - information such as supplier prices, internal labour costs, and information which would affect the NSP's ability to obtain competitive prices in future infrastructure transactions, such as tender processes.
- *Market intelligence* - information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities.
- *Strategic information* - information such as the acquisition of land and easements, where the release of this information might adversely impact the NSP's ability to negotiate a fair market price for these items.

²¹ ENA, submission in response to the AER issues paper, May 2013, p. 14.
²² <http://www.aer.gov.au/node/18864>

- *Personal information* - information about an individual or customer whose identity is apparent or can reasonably be ascertained from the information, which raises privacy considerations.
- *Other* - information a NSP claims is confidential but does not fit into one of the above categories.

We intend to take a case by case approach to assessing confidentiality claims. This means that we will assess each confidentiality claim on its merits. Therefore, classification into a category would not guarantee protection.

5.1.2 Reasons for proposed approach

We have revised our position on classifying confidentiality claims into categories for four key reasons:

- overwhelming support for categories from NSPs and other stakeholders
- the reduced administrative burden
- categories would provide additional guidance to NSPs
- our proposed case by case approach would provide an additional check, ensuring we strike the balance we seek.

There was substantial, but not universal, support from NSPs and other stakeholders for the list of items we proposed in the issues paper becoming categories for the Confidentiality Guideline.

NSPs also proposed we include confidential contractual terms and third party information provided on a confidential basis as specific categories. We propose not to use these categories. We may wish to protect some information that might fall under these categories. However, this would be because of the information's content. For example, we may wish to protect actual contract prices subject to a confidentiality clause where there is a thin market for the relevant item. But that is because of the impact disclosing that information may have on the long term interests of consumers, rather than because the information may be subject to a confidentiality clause. Also, a NSP could classify the information under one of the categories we are proposing such as 'market sensitive cost inputs.'

Consumer stakeholders also raised concerns about the categories NSPs proposed. They noted it was common practice for parties to enter confidentiality clauses or provide information in confidence, even where the relevant content is not genuinely confidential. In their view, including these categories would create incentives to enter these arrangements to avoid disclosure.

Table 5.1 summarises our reasons for not accepting other proposed categories or items of information.

Consumer stakeholders were also concerned the category Market Sensitive Cost Inputs could be too broad. There was concern this category could see fundamental data withheld from stakeholders. Consistent with the overview of our policy position, we share this concern. However, our case by case approach should mitigate it.

We will consider a NSP's classification when assessing confidentiality claims. However, as we will be taking a case by case approach, we may not agree with the classification. Also, we may agree that the information fits into the category but, nonetheless, the public benefit in disclosure may outweigh the detriment. Central to our consideration will be the reasons a NSP provides for its confidentiality claims.

Table 5.1 Our reasons for not accepting other proposed categories or items of information

Proposed category/item	Our view
Proprietary information of a NSP or third party. ²³	<p>This category is overly broad and at some level, every written document could contain proprietary information or intellectual property. This therefore could create an incentive for NSPs to claim a substantial proportion of their information as proprietary. This category also creates an incentive for third parties to claim intellectual property over their information even when they may be content to disclose it.</p> <p>Our key concern is that disclosure of this type of material may result in third parties being less willing to provide NSPs with access to their intellectual property. Where this occurs, the information would fall under the categories 'market sensitive cost inputs' or 'strategic information'.</p>
Information which, if made public, may jeopardise security of the network or a NSP's ability to effectively plan and operate its network. ²⁴	This category of information is covered by the categories 'information affecting the security of the network' or 'strategic information.'
Information which identifies the personal affairs of customers or individuals.	This item of information is covered by the category 'personal information'.
Detailed information about assets. ²⁵	This item of information is broad and ambiguous. We consider that to the extent that protection of such information is necessary, the existing categories we have proposed should be sufficient.
Information that may compromise the security of the network or a third party. ²⁶	This item of information would be covered by the category 'information affecting the security of the network.'
Information about a third party contract, arrangement, business or understanding that a NSP is not at liberty to disclose. ²⁷	See considerations above on confidential contractual terms and information provided by a third party on a confidential basis.
Intellectual property created by, or belonging to, a NSP (as opposed to the results of the application of that intellectual property) or a third party. ²⁸	See considerations above on proprietary information of a NSP or third party.
Working documents. ²⁹	This item of information is broad and ambiguous. We consider that to the extent that protection of such information is necessary, the existing categories we have proposed should be sufficient.
Information related to a particular user's or prospective user's energy usage or information that would allow a user's or prospective user's energy usage to be derived. ³⁰	This item of information is covered by the category 'personal information.'
Information covered by confidentiality clauses under contract. ³¹	See considerations above on confidential contractual terms and information provided by a third party on a confidential basis.

²³ ENA, submission in response to the AER issues paper, May 2013, p. 9.
²⁴ ENA, submission in response to the AER issues paper, May 2013, p. 9.
²⁵ ENA, submission in response to the AER issues paper, May 2013, p. 9.
²⁶ Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 3.
²⁷ Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 3.
²⁸ Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 3.
²⁹ Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 3.
³⁰ APA Group, submission in response to the AER issues paper, 14 May 2013, p. 2.
³¹ APA Group, submission in response to the AER issues paper, 14 May 2013, p. 2.

5.2 Guidance on what information stakeholders should have access to

As mentioned above, we think that practical guidance is necessary to ensure that the draft Confidentiality Guideline and Explanatory Statement are most useful. Therefore, we propose an indicative list of the types of documents NSPs often submit with Regulatory Proposals that we generally consider they should place in the public domain.

5.2.1 Proposed approach

We consider the documents listed in Attachment 3 are documents, which NSPs often submit in Regulatory Proposals, which generally contain a majority of content that should be in the public domain. As a result, we consider limited redactions are the most appropriate way of striking the balance between protection and disclosure of these.

5.2.2 Reasons for proposed approach

We have decided to include a list of documents we generally consider NSPs should disclose publicly to provide practical guidance to NSPs and other stakeholders. We based this practical guidance on our experience in dealing with confidential information in the context of Regulatory Proposals to date. We have chosen the documents listed in Attachment 3 because, in our experience, they usually contain information that is central to justifying various aspects of a NSP's proposals. In particular, they generally include the data and analysis that are important to understanding and assessing the substance of issues affecting other stakeholders' interests. In our view these documents reflect the information we will likely require from NSPs to support their expenditure proposal as outlined in our Draft Expenditure Forecast Assessment Guidelines and Explanatory Statement.

We acknowledge the documents in Attachment 3 may also contain information that we should protect. However, in our experience the majority of the content of these documents should be in the public domain. As a result, we consider placing limited redactions over the information we should protect is the most appropriate way of balancing protection and disclosure of these documents. This is not equivalent to full public disclosure of these documents. Rather it is disclosure sufficient to provide all stakeholders with access to information to enable them to understand the substance of all issues affecting their interests.

NSPs proposed not including such a list and that the AER should focus on content. As discussed above, our focus is on content. We will take a case by case approach to assessing each confidentiality claim to ensure that we only protect information that is genuinely confidential. However, we also consider additional practical guidance is appropriate to promote the usefulness of the draft Confidentiality Guideline and Explanatory Statement.

Consumer stakeholders suggested the AER should disclose the following items of information:

- information on data acquired for benchmarking
- related party transactions/arrangements
- non-regulatory activities
- street lighting maintenance data.

At this stage, we propose not to accept these. This information may be important to understanding and assessing the substance of issues affecting stakeholders. However, it also may contain market sensitive cost inputs. Therefore, we propose to apply our case by case approach to this information.

We acknowledge that accessing benchmarking data is critical to our regulatory determinations and annual benchmarking reports need to be transparent. We are in the early stages of developing a database for the collection and storage of certain NSP expenditure information. We intend to allow public access to this database and discussions around this will take place during consultations on the Expenditure Forecast Assessment Guideline. We consider the database will assist consumers to effectively engage and participate in the regulatory decision making process. We will ensure that the Confidentiality Guideline is consistent with the outcome of these discussions.

6 Stage one - pre-lodgement discussions

In our issues paper we outlined our existing two stage process to deal with confidential information. This process aims to filter and minimise the need for us to use our information disclosure powers. At present, in stage one we inform NSPs of our information handling processes before they provide us with information. Specifically, we notify NSPs that if they wish to claim confidentiality over any information they submit, they must:

- a. For all information and documents, clearly identify and mark the part of the information they consider confidential.
- b. Provide reasons that support each confidentiality claim. We ask NSPs to explain why we should protect particular information, focusing on section 28ZB of the NEL.
- c. Submit both a public and confidential version of the document.

We also notify NSPs that:

- d. A confidentiality claim by itself is insufficient to prevent disclosure. We have information disclosure powers, such as those in section 28ZB.
- e. If a NSP makes a confidentiality claim in the manner mentioned above, this will reduce the likelihood we will exercise these powers.
- f. Prior to exercising these powers, we will provide the NSP with notice and an opportunity to comment.

Following consultation with stakeholders, we have revised the processes in stage one. This section sets out the AER's revised position on stage one.

6.1 Proposed approach

We propose to make our pre-lodgement discussions the focus of our approach to dealing with confidential information. Specifically, at the same time we develop our framework and approach paper we will work with stakeholders to reach a shared, practical understanding of confidentiality issues. We intend discussions to focus on:

- what information NSPs are claiming confidentiality over and the reasons behind this claim
- what specific items should be protected/disclosed and in what form
- the manner in which NSPs should make confidentiality claims
- how NSPs have engaged with consumer groups on confidentiality
- NSPs working with third parties to ensure that they limit confidentiality claims and provide confidential and public versions of all documents.

We aim for these discussions to achieve consensus as to what information requires protection and what information NSPs should disclose. Our aim is to reach agreement on as many confidentiality claims as possible. Where we cannot achieve consensus, at least we will know the areas of disagreement in advance and understand them.

6.2 Reasons for proposed approach

Submissions supported the Confidentiality Guideline placing greater emphasis on us working collaboratively with NSPs to resolve many information protection and disclosure issues during stage one. We agree with these submissions. Pre-lodgement discussions provide certain advantages. These are not available post lodgement, using our formal information disclosure powers. These include the ability for us and stakeholders to explore creative options so all stakeholders can understand and assess the substance of information a NSP is claiming confidentiality over. These might include:

- providing public information in sufficient detail for assessment without disclosing details that might negatively affect the long term interests of consumers
- providing detailed information subject to confidentiality undertakings, where details are key to understanding and assessing substance, but public or broader disclosure might negatively affect the long term interests of consumers.

Before we receive a NSP's proposal, there are often less time pressures and the competing need for us to assess the proposal's substance. As a result there is a greater opportunity for us to work with NSPs to reach a common understanding of what information we will protect or disclose at an early stage.

Also by focusing on pre-lodgement discussions, we will have a stronger understanding of what the NSP intends to claim confidentiality over and why. Therefore, we would expect to have no surprises in relation to the information the NSP is claiming confidentiality over and the reasons why the NSP considers this information confidential.

7 Stage two - submitting confidential information

We aim to resolve as many confidentiality issues as possible in stage one. However, for those confidentiality issues we do not resolve at stage one, we intend to use our information disclosure powers. Two circumstances where these powers allow us to disclose confidential information are where disclosure:

- would not cause detriment to the information provider; or the public benefit in disclosing the information outweighs any detriment³²
- will afford a person affected by our decision natural justice.³³

The Confidentiality Guideline's key requirement is to specify the manner in which NSPs must make confidentiality claims. This section sets out our approach to how NSPs must make confidentiality claims and provides guidance on how we will use our information disclosure powers.

7.1 Manner in which NSPs must make confidentiality claims

The Confidentiality Guideline must specify the manner in which NSPs may make confidentiality claims in Regulatory Proposals. This may include specifying categories of confidential information by reference to which NSPs must classify any confidentiality claims.

7.1.1 Proposed approach

We proposed a confidentiality template contained in Attachment 1 of our issues paper. We based the confidentiality template on a template we currently use. We propose to require NSPs to submit a confidentiality template together with each Regulatory Proposal. Also, as a result of submissions from NSPs and consumers we have amended the confidentiality template's requirements. The revised confidentiality template would require NSPs to specify:

- the title, page and paragraph number of any document containing confidential information (regardless of the document's author)
- a description of the confidential information
- the topic the confidential information relates to (for example capex, opex, WACC, incentive mechanism etc.)
- the confidentiality category into which the NSP classifies the information
- a brief explanation of why the information falls into the selected category. If information falls within 'other' the NSP will need to provide further details on why the information should be treated as confidential
- reasons supporting how and why detriment may be caused from information disclosure
- any reasons the NSP wishes to provide about public benefit considerations (especially public benefits such as the effect on the long term interests of consumers).

In addition to the above, we propose the guideline require NSPs to:

³² NEL, s.28ZB.
³³ NEL, s.28Y(c).

- in confidential versions of documents, highlight the information claimed to be confidential in yellow shading
- provide a public version of the documents which contain confidential information. The public version must clearly identify the information the NSP wants to protect. It must redact or 'black out' that information. Public versions would need to retain the same formatting and page numbers as the confidential version. Apart from the redacted information, the public version would need to be identical to the confidential version
- submit the completed confidentiality template in Microsoft Word format
- specify on electronic documents' filenames whether the document is "public" or "confidential".

Finally, we propose to publish completed confidentiality templates on our website as soon as possible after receipt.

7.1.2 Reasons for the proposed approach

Confidentiality template explained

The reasons for our proposed approach to each aspect of the confidentiality template are below.

Description & topic

Providing the title of the document containing confidential information will often be insufficient to allow stakeholders to understand the relevance of the information claimed to be confidential. Consumer representatives submitted the AER's proposed confidentiality template would be strengthened if it included a summary of the nature and materiality of information that a NSP has claimed as confidential.

Therefore we have proposed that the confidentiality template include the requirement that NSPs provide both a brief description of the information and identify the topic (ie WACC, opex, capex) to which the information relates. We consider this information would provide consumers with a better understanding of the nature of the information which NSPs are claiming confidentiality over, without revealing any confidential information. A description of the nature of the material claimed to be confidential is more likely to make the confidentiality claim's justification obvious. This may quickly allay any concerns from stakeholders that they are being denied access to vital information. In turn, it may reduce their desire to see the information.

Classifying confidentiality claim into relevant category & reasons for classification

As discussed in section 5 we have recognised a number of confidentiality categories including the category 'other'. We accept NSPs' submissions that using confidentiality categories will assist us:

- streamline the process for making confidentiality claims
- provide NSPs with guidance and clarity on the nature of information which could be considered confidential, thus reducing the number of unnecessary or excessive confidentiality claims
- alleviate the administrative burden on us in assessing confidentiality claims by identifying a basis for which confidentiality is being claimed, enabling us to easily assess whether the confidentiality claim is genuine and whether the information is of a nature that should be subject to public scrutiny

- retain the regulatory discretion to reject a claim for confidentiality, despite the information being within a recognised category.³⁴

As mentioned above, classifying information into a category does not mean it will be protected. We intend to take a case by case approach to determining whether we will protect or disclose information. This requires NSPs to provide reasons supporting why they consider the information falls within the specified confidentiality category.

Reasons for confidentiality claim

The confidentiality template we proposed in our issues paper included a requirement for NSPs to justify confidentiality claims.³⁵ We propose to maintain this requirement in our draft Confidentiality Guideline. This approach is consistent with the AEMC's position to improve transparency and accountability by requiring NSPs to nominate the reasons why it classifies material as confidential.³⁶

The majority of NSPs proposed that this requirement should be optional.³⁷ However, we consider it essential that NSPs tell us the reasons why they consider that information they have submitted to us, if disclosed, would cause them detriment. This information is essential to our task of assessing whether there is a genuine basis for a confidentiality claim and whether there is public benefit in disclosing the information.

Also, as the regulator, we have a different perspective from NSPs. As a result, it can sometimes be difficult for us to determine what detriment an NSP would incur if we disclosed certain information. Ultimately the NSP, as the information provider, is best placed to tell us how their interests would be adversely affected if certain information were made publicly available.

Furthermore, understanding the detriment a NSP would suffer from disclosure enables us to decide whether to proceed with formal powers. In most cases having these reasons would facilitate faster processing of the confidentiality claim.

NSPs submitted that they should only have to provide reasons where it was practically reasonable to do so.³⁸ They did not provide specific examples of where this might occur. We are unaware of any circumstances where it would be impractical for an NSP to provide reasons explaining why it considers information it is providing is confidential. Therefore, we do not accept the proposal.

Identify whether detriment is outweighed by the public benefit in disclosure

In our issues paper we proposed that in addition to identifying detriment NSPs must also specify that this detriment is not outweighed by the public benefit in disclosing the information. NSPs submitted that the legal obligation under the NEL to undertake an assessment of whether disclosure of the information is or is not outweighed by the public benefit in disclosure is upon the AER and should not be a requirement placed on NSPs.

In consultations with NSPs they suggested that public benefit could be very broad. It might include various public policy considerations beyond their expertise in providing network services. That was

³⁴ ENA, submission in response to the AER issues paper, May 2013, p. 12; Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 4; Ergon Energy Corporation Limited, submission in response to the AER issues paper, 14 May 2013, p. 3.

³⁵ AER, Better Regulation, Distribution and transmission Confidentiality Guidelines - Issues paper, Attachment 1 p.23.

³⁶ AEMC, Final rule determination, 29 November 2012, p.xi.

³⁷ ENA, submission in response to the AER issues paper, May 2013, p. 6.

³⁸ ENA, submission in response to the AER issues paper, May 2013, p. 6.

not our intention. Rather, we intended to give NSPs the opportunity to comment on a consideration that is important to our determining whether to use our formal information disclosure powers.

Given NSPs' concerns we propose not to require them to address the public benefit as part of the confidentiality template. However, we are keen to take into account where disclosure might have impacts on public benefit considerations. We would be interested if NSPs have a view about such matters. For example, if a NSP considers disclosure is likely to result in higher prices for consumers, this is an issue that we would like to know about. Also, we are keen to know about any steps a NSP has taken during stage one that ensure all stakeholders or particular stakeholders already have access to sufficient information to enable them to understand and assess the substance of all issues affecting their interests. Therefore, we encourage NSPs to address these types of public benefits in their reasons for confidentiality claims.

Public version of the document

We maintain the position we took in our issues paper. We propose to require NSPs to provide a public version of each document which they claim contains confidential information, even if fully redacted. In our experience, very few documents contain solely confidential information. The majority of documents will contain a mix of confidential and non-confidential information and often the confidential information is in small parts. Therefore, that which can be disclosed, should be. We acknowledge, wholly redacted documents would be undesirable. But we consider our approach will focus NSPs' minds on whether such an extensive redaction is necessary.

For these reasons, we disagree with NSP submissions that the guideline should not require public versions of all documents.

Publishing the completed confidentiality template on the AER website

We propose to publish all confidentiality templates on our website as soon as possible after we receive them. The confidentiality template itself should not contain any confidential information. At most, it should contain a description of confidential information. Also, we generally consider it appropriate for NSPs to justify confidentiality claims. There are legitimate reasons for confidentiality claims. However, to ensure transparency and confidence in the decision making process, it is necessary for all stakeholders to be aware of information they cannot access and the reasons why.

We consider that publishing the confidentiality template would allow stakeholders to understand what information is being withheld from them and why the NSP seeks to withhold this information. We also consider publishing the confidentiality template may improve relations between stakeholders. During consultations, we observed substantial distrust between NSPs and other stakeholders on confidentiality issues. It is likely that the majority of the information described in the confidentiality templates will be uncontroversial. However, at present, many stakeholders do not understand what information is being withheld from them or why. As a result, they believe the worst—that information key to determining network prices is being withheld and that they are adversely affected as a result. Publishing the template may help change this. It may show that much confidential information really does not affect the substance of issues relevant to stakeholders.

Also, publishing the confidentiality template gives stakeholders the opportunity to identify specific information they consider should be disclosed/accessed. Furthermore, the knowledge that a NSP's confidentiality template will be public creates incentives to minimise claims to those that are really necessary and provide quality justifications.

Requirement to complete the confidentiality template

We propose to require NSPs to submit a confidentiality template together with each Regulatory Proposal.

We consider the confidentiality template makes NSPs accountable for their confidentiality claims. It requires NSPs to provide clear and logical reasons as to why we should protect information. This type of reasoning will assist the AER in determining whether it should protect or disclose information. We also consider the confidentiality template will help us to strike the right balance between protecting confidential information, while maximising stakeholder ability to scrutinise Regulatory Proposals.

As mentioned above, the Confidentiality Guideline is binding. Therefore, all Regulatory Proposals must comply with the Confidentiality Guideline. If not, we may require a NSP to resubmit its proposal, in compliance with the Confidentiality Guideline.³⁹

NSW DNSPs submitted that the above approach suggests compliance with the guideline will be relevant to the AER's assessment of whether a Regulatory Proposal is compliant.⁴⁰ NSW DNSPs consider this is beyond the proper scope of the guideline and is not what the AEMC intended when it included the guideline in the NER. Further, they consider this does not align with the policy intent for establishing the guideline. Rather, in their view, the Confidentiality Guideline should provide for a sound practice of claiming confidentiality, which focuses on the nature of information under consideration and aligns with the statutory framework for confidentiality.

We disagree with the NSW DNSPs submission. Compliance with the Confidentiality Guideline will be relevant to our assessment of whether a Regulatory Proposal is compliant. We consider the AEMC did intend this outcome when it decided that the Confidentiality Guideline would be the only new guideline that is binding on us and NSPs. This unique aspect of the Confidentiality Guideline indicates the AEMC intended the Confidentiality Guideline to be enforceable. Resubmission is the mechanism that achieves this outcome.

7.2 Information disclosure powers

While not a requirement of the Confidentiality Guideline, it is appropriate that we provide some guidance on our approach to using our information disclosure powers.

7.2.1 Proposed approach

Our preference is to resolve as many confidentiality issues in stage one as possible. Where we are unable to reach agreement during pre-lodgement discussions, we will use our information disclosure powers under the NEL as appropriate. Of the various information disclosure powers we have, we most often use the power in section 28ZB of the NEL. It provides a test for determining whether to protect or disclose information (28ZB Test). It requires that, before disclosing information, we must decide whether:

- disclosing the information would cause detriment to the person who has given it to us or to the person from whom that person received it; or
- that, although the disclosure of the information would cause detriment to such a person, the public benefit in disclosing it outweighs that detriment.

³⁹ NER, cl.6.9.1(a) & cl.6A.11.1(a)(8).

⁴⁰ NSW DNSP's submission in response to the AER issues paper, 10 May 2013, p. 7.

We also propose to make greater use of our ability to disclose information for the purposes of according natural justice to a person affected by a decision of the AER.⁴¹ This would involve limited information disclosure subject to a confidentiality undertaking. Having a confidentiality undertaking as a condition for disclosure would give NSPs a remedy for any breach of that undertaking. We propose that disclosure under a confidentiality undertaking involve the following steps:

- As soon as possible after receiving a Regulatory Proposal, we upload the NSP's completed confidentiality template to our website.
- A stakeholder that wants access to confidential information would apply to us. For us to consider the application, the stakeholder would need to provide a signed template confidentiality undertaking.⁴² We require signed undertakings from both the organisation and the individuals representing it who want access to the confidential information. The undertakings must specify the information sought. The undertakings would be both to the AER and the NSP. We would also require the organisation seeking access to provide a covering note explaining why it wants to access the information.
- The AER would forward the signed undertaking and covering note to the NSP and seek its views.
- We would consider the application and any NSP views and decide whether or not to grant access to all or some of the confidential information requested.

We propose to assess each confidentiality claim on a case by case basis. Where we agree with the claim, we would protect the information. Where we disagree, we would examine the claim against our information disclosure powers. Also, in determining whether to use our information disclosure powers, we propose to look beyond the content of the information. Specifically, we propose to take into account:

- how the information claimed to be confidential could affect the interests of the stakeholder seeking access
- whether the substance of the issue the information relates to is already in the public domain
- whether the NSP has offered other stakeholders reasonable methods for accessing the information
- if the NSP objects to disclosure, its reasons
- whether, in the past, other NSPs have claimed confidentiality over or publicly disclosed the same type of information.

Stakeholders, whose submissions include information obtained under a confidentiality undertaking, must provide a public and confidential version of the submission. Stakeholders must also:

- in the confidential version, highlight the information obtained under the undertaking in yellow shading
- in the public version, redact or 'black out' the information obtained under the undertaking.

We will protect the confidential version of such submissions.

⁴¹ NEL, s.28Y(c).

⁴² Attachment 4 includes our proposed template undertaking. It is based upon that applying to Consumer Challenge Panel members.

7.2.2 Reasons for our proposed approach

As mentioned in our overall policy position, our preference is to resolve all or many confidentiality issues in stage one. However, our ability to continue to use information disclosure powers is also necessary, as a backstop. Our information disclosure powers provide incentives for stakeholders to reach agreement and develop their own methods for sharing information. We consider our proposed approach provides a balanced incentive for all parties to act reasonably in trying to reach agreement, minimising the need for us to use our powers.

Submissions from NSPs and other stakeholders were supportive of our using our information disclosure powers sparingly. They also supported limited disclosure of confidential information subject to a confidentiality undertaking, even as a second best option. NSPs wanted such disclosure to be at their discretion. Consumer stakeholders shared previous experiences of access being subject to conditions too onerous to enable them to make submissions. We consider our proposed approach balances these concerns. Specifically, we consider it:

- provides timely access to sufficient information for stakeholders to understand and assess the substance of all issues affecting their interests
- offers adequate protection and enforcement mechanisms to NSPs.

8 Other issues

8.1 Proportion of confidential material notice

The AEMC amended the NER to require us to publish a notice setting out the proportion of material in NSP Regulatory Proposals that is subject to a claim of confidentiality compared to that which is not.⁴³

In our issues paper, we proposed a template notice contained in Attachment 2. This template was consistent with the AEMC's views.⁴⁴

8.1.1 Proposed approach

While not a requirement of the Confidentiality Guideline, we propose to deal with the proportion of confidential material notice together with the Confidentiality Guideline. The notice would be a separate requirement to complying with the Confidentiality Guideline. Our proposed approach requires NSPs to specify the number of pages in its submission which contain a confidentiality claim and the number of pages which do not.

When publishing the notice, we propose to include a note stating:

"This notice is an approximate indication of the proportion and comparative proportion of material in the NSP's proposal that is subject to a claim of confidentiality compared to that which is not."

8.1.2 Reasons for proposed approach

As submitted in our issues paper, we must publish a notice on our website that sets out the proportion of material in NSP Regulatory Proposals that is subject to a claim of confidentiality compared to that which is not.⁴⁵ In our issues paper we proposed to require NSPs to complete the table in Attachment 2. Attachment 2 required NSPs to specify the number of pages it submits which contain information it claims to be confidential and the number of pages of its submission which do not contain such information.

NSPs submitted that the requirement to determine the proportion of confidential information in Regulatory Proposals is an obligation on the AER.⁴⁶ Also, the ENA submitted that identifying the number of pages of a Regulatory Proposal that contain one or more pieces of information does not necessarily reflect the degree that confidentiality claims might inhibit stakeholder understanding of that Regulatory Proposal. The ENA also submitted that if the AER were to choose to discharge this obligation by a page count, the AER should provide a clear statement about the limitations of interpreting the information or undertaking any direct comparisons between NSPs based upon it.⁴⁷

We acknowledge that the relevant NER obligation is on us. However, we consider NSPs are better placed to provide us with this information as part of their pre-lodgement preparations. For us to undertake this task we would need to divert resources from analysing proposals that are subject to tight timeframes. We consider our proposed method of measuring the proportion of confidential to non-confidential information as imperfect, but quick and simple to apply. We accept this method may not present the most accurate picture of precisely how much information a NSP is claiming

⁴³ NER, cl.6.9.2A(b) & cl.6A.11.2A(b).

⁴⁴ AEMC, Final determination, p. 173

⁴⁵ NER, cl.6.9.2A(b) & cl.6A.11.2A(b).

⁴⁶ ENA, submission in response to the AER issues paper, May 2013, p. 13.

⁴⁷ ENA, submission in response to the AER issues paper, May 2013, p. 13.

confidentiality over and would welcome suggestions from stakeholders on alternative methods. However, it is a practical option that we propose to pursue.

Therefore we require NSPs to complete the proportion of confidential material notice when submitting their Regulatory Proposals. If necessary, we propose to use our formal information acquisition powers to obtain this information. Provided we use the page count method, we also propose to provide a clear statement alongside the notice about the limitations of this information.

8.2 Compliance costs

8.2.1 Proposed approach

We consider that our revised stage one and stage two processes will limit compliance costs on NSPs.

8.2.2 Reasons for proposed approach

Our proposed revised stage two processes will minimise administrative costs to NSPs whilst ensuring the appropriate balance between protecting confidential information and the public disclosure of information. Specifically, including confidentiality categories and making the requirement to address public benefit optional will reduce the administrative burden on NSPs by reducing the time spent associated with making a confidentiality claim. We also consider that the focus on stage one processes which take place before NSPs have submitted their Regulatory Proposal is likely to reduce the amount of information NSPs will need to claim confidentiality over.

8.3 Other issues raised in submissions

Table 8.1 outlines other issues raised by stakeholders in submissions on the Confidentiality Guideline issues paper.

Table 8.1 Other issues raised in submissions on the issues paper

Issue	Submission	Our response
Legal Framework	ENA submitted that imposing compulsory requirements to the manner in which confidentiality may be claimed conflicts with the confidentiality framework, including the right to provide information on an in-confidence basis. ⁴⁸	We disagree with these submissions and consider that the Confidentiality Guideline does not conflict with the confidentiality framework. We acknowledge that NSPs are entitled to submit information to us on an in confidence basis. As we said in our issues paper, we are committed to treating confidential information responsibly and in accordance with the law. Our aim is to strike a balance between protecting certain information because of its sensitive nature and the need to disclose information for an open and transparent regulatory decision-making process.
	The NSW DNSPs made a similar submission, that our issues paper indicated a presumption in favour of disclosing information identified as confidential, unless a NSP's confidentiality claim establishes detriment in accordance with the public benefit interest test under section 28ZB of the NEL. ⁴⁹	The aim of the confidentiality template is to provide a streamlined process on the manner in which NSPs are to make confidentiality claims. This is clearly within our power under the new rules. Also, the framework does not provide unconditional protection for information provided

⁴⁸ ENA, submission in response to the AER issues paper, May 2013, p. 3.

⁴⁹ NSW DNSP's submission in response to the AER issues paper, 10 May 2013, p. 3

in confidence. It provides protection from unauthorised disclosure. All of the disclosures the AER has mentioned in the Confidentiality Guideline and Explanatory Statement fall under the express authorisations in the *Competition and Consumer Act 2010* and the NEL.

AER Annual Report	Jemena submitted that we report annually on unauthorised disclosures of confidential information. It considers that such reporting would represent best practice regulation. ⁵⁰	We consider this submission falls outside the scope of the Confidentiality Guideline. But, the AER is considering this as part of its broader reporting.
Section 1317AE <i>Corporations Act 2001</i>	Aurora submitted that applying the confidentiality guideline contradicts the confidentiality requirements placed on companies, company officers, employees and auditors under section 1317AE of the <i>Corporations Act 2001</i> . ⁵¹	We have reviewed these provisions, which mainly relate to protecting corporate whistle-blowers. It is unlikely that NSP Regulatory Proposals would include information indicating that a NSP has or may have breached the <i>Corporations Act 2001</i> . Therefore we consider it unlikely that the Confidentiality Guideline will contradict confidentiality requirements under section 1317E of the <i>Corporations Act 2001</i> .
Timeline/key milestones	Ethnic Communities and SSROC submitted that the confidentiality guideline should include key milestones and a timeline for assessing confidentiality claims. ⁵²	Where we are required to use our information disclosure powers, the timelines of disclosure depends on the amount of information we are seeking to disclose. As a result we are unable to provide precise timelines. However, we consider our stage one and two processes will assist all stakeholders to access information in a timely fashion.
ENA enhanced approach towards information handling processes.	<p>ENA proposed an enhanced information handling process, which largely builds on the AER's existing process.</p> <p>Stage 1: NSP makes a claim of confidentiality (using the confidentiality template).</p> <p>Stage 2: the AER assesses the NSP's claim of confidentiality.</p> <p>Step 3: AER enters into informal discussions with the NSP.</p> <p>Step 4: AER moves to formal processes.⁵³</p> <p>ENA submitted that the above processes will place the AER in a better position to strike an appropriate balance between protecting information and disclosing it. ENA also submitted that its proposed process places greater emphasis on the AER and NSP working collaboratively together to resolve information protection and disclosure issues.⁵⁴</p>	We disagree with the ENA's enhanced information handling process. Entering pre-lodgement discussions with a NSP after it has made a confidentiality claim is too late. In submissions and consultations, NSPs said that their preference is to work collaboratively with us to determine whether information should be protected or disclosed. We consider that our proposed two stage process, which commences before a NSP submits information, will resolve issues earlier and minimises the need for us to use our information disclosure powers.
Interpretation of 'detriment' and	COSBOA submitted that it might be worth the AER considering setting out in its guideline how it will	We have provided guidance in this Explanatory Statement as to the types of information we

⁵⁰ Jemena Limited, submission in response to the AER issues paper, 14 May 2013, p. 3.

⁵¹ Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 1.

⁵² Ethnic Communities, submission in response to the AER issues paper, 10 May 2013, p. 2; SSROC submission in response to the AER issues paper, 14 May 2013, p. 2.

⁵³ ENA, submission in response to the AER issues paper, May 2013, p. 8.

⁵⁴ ENA, submission in response to the AER issues paper, May 2013, p. 8.

'public benefits'	interpret the words 'detriment' and 'public benefits' for the purposes of administering this test. ⁵⁵	propose to disclose. We have also specified the categories into which NSPs must classify claims for confidentiality. We consider that this provides sufficient insight into what we consider are key detriments and public benefits when exercising our information disclosure powers.
Place weight on confidential information	Ethnic Communities and SSROC submitted that we should place less weight on confidential information. ⁵⁶	Under the NER we are not permitted to place less weight on confidential information provided in relation to a Regulatory Proposal. We can, however, give less weight to confidential information in submissions. ⁵⁷ The AER may take this approach where submissions make confidentiality claims in a manner different from that set out in the Confidentiality Guideline.
Financial impact	Aurora submitted that we have not indicated our interest in understanding and assessing the financial and other impacts the confidentiality guideline would have on stakeholders. ⁵⁸	We consider that our revised two stage processes minimise any compliance or administrative costs that stakeholders may incur.
Materiality of information	Ethnic Communities, SSROC and MEU submitted that the confidentiality template should indicate the materiality of information for which confidentiality is being claimed. ⁵⁹	We acknowledge that the materiality of information would assist stakeholders to determine whether they want to access the confidential information. However, practically it would be difficult to implement this requirement. We consider the requirement to describe the confidential information and to specify the topic it relates to is sufficient to assist stakeholders identify information that they want to access.

⁵⁵ COSBOA, submission in response to the AER issues paper, June 2013, p. 3.

⁵⁶ Aurora Energy, submission in response to the AER issues paper, 10 May 2013, p. 2.

⁵⁷ NER cl. 6.14(e) & cl.6A.16(e).

⁵⁸ Ethnic Communities, submission in response to the AER issues paper, 10 May 2013, p. 2; SSROC submission in response to the AER issues paper, 14 May 2013, p. 2.

⁵⁹ Ethnic Communities, submission in response to the AER issues paper, 10 May 2013, p. 2; SSROC submission in response to the AER issues paper, 14 May 2013, p. 2 and Major Energy Users Inc, submission on the AER issues paper, May 2010, p. 8.

9 Next Steps

We consider that the best approach going forward is to focus on developing the stage one processes. Specifically, the mechanism that NSPs and stakeholders can put in place to minimise the need for us to use our information disclosure powers.

Discussions between now and the final Confidentiality Guideline should focus on developing a shared practical understanding of options NSPs and other stakeholders can implement to make stage one work best. This includes developing a more comprehensive list of information we consider should be disclosed and an equivalent indicative list of information we should protect.

We intend our consultations in the lead up to the final Confidentiality Guideline and its Explanatory Statement to focus on these areas. However, we are also open to receiving submissions on any other issues stakeholders wish to discuss.

Table 9.1 sets out our proposed timeline for completing the Confidentiality Guideline.

Table 9.1 **Timeline for Confidentiality Guideline development**

Date	Topic	Description
18 March	Issues paper published	Explain issues and preliminary thoughts on approach to the distribution and Confidentiality Guideline. Invitations for written submissions.
4 April	1st working group meeting	Discussion on aspects of the issues paper
14 May	Submissions on issues paper close	Formal response to issues paper as well as anything discussed during meetings close.
9 August	Draft Confidentiality Guideline published	The AER's draft Confidentiality Guideline and accompanying Explanatory Statement published.
Late August	2nd working group meeting	Discussion on aspects of the draft Confidentiality Guideline and accompanying Explanatory Statement published.
20 September	Submissions on draft Confidentiality Guideline due	Formal response to draft Confidentiality Guideline close.
29 November	Publish final Confidentiality Guideline	Final Confidentiality Guideline published along with any supporting material.

Attachment 1- Confidentiality template

Title, page and paragraph number of document containing confidential information.	Description of the confidential information.	Topic the confidential information relates to (e.g. capex, opex, WACC etc.)	Identify the recognised confidentiality category that the information falls within.	Provide a brief explanation of why the information falls into the selected category. If information falls within 'other' please provide further details on why the information should be treated as confidential.	Specify reasons supporting how and why detriment may be caused from disclosing the identified information.	Provide any reasons supporting why the identified detriment is not outweighed by the public benefit (especially public benefits such as the effect on the long term interests of consumers).

Attachment 2 - Proportion of confidential material

Portion of material submitted that is subject to any confidentiality claim compared to that which is not subject to any such claim.

Submission Title	Number of pages of submission that include information subject to a claim of confidentiality	Number of pages of submission that do not include information subject to a claim of confidentiality	Total number of pages of submission	Percentage of pages of submission that include information subject to a claim of confidentiality	Percentage of pages of submission that do not include information subject to a claim of confidentiality

Note: This notice is an approximate indication of the proportion and comparative proportion of material in the NSP's proposal that is subject to a claim of confidentiality compared to that which is not.

Attachment 3 - List of documents for public disclosure

As mentioned in section 5.2.1 this attachment lists documents that generally should be in the public domain. As a result, we consider limited redactions are the most appropriate way of striking a balance between protection and disclosure of these documents.

Examples listed below relate to the AER's most recent electricity and gas distribution reviews for regulatory proposals by Aurora Energy in 2011 and the Victorian gas businesses in 2012, respectively.⁶⁰

Document type	Description and examples
Consultant reports	<p>A report provided by a third party engaged by the NSP to provide advice on a particular aspect of the NSP's regulatory proposal. This would also include Auditor reports. For example:</p> <ul style="list-style-type: none"> ▪ Demand forecasting methodologies and load forecasts ▪ Material and Labour cost escalation methodologies and forecasts ▪ Audit reports on regulatory models ▪ Benchmarking studies.
Asset management plans	<p>These are the plans for planning and managing the NSP's network and the development of the forecast capital and operating expenditure proposal. These plans would include long term network development, asset planning, asset management and network maintenance. For example:</p> <ul style="list-style-type: none"> ▪ Aurora Energy's Management Plan 2011, which includes system operations, reliability power quality, demand management, connections, metering, public lighting and vegetation management⁶¹; ▪ Envestra's Victorian and NSW Asset Management Plan, which includes plans regarding asset performance, network management and asset life cycles.⁶²
Business cases for proposed projects	<p>These are the documents that sit under the asset and management plans that set out the justification and recommendation for a specific project that makes up part of the regulatory proposal.</p> <p>A business case typically provides for the following:</p> <ul style="list-style-type: none"> ▪ Identification of the need for the project ▪ Detailed outline of the proposal

⁶⁰ The material published by the AER for Aurora Energy can be found at <http://www.aer.gov.au/node/182>.

The material for the Victorian gas businesses can be found at:

<http://www.aer.gov.au/node/13556> (APA GasNet)

<http://www.aer.gov.au/node/14473> (Envestra Victoria)

<http://www.aer.gov.au/node/4799> (Multinet Gas)

<http://www.aer.gov.au/node/4810> (SP AusNet).

⁶¹ <http://www.aer.gov.au/sites/default/files/AE024%20-%20Management%20Plan%202011%20-%20Protection%20and%20Control.pdf>

⁶² <http://www.aer.gov.au/node/14473>

- A cost benefit analysis, including:
 - Benefits of the proposed approach
 - Evaluation of the alternatives
 - Costs of the selected approach and considered alternatives, including a risk assessment
- Plans for the effective delivery of the project.

An example of this is APA GasNet's Augmentation Business Case for the Gas to Culcairn Project (Attachment C-4, BC 083).⁶³

Financial models including underlying assumptions	<p>These are the models used to derive the outputs that underlie the regulatory proposal. They include the models:</p> <ul style="list-style-type: none"> ▪ used by the AER, such as the roll forward and post-tax revenue models ▪ developed by the NSPs to support proposed capital and operating expenditure for standard control services ▪ for alternative control services, such as fee based services, metering and public lighting. <p>An example of this is Aurora Energy's Public Lighting Annuity Model v.2.⁶⁴</p>
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Forecast and actual expenditure (including by category)	<p>This relates to actual, estimated and forecast operating and capital expenditure values which may be aggregated and disaggregated into the NSP's individual work categories (e.g. growth, reinforcement or replacement related capital expenditure).</p> <p>An example of this is Aurora Energy's RIN Response Part A (General)⁶⁵, Part B (Capital Expenditure)⁶⁶ and Part C (Operating and Maintenance Expenditure)⁶⁷.</p>
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Financial statements	<p>Financial statements of the NSP, including profit and loss and balance sheet.</p> <p>NSP's should provide financial information in their annual reporting RINs issued by the AER, in addition to their obligations under the <i>Corporations Act 2001</i> and the Australian Stock Exchange rules, where applicable.</p>
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Changes in provisions	<p>Provisions are a liability of an amount, the timing of which is uncertain. Provisions may include:</p> <ul style="list-style-type: none"> ▪ annual and long service leave ▪ superannuation ▪ workers compensation claims ▪ taxes, such as income and payroll tax. <p>Changes in provisions represent actual expenditure. A request for this information (i.e. the annual amount in the movement in provisions) is often included in the AER's RIN and accompanying template. This may also</p>
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⁶³ <http://www.aer.gov.au/sites/default/files/BC175-Gas%20to%20Culcairn%20Project%20Redacted.pdf>
⁶⁴ <http://www.aer.gov.au/node/182>
⁶⁵ <http://www.aer.gov.au/sites/default/files/RIN%20Response%20Part%20A%20-%20General.pdf>
⁶⁶ <http://www.aer.gov.au/sites/default/files/RIN%20Response%20Part%20B%20-%20Capital%20Expenditure.pdf>
⁶⁷ <http://www.aer.gov.au/sites/default/files/RIN%20Response%20Part%20C%20-%20Operating%20and%20Maintenance%20Expenditure.pdf>

include actuarial reports that form the basis for movements in provisions.

An example of this is Aurora Energy's RIN Response Part C (Operating and Maintenance Expenditure), section 14.

<p>Efficiency benefit sharing scheme data (EBSS)</p>	<p>This is usually a copy of the EBSS model calculating the proposed carryover amount.</p> <p>This would include an explanation of all cost categories proposed to be excluded from the scheme (i.e. why it is uncontrollable)</p> <p>An example of this is, Aurora Energy's Regulatory Proposal 2012-2017, Chapter 24.⁶⁸</p>
<p>Demand management incentive scheme data</p>	<p>This data is reported annually to the AER for ex-post approval as required by the scheme.⁶⁹</p>
<p>Network performance data</p>	<p>This covers data relating to network System Average Interruption Duration Index, System Average Interruption Frequency Index and Momentary Average Interruption Frequency Index measures, outages information and customer service parameters.</p> <p>An example of this is Aurora Energy's Attachments to the RIN response Part 3 STPIS data, including category target modelling by kVA, category target modelling by customer, all outage data MED calculations and STPIS customer targets and expected growth in NMI's and kVA connected.⁷⁰</p>
<p>Network metrics</p>	<p>Physical description of the network such as:</p> <ul style="list-style-type: none"> ▪ line length ▪ number of customers ▪ number of substations. <p>An example of this is Aurora Energy's Attachments to the RIN response Part 3 Demand & customer number forecasts.⁷¹</p>
<p>Network demand</p>	<p>This includes:</p> <ul style="list-style-type: none"> ▪ a description of the methodology used to prepare forecasts of maximum demand, energy and customer numbers ▪ the expected forecasts of demand for the whole of the network, and more detailed breakdowns, including peak demand forecasts by zone. <p>An example of this is Aurora Energy's Attachments to the RIN response Part 3 Demand & customer number forecasts.</p>

⁶⁸ <http://www.aer.gov.au/sites/default/files/Aurora%20Energy%20Regulatory%20Proposal%202012%20C3%A2%E2%82%AC%E2%80%9C2017.pdf>

⁶⁹ Examples of the scheme data can be found on the AER's website at: <http://www.aer.gov.au/node/484>

⁷⁰ <http://www.aer.gov.au/node/182>

⁷¹ <http://www.aer.gov.au/sites/default/files/Attachments%20to%20RIN%20response%20Part%203%20Demand%20and%20customer%20number%20forecasts-%20RIN%20response%20Substation%20parameters.pdf>

Asset installation data and commentary that explains data or a NSP's position and justification for its expenditure proposal.

Details of proposed capital works, including scope, justification, non-network alternatives and forecast expenditure.

For example, see Aurora Energy's:

- RIN response Part B – Capital Expenditure;⁷²
 - Attachments to the RIN response Part 1 Capital expenditure;⁷³
 - Attachments to the RIN response Part 2 Capex.⁷⁴
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⁷² <http://www.aer.gov.au/sites/default/files/RIN%20Response%20Part%20B%20-%20Capital%20Expenditure.pdf>

⁷³ <http://www.aer.gov.au/node/182>

⁷⁴ <http://www.aer.gov.au/node/182>

Attachment 4 - Confidentiality undertaking

For organisations

I [NAME].....on behalf of

[ORGANISATION NAME]

[ORGANISATION ADDRESS]

(a) acknowledge that all information provided to [ORGANISATION NAME] by the Australian Energy Regulator ('the AER') pursuant to section 28Y of the National Electricity Law or section 326 of the National Gas Law ('the Information') was provided by the AER in confidence;

(b) undertake to the AER and to [NSP NAME] :

(i) that [ORGANISATION NAME] will use the Information only for the purposes of producing and providing submissions to the AER regarding distribution determinations, transmission determinations or access arrangements as defined in the National Electricity Law and National Gas Law;

and

(ii) that [ORGANISATION NAME] will not to disclose, publish or communicate to any person other than the AER or otherwise make public, either directly or indirectly:

(1) the Information as provided by the AER;

(2) the Information as incorporated in [ORGANISATION NAME] submissions as permitted under subclause (b)(i) above; or

(3) any data analysis or other work undertaken by [ORGANISATION NAME] from which the Information can be identified or derived,

except with the prior written approval of the AER.

(c) To avoid doubt, this undertaking does not prevent [ORGANISATION NAME] from disclosing, publishing or communicating its submissions provided that the Information is redacted from such submissions.

Executed as a Deed Poll:

Signed, Sealed and Delivered by:

Name.....

Signature.....

Date..... as duly authorised representative of [ORGANISATION NAME]

For individuals

I [NAME]..... of

[ORGANISATION NAME]

[ORGANISATION ADDRESS]

(a) acknowledge that all information provided by the Australian Energy Regulator ('the AER') pursuant to section 28Y of the National Electricity Law or section 326 of the National Gas Law ('the Information') was provided by the AER in confidence;

(b) undertake to the AER and to [NSP NAME] :

(i) to use the Information only for the purposes of producing and providing submissions to the AER regarding distribution determinations, transmission determinations or access arrangements as defined in the National Electricity Law and National Gas Law;

and

(ii) not to disclose, publish or communicate to any person other than the AER or otherwise make public, either directly or indirectly:

(1) the Information as provided by the AER;

(2) the Information as incorporated in [ORGANISATION NAME] submissions as permitted under subclause (b)(i) above; or

(3) any data analysis or other work undertaken by [ORGANISATION NAME] from which the Information can be identified or derived,

except with the prior written approval of the AER.

(c) To avoid doubt, this undertaking does not prevent [ORGANISATION NAME] from disclosing, publishing or communicating its submissions provided that the Information is redacted from such submissions.

Executed as a Deed Poll:

Signed, Sealed and Delivered by:

Name.....

Signature.....

Date.....

Attachment 5 - Summary of submissions

Issue	Stakeholder	Summary
Attachment 1	ENA	Did not support the AER's proposed Attachment 1 and proposed a revised Attachment 1.
	Jemena	Supports ENA's proposed Attachment 1. Submitted that this Attachment 1 would provide stakeholders with additional clarity regarding the type of information for which confidentiality claims are normally approved.
	SP AusNet	Supports ENA's proposed Attachment 1.
	ActewAGL	Supports ENA's proposed Attachment 1. Submitted that the assessment of public benefit versus detriment should not be a prerequisite to compliance.
	APA Group	Submitted they would prefer to follow their existing confidentiality claim procedure.
	Aurora	Supports the AER's Attachment 1. Submitted that the requirement to use the Attachment 1 for all confidential information would be onerous.
	NSW DNSPs	Supports ENA's proposed Attachment 1. Concerned that the AER's Attachment 1 does not align with statutory framework.
	Energex	Supports ENA's proposed Attachment 1. Did not agree with the AER's proposal to reject confidentiality claims based on non-compliance with the Attachment 1.
	Ergon Energy	Supports ENA's proposed Attachment 1. Did not agree with the AER's requirement for NSPs to prove detriment against public benefit.
	Ethnic Communities & MEU	Supports the AER's Attachment 1. Requested that the Attachment 1 summarise the nature of the confidential information and the materiality of the information to the pricing decision
Confidentiality categories	SSROC	Submitted that the onus should be on the NSP to make a full case for non-disclosure. Requested that the AER's Attachment 1 summarise the nature of the confidential information and its materiality to the pricing decision. The default position should be that the public benefit outweighs the detriment to a NSP unless the NSP puts forward a strong case to the AER.
	EUAA, Darach Consulting & COSBOA	Supports the AER's Attachment 1.
	ENA, Jemena, SP AusNet, ActewAGL & NSW DNSPs	Do not support the AER's proposed position. Noted that the use of categories would reduce the administrative burden on the AER and would guide NSPs as to when the AER would generally keep information confidential. Submitted that categories should not be exhaustive and NSPs should be allowed to make a claim regardless of whether information falls within a category.
	ActewAGL	Supports ENA's list of categories. Proposed to add another

		category titled 'details of competitive tender processes'.
	APA Group & COSBOA	Supports the AER's position.
	Aurora	Supports the use of categories.
	Ergon Energy	Supports ENA's submission. Submitted that rejection or acceptance of a claim should be based on the content of the document, not the type. Categories should not be exhaustive.
	Ethnic Communities	Submitted that categories should not be a substitute for a fully justified confidentiality claim. Noted that several of the AER's categories are too broad. Requested that the 'market sensitive cost input' category not include supplier-related information because the utility has chosen to make confidentiality a general condition of its tendering contracting approach.
	MEU	Supports the AER's position. Confidentiality claims should be minimised to ensure that information about unregulated revenue from shared assets, the tender process and contracts for outsourced work is disclosed to consumers.
	SSROC	Submitted that categories should be specific and should not act as a substitute for a fully justified confidentiality claim.
	Etrog Consulting	Submitted that category 2 is too broad and could result in fundamental data items being taken as data that would enhance a competitor's ability to compete against a NSP for the provision of a very wide range of services.
	Darach Consulting	Submitted that the AER's categories are too broad.
Items we should protect	ENA, Ergon Energy, SP AusNet	Requested that three additional categories be included in the AER's list. Confidential contractual terms, information provided by a third party on a contractual basis, and the proprietary information of a NSP or a third party. If these three categories are not included in the AER's list, then the AER should provide the ENA with reasons why.
	ActewAGL	Concerned about the development of a definitive list. Any list should be considered as a guide only.
	APA Group	Supports the AER's list. Proposed to also include information related to a particular or prospective user's energy usage and information covered by confidentiality clauses under contract.
	Aurora	Proposed additional categories including detailed information about assets, information that may compromise the security of the network, or a third party, information about a third party contract, arrangement business, intellectual property created by, or belonging to, a NSP or third party, and working documents. Supportive of needing consent to disclose information.
	NSW DNSPs	Supports ENA's submission. Requested that if the AER decides not to include these categories then it should articulate why ENA's categories do not constitute a legitimate basis for claiming confidentiality.
	Jemena	Supports ENA's submission. Requested that the list include

		a category labelled 'Other'.
	MEU	Submitted that the list of protected information should be definitive.
	SSROC	Submitted that some of the AER's categories are too broad. Suggested that the guideline make clear to NSPs that the general conditions of tendering, contracting, sub-contracting, outsourcing and other commercial arrangements may need revision with respect to confidentiality.
	Darach Consulting	Supports the AER's list. Suggested that the default position be that all information is non-confidential, with the NSP being required to substantiate detriment.
	COSBOA	Supports the AER's list. Suggested that the following information be listed as disclosable; information relating to return of and return on capital, data relating to benchmarking future capex and opex, capital efficiency sharing scheme data, and capitalisation policies.
Items we should disclose	ENA, NSW DNSPs, Ergon Energy, SP AusNet	Submitted that the AER's focus should be on the content and meaning of the information.
	ActewAGL	Submitted that the AER should assess each claim on a case by case basis to take into account each NSP's individual circumstances.
	Jemena	Submitted that the AER should retain flexibility when using formal disclosure powers.
	Ethnic Communities	Agreed with the AER's approach. Submitted that the disclosure of financial models should include the underlying assumptions on which the models are based.
	MEU	Requested that additional items be disclosed along with the proposed items listed by the AER. These items include related party transactions and arrangements, demand management projects and arrangements, non-regulatory activities, and information on data acquired for benchmarking.
	SSROC	Submitted that specific items that should be disclosed include financial modelling assumptions, street lighting maintenance data, related party transactions, and non-regulated activities.
	Etrog Consulting	Requested that the AER disclose a spread sheet underlying annual pricing proposals to enable stakeholders to verify the AER's annual pricing decisions.
	Darach Consulting	Submitted that the AER should explicitly address the issue of third party service pricing under standard and other forms of contracting in the guideline.
Attachment 2	ENA, NSW DNSPs, Ergon Energy, Jemena, SP AusNet	Did not support the AER's position. Noted that determining the proportion of confidential information in a regulatory proposal is an obligation of the AER. Proposed that identifying the number of pages of a proposal that contain confidential information may not reflect the degree that confidentiality claims may inhibit stakeholder understanding of a proposal. Requested that the AER provide a clear

warning about the limitations of interpreting information.

	Aurora	Agreed with the AER's Attachment 2.
	Energex	Did not agree with the AER's Attachment 2. Noted that determining the proportion of confidential information is a specific Rule requirement imposed on the AER.
	Ethnic Communities	Submitted that the use of page count is unlikely to be useful or a sufficient measure of the degree of non-disclosure. Rather of greater relevance is the materiality of the information that is not disclosed. Suggested inserting an additional column in Attachment 2 which requires NSPs to address whether consumers were engaged on the materiality of the confidential information.
	MEU	Submitted that NSPs should use Attachment 2 to show the proportion of information over which they have claimed confidentiality.
	SSROC	Submitted that the proportion of information over which NSPs have claimed confidentiality is unlikely to be useful. Suggested adding an additional column requiring NSPs to address the nature of the information withheld and whether or not consumers were engaged on the materiality of the confidential information withheld.
	EUAA	Agreed with the AER's Attachment 2. Submitted that the relative significance of information claimed to be confidential should also be made known to stakeholders. This could be done through summarising NSPs confidentiality claims and pointing energy user advocates and other stakeholders towards the most significant claims.
	COSBOA	Agreed with the AER's Attachment 2. Proposed that the AER include a brief statement outlining the scope, nature and subject matter contained in the claim.
Blanket confidentiality claims	ENA, Energex, Ergon Energy, Jemena, SP AusNet	Supports the AER's position. Noted that certain documents may contain a large amount of confidential information, therefore a redacted public version of the document may prove meaningless or be taken out of context.
	APA Group	Submitted that the AER should allow blanket claims to be made where relevant.
	NSW DNSPs	Noted that there may be circumstances where a whole document is confidential.
	Ethnic Communities	Supports the AER's position. The nature of the information should be the primary test in determining disclosure.
	MEU	Supports the AER's requirement for NSPs to provide reasons why information should be protected. Submitted that the AER should address the timeliness relating to the later release of information to the public as late release has the same impact as non-disclosure.
	SSROC	Supports the AER's position. Submitted that the specific nature of the information should be the primary test of disclosure. The guideline should make clear to NSPs that general conditions of tendering, contracting, subcontracting, outsourcing and other commercial arrangements may need revision with respect to

		confidentiality.
	Darach Consulting & COSBOA	Supports the AER's position.
Third party documents	ENA, SP AusNet	Supports the AER's requirement that NSPs should verify all third party confidentiality claims. Submitted that some NSPs may be unable to do so due to third party confidentiality rights. Suggested that NSPs present third party confidentiality claims in the same way as other documents. The key consideration should be the nature of the information claimed to be confidential, not who prepared or provided the information.
	Aurora	Did not agree with the AER's position.
	NSW DNSPs	Supports the AER's position but submitted that the guideline should recognise that some third party claims may arise from claims over property or intellectual property which a NSP would not be in a position to verify or defend.
	Energex	Submitted that information should be treated the same in terms of confidentiality regardless of who prepared it. The AER should focus on the nature of the information in the document.
	Ergon Energy	Supports the AER's position. Submitted that a fundamental consideration for a claim should be the nature of the information, not who prepared or provided the information.
	Jemena	Requested that, subject to the categories being introduced, there should be a consistent approach between third party confidentiality claims and those of NSPs.
	Ethnic Communities, SSROC, Darach Consulting & COSBOA	Supports the AER's position.
	MEU	Supports the AER's proposed requirements. Requested that the AER impose a requirement on NSPs to include a provision in contracts with third parties that information may be given to the AER for public release. Suggested that aggregation of data might be appropriate to provide protection to third parties.
Scope and coverage	ENA, SP AusNet	Supports the application of the guideline to formal submissions the AER receives from NSPs, but noted that this support is contingent on the actual content of the guideline being consistent with industry position. Requested that a broader application of the confidentiality guideline be non-binding.
	APA Group	Did not support the AER's position because it is labour intensive and would impose an unreasonable compliance burden on businesses.
	Aurora, NSW DNSPs, Ethnic Communities, Darach Consulting & COSBOA	Supports the AER's position.
	Energex	Requested that the guideline only be binding on regulatory proposals.
	Ergon Energy	Sought confirmation that the guideline would only be binding on regulatory proposals. Submitted that any

		broader application should be non-binding on NSPs.
	Jemena	Supports the broader application of the confidentiality guideline provided that it is non-binding. Submitted it would seek consistency in its approach to confidentiality claims across both electricity and gas networks.
	MEU	Generally supports the AER's position. Submitted that all information provided by NSPs should be made available to the public unless disclosure would provide a commercial risk to a third party operating in a truly competitive environment.
	SSROC	Supports applying the confidentiality guideline more broadly to cover regulatory information notices and broader AER processes.
Compliance costs	ENA, Ergon Energy & SP AusNet	Noted that any additional administrative costs will ultimately be borne by NSP customers. Suggested introducing categories of confidential information which would subsequently reduce costs, time spent, and the chances that the claim will be rejected.
	Aurora	Submitted that redacting information increases administrative costs. Noted that the 28ZB process is onerous and the AER should make it as simple as possible.
	NSW DNSPs	Supports ENA's position. Submitted that greater use of limited disclosure could allow the AER to strike a balance between protecting and disclosing information.
	Energex	Requested that the AER's approach be revised to facilitate disclosure while minimising administrative costs. Suggested that the introduction of categories of confidential information would reduce the administrative burden on NSPs and increase certainty for businesses and consumers.
	Jemena	Submitted that the use of categories would reduce the administrative burden on NSPs. Noted that the requirement on NSPs to provide a public benefits test should be optional as it would increase the administrative burden on NSPs. Submitted that providing page count information should not be required as the benefit will not outweigh the administrative cost to NSPs.
	Ethnic Communities, SSROC & COSBOA	Submitted that the costs of compliance do not appear material, particularly given the financial ramifications of some of the information in question.
	MEU	Submitted that proposed suggestions on materiality and cost categorisation information will minimise administrative costs.
	EUAA	Submitted that increasing the administrative costs of NSPs will not discourage them from making large confidentiality claims.
	Etrog Consulting	Submitted that reducing the need for the AER to use stage 2 of the process will go a long way to offsetting additional compliance burdens on NSPs.
Limited release of confidential	ENA, SP AusNet, NSW DNSPs,	Submitted that any release of confidential information to third parties should be at the full discretion of NSPs and

information

Ergon Energy, Jemena

under a confidentiality agreement with the third party if required.

Aurora

Supports the AER's position. Requested the following additional requirements – that NSPs be consulted following a request from a third party for access to confidential information, that NSPs have the discretion to reject the release of confidential information, and that the undertaking must clearly specify the purpose for which the recipient may use the confidential information.

COSBOA

Supports the AER's position.

Ethnic Communities

Submitted that the use of confidentiality undertakings should be viewed as a second best solution to full disclosure. Noted that confidentiality undertakings can severely constrain any subsequent submissions made by consumers to the AER and may unreasonably restrict them from discussing matters with the very constituents who are funding their work.

MEU

Supports the AER's position. Requested that there be an option for specified consumer advocates to be allowed access to confidential information. Noted that the guideline should provide rules as to how preferential access is facilitated and how it can be used.

SSROC

Submitted that confidentiality undertakings are a second-best solution to disclosure. Such undertakings can severely constrain any subsequent submissions made by councils to the AER and may restrict councils from discussing matters with the constituents who are funding the work.

Attachment 6 - Summary of issues raised during CRG meetings

Summary of issue raised at CRG or CRG subgroup meetings	Our response
Consumers are concerned that hiding behind confidentiality is a way the network businesses can 'game' the regulator.	We consider the mechanisms outlined in this Explanatory Statement and our proposed draft Confidentiality Guideline address consumers concerns that NSPs may use confidentiality to 'game' regulatory decision making.
Consumers are wary of allowing broad categories to be considered confidential as it may allow more information to be considered 'confidential' than what was intended or what is desired.	This issue is addressed in section 5.1.2
Consumers are concerned that NSPs hide behind third party contracts, that is outsourcing and related parties. How will new guideline get the necessary information from these other parties?	This issue is addressed in section 5.1.2
The default should be openness. The burden of proof when requesting confidentiality is on the NSPs (it should not be up to the AER or consumers to argue why it should be public).	We aim to balance protecting confidential information with disclosing information for an open and transparent regulatory decision making process. We agree that NSPs should be required to justify their confidentiality claims and consider that our two stage process addresses this issue.
Timing of information release—consumers would prefer a partial release up front as opposed to a whole data set at the end (when it is no longer useful to consumers).	This issue is addressed in section 7.2.1. Consumers may be able to access information up front under limited information disclosure subject to a confidentiality undertaking.
Confidentiality claims must be supported with reasoning and evidence. If not, the AER should place less weight on that information.	We agree that confidentiality claims must be supported with reasoning by way of the NSP identifying how and why detriment may be caused from information disclosure. Under the NER we are not permitted to place less weight on confidential information provided in relation to a Regulatory Proposal. This issue is addressed in section 8.3.
Businesses may try to hide behind confidentiality concerns. If there are confidentiality concerns, then the AER should have a process for dealing with the information.	We consider that our two stage process outlined in sections 6 and 7 addresses this issue.
Commercial confidence may inhibit the AER obtaining relevant information for the purpose of considering sharing benefits in the context of shared assets.	We do not agree with this submission. We have powers under the NEL and NGL that allow us to obtain information we require to assess all aspects of an NSP Regulatory Proposal.
<p>"Where the NSPs do have concerns around providing confidential information, the AER should have a process whereby consumer representatives be provided with, and use the information sensitively.</p> <p>A conflicting view here from CRG members was that it can be dangerous to release information to some advocates and not others. Ideally, most information is not categorised as confidential."</p>	Please see our response in section 7.1.2 on publishing the confidentiality template on the AER website.
A CRG member noted that timeliness is an important issue. In the event that the process of determining confidentiality takes months, the information could lose some relevance and defeat the purpose of disclosure.	Please see our response to this issue in 8.3

