



Better Regulation

Distribution and transmission confidentiality guidelines

Issues paper

March 2013

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Request for submissions

This issues paper is part of the Australian Energy Regulator's (AER) Better Regulation program of work, which follows changes to the National Electricity Rules announced in November 2012 by the Australian Energy Market Commission. Our 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 us regarding this issues paper by the close of business, 14 May 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
General Manager–Network Operations and Development
Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001

We prefer that all submissions be publicly available to facilitate an informed and transparent consultative process. We will treat submissions 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 our website at www.aer.gov.au. For further information regarding the our use and disclosure of information provided to us, see the ACCC/AER Information Policy, October 2008 available on our 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 work streams are available at <http://www.aer.gov.au/node/18824>.

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Glossary

Acronym	Extended Form
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Confidentiality guidelines	Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines
DNSP	Distribution Network Service Provider
NEL	National Electricity Law
Rules	National Electricity Rules
NSP	Network Service Provider
EUCV	Energy Users Coalition of Victoria
TNSP	Transmission Network Service Provider
28ZB test	The test for disclosing information set out in section 28ZB of the National Electricity Law

Summary and list of questions

The Australian Energy Regulator (AER) is responsible for the economic regulation of electricity transmission and distribution services in the national electricity market (NEM) as well as gas transportation services. We also monitor the wholesale electricity and gas markets and are responsible for compliance with and enforcement of the National Electricity Rules (Rules) and National Gas Rules (NGR).

We are beginning a program of work to deliver an improved regulatory framework focused on the long term interests of electricity consumers. This follows from changes to the Rules and NGR that were published by the Australian Energy Market Commission (AEMC) on 29 November 2012. Our 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.

A major element of our new approach is the publication of Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines (the confidentiality guidelines). The Rules require us to make and publish the confidentiality guidelines by 29 November 2013.² The confidentiality guidelines must specify the manner in which network service providers (NSPs) may make confidentiality claims.³ The confidentiality guidelines will be binding on the AER and NSPs in relation to initial and revised regulatory proposals, revenue proposals and proposed pricing methodologies. We are also considering applying the guidelines as policy to all information the AER receives.

This issues paper is our first step in consulting on the confidentiality guidelines. It is based upon our experience to date dealing with confidentiality claims and using our information disclosure powers.

On the whole, we will be looking to achieve 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 that allows all stakeholders to engage effectively. We also want to move away from our current practice of using formal information disclosure powers on a regular basis.⁴ Our aim is to have a more collaborative process where:

- before we receive information, we work with NSPs to reach a common understanding of the types of information we will generally protect or disclose and how to make confidentiality claims
- at the time we receive information, NSPs claim confidentiality in a fashion that allows us to resolve most confidentiality claims quickly and minimises the need for us to resort to formal disclosure powers.

We see the confidentiality guidelines playing an important role in facilitating this process by clarifying the process for making confidentiality claims. In developing and implementing our confidentiality guidelines we will be mindful of consumer interests as articulated in the National Electricity Objective and in the revenue and pricing principles, but also views directly expressed through consumer engagement.

We are seeking direct input from industry and other stakeholders into the development of the confidentiality guidelines. Issues raised in this paper are intended to form a basis for discussion

² NER, cl.6.4.5(a) and cl.6A.5.6(a) require that we publish the Guidelines. Transitional NER provisions, cl.11.53.4 and cl.11.54.4 set the date for their publication.

³ NER, cl.6.14A(b) & cl.6A.16A(b).

⁴ NEL, ss. 28W-28ZB.

between ourselves and stakeholders in the coming months through detailed working groups and in written submissions.

We have separately set out our overall approach to consulting on the range of new guidelines and schemes.⁵ The process will include multiple consultation stages (after the issues paper and draft Guidelines) with various methods of engagement (forums, workgroups, written submissions and bilateral meetings). The next steps in consultation on the confidentiality guidelines are outlined in section 5 below.

Questions for stakeholder comment are posed throughout the issues paper and are repeated here as a summary.

Manner in which NSPs may make confidentiality claims

Question 1

What are stakeholders' views on requiring NSPs to make confidentiality claims using the template in Attachment 1?

Categories or lists of confidential information

Question 2

Should the confidentiality guidelines specify categories of information by which NSPs must classify any claims of confidentiality?

Question 3

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should protect?

Question 4

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should disclose?

Website notices

Question 5

What are stakeholders' views on requiring NSPs to use the template in Attachment 2 to determine the proportion of information over which they have claimed confidentiality?

⁵ AER, *Better regulation issues paper*, 10 December 2012.

Blanket confidentiality claims

Question 6

What are stakeholders' views on our proposed measures for dealing with blanket confidentiality claims in the confidentiality guidelines?

Third party documents

Question 7

What are stakeholders' views on our position that NSPs should verify all third party confidentiality claims that are included in their submission?

Scope and coverage

Question 8

Should we apply the confidentiality guidelines, as a policy, to all information we receive from NSPs and gas service providers? If not, what information handling procedures should we use to deal with this information?

Compliance costs

Question 9

What are stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs?

Limited release of confidential information

Question 10

Should we facilitate NSPs disclosing information to certain stakeholders for the purpose of making a submission to the AER?

1 Introduction

The AER has both the obligation to protect confidential information and the authority in certain circumstances to disclose it. We must take all reasonable measures to protect from unauthorised use or disclosure information given to us in confidence or obtained by compulsion.⁶ However, we also have information disclosure powers. We are authorised to disclose information to certain government agencies⁷ and, under the NEL, to disclose confidential information where the information:

- is already in the public domain⁸ or the information provider gives written consent;⁹
- will afford a person affected by our decision natural justice;¹⁰
- is for the purpose of court or tribunal proceedings;¹¹
- does not identify the information provider;¹² or
- would not cause detriment to the information provider; or the public benefit in disclosing the information outweighs any detriment.¹³

We have always been committed to treating confidential information responsibly and in accordance with the law. We recognise that disclosing confidential information may have an adverse effect on NSPs. However, we are also committed to achieving a balance between protecting confidential information and the need to disclose information for an open and transparent regulatory decision-making process that allows all stakeholders to engage effectively. To achieve this balance, we have developed procedures to both protect and disclose information as appropriate. These include training our staff, maintaining relevant IT mechanisms and, especially over the last year, using formal information gathering powers.

More recently, in November 2012, the AEMC made changes to the Rules 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. Specifically, the new rules apply to NSPs' initial and revised regulatory proposals, revenue proposals and proposed pricing methodologies.

These new Rules require us to make and publish Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines.¹⁴ We have decided to deal with both guidelines together in a single set of guidelines (the confidentiality guidelines). The confidentiality guidelines must specify the manner in which NSPs may make confidentiality claims.¹⁵ They may also include categories of confidential information by which NSPs must classify any claims of confidentiality in their regulatory proposals, revenue proposals or proposed pricing methodologies.¹⁶ There must be confidentiality

⁶ *Competition and Consumer Act 2010*, s.44AAF(1).

⁷ *Competition and Consumer Act 2010*, ss.44AAF(2)-(3).

⁸ NEL, s.28ZAB.

⁹ NEL, s.28X.

¹⁰ NEL, s.28Y(c).

¹¹ NEL, ss.28Y(a)-(b).

¹² NEL, s.28ZA.

¹³ NEL, s.28ZB.

¹⁴ NER, cl.6.2.8(c) & cl.6A.2.3(a)(2).

¹⁵ NER, cl.6.14A(b) & cl.6A.16A(b).

¹⁶ NER, cl.6.14A(b) & cl.6A.16A(b).

guidelines in force at all times after the date on which we first publish the confidentiality guidelines.¹⁷ The confidentiality guidelines will be binding on us and NSPs.¹⁸

The new Rules complement our existing obligations to protect information and our information disclosure powers. These have not changed. They are also consistent with our existing procedures for both protecting and disclosing information – see section 3 below. However, the new Rules provide an important new feature. As mentioned above, the confidentiality guidelines are binding. Therefore, all NSPs' regulatory proposals, revenue proposals and proposed pricing methodologies must comply with the confidentiality guidelines.¹⁹ If not, we may reject an NSP's proposal and require it to resubmit it, in compliance with the confidentiality guidelines.²⁰

This feature is an appropriate measure to assist in achieving the correct balance between protecting information and disclosing it. Unlike businesses in competitive markets, network service providers are natural monopolies or have significant market power. This can mean that information on an NSP's operations, such as most of its detailed supply costs, will not typically be as commercially sensitive as for businesses in a competitive market. In a competitive market, such details could undermine competitive rivalry and fair market conduct. Exceptions to this view would mainly relate to information which may compromise an NSP's commercial tender processes or affect its ability to obtain a competitive input price.²¹ As well, asymmetric information inhibits the stakeholders' ability to participate effectively in the process. For example, all stakeholders need the opportunity to comment on and scrutinise NSP proposals. Also, it is appropriate that all stakeholders can fully understand the efficiency of an NSP's performance and proposals. This enables them to better understand why an NSP is seeking particular expenditure allowances. Therefore, a substantial degree of information should be available to all stakeholders.

Please note, we do not intend to publish all information we receive. Balance is our aim – not total disclosure.

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 (the 28ZB test). It requires that, before disclosing information, we must decide whether:

- disclosing 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.

In future, where we need to use formal information disclosure powers, we intend to continue to most often rely on the power in section 28ZB.

Our experience with confidentiality claims to date has been mixed. We agree with NSPs regarding many confidentiality claims. However, some NSPs claim confidentiality over entire documents or entire submissions. These claims may not explain why the AER should protect the information. For example these claims are often as simple as "In confidence" without any explanation of how disclosure would cause detriment which is not outweighed by the public benefit. For example, Table 1

¹⁷ NER, cl.6.14A(c) & cl.6A.16A(c).

¹⁸ NER, cl.6.14A(d) & cl.6A.16A(d).

¹⁹ NER, cl. 6.9.1(a) & cl. 6A.11.1(a)

²⁰ NER, cl.6.9.1(a) & cl.6A.11.1(a)(8).

²¹ See section 4.2 below on possible categories or lists of confidential information.

shows a page count of the regulatory proposals Victorian Distribution Network Service Providers (DNSPs) submitted for the 2011-15 distribution determinations.²²

Table 1 Page count - documents DNSPs submitted to the AER's Victorian electricity distribution determination (2011-15)

	Regulatory Proposal		Revised Regulatory Propose	
	Public	Confidential	Public	Confidential
Business 1	1,540	4,584	4,157	5,599
Business 2	2,960	5,231	9,337	10,235
Business 3	1,869	22,811	1,704	2,626

Note: The AER's page count is approximate. It does not account for the different types of documents submitted by each of the Victorian DNSPs, and does not include spreadsheets, AER or AEMC documents that are publicly available and references to legislation and regulations.

Many of these claims were for entire documents and did not include reasons why the AER should protect the information. Also, the volume made it difficult for the AER to apply its formal information disclosure powers, without diverting substantial resources from analysing the proposals. In turn, this prevented other stakeholders from accessing that information, hindering their ability to engage effectively in the regulatory process.

More recently, stakeholders have also expressed concern. Recently the Energy Users Coalition of Victoria (EUCV) made the following comments on APA GasNet's access arrangement proposal:

- GasNet refers to an appendix to explain why its major augmentation project costing \$110.4 million is necessary, however because this appendix was not disclosed it could not be scrutinised by stakeholders.²³
- Also, due to lack of detail about three other smaller projects, EUCV is unable to comment on the value for money that the projects might provide.²⁴

Over the next 12 months, all stakeholders will have direct input into the development of these confidentiality guidelines. We intend that issues raised in this paper will form a basis for discussion through workshops and written submissions.

We have separately set out our overall approach to consulting on the range of new guidelines and schemes.²⁵ The process will include multiple consultation stages (after the issues paper and draft decision) with various methods of engagement. Section 5 of this issues paper outlines the next steps in consultation.

²² AER Submission, AEMC Directions Paper, Economic regulation of Network Service Providers, April 2012, p.62.
²³ Response by Energy Users Coalition of Victoria, Victorian Gas Transmission Revenue Reset, June 2012, p16.
²⁴ Response by Energy Users Coalition of Victoria, Victorian Gas Transmission Revenue Reset, June 2012, p17.
²⁵ http://www.aer.gov.au/sites/default/files/AER%20Better%20regulation%20issues%20paper%20-%20December%202012_13.pdf

2 Purpose and objective of the proposed confidentiality guidelines

The proposed confidentiality guidelines aim to assist in delivering better regulatory decisions. It aims to achieve the right balance between protecting and disclosing information in accordance with the law. By achieving this balance we aim to simultaneously provide appropriate protection and facilitate improved stakeholder engagement.

The confidentiality guidelines also aim to make NSPs accountable for their confidentiality claims. Consistent with our current procedures, they aim to require NSPs to provide clear and logical reasons as to why we should protect information. These reasons will need to focus on how disclosing the information will cause detriment to the NSP and whether the public benefit in disclosing information outweighs that detriment. This type of reasoning will assist the AER in determining whether it should protect or disclose information.

Finally, the confidentiality guidelines aim to make the process for claiming confidentiality and how we will assess these claims clearer. The confidentiality guidelines will involve clear and well understood procedures that outline what information we are likely to protect as well as a streamlined process on how to make confidentiality claims. This provides greater certainty to NSPs providing information to us.

3 Our current information handling process

We currently use a two stage process for determining whether to protect or disclose information. The process aims to act as a filter, resolving more confidentiality issues at each stage. This section outlines that process.

3.1 Stage one: informal discussions before receiving information

Our preference is to deal with issues around protecting and disclosing information in a collaborative fashion. Therefore, we seek to 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, focussing on the 28ZB test.
- 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 of the NEL.
- e. if a NSP makes a confidentiality claim in the manner mentioned above, this will reduce the likelihood that we will exercise these powers.
- f. prior to exercising these powers, we will provide the NSP with notice and an opportunity to comment.

We encourage NSPs to engage with us on these issues before they provide us with information.

We aim to resolve as many confidentiality issues as possible at this stage. Before we receive information, there is often less time pressure and the competing need for us to assess the proposal's substance has not yet arisen. As a result, there is often greater opportunity for us to work with NSPs to reach a common understanding of the types of information we will generally protect or disclose and how to make confidentiality claims. We consider this is the best way to achieve the right balance between protecting information and disclosing it for an open and transparent regulatory decision. We would prefer that only very few issues continue beyond this stage.

Our experience has been that we have been unable to resolve all confidentiality issues at stage one. Where that happens, we move to stage two.

3.2 Stage two: formal processes after receiving information

Once we receive information, we disclose the information the NSP has consented to place in the public domain. We also assess each confidentiality claim. Where we agree with the claim, we protect the information. Where we disagree, we examine the claim against our information disclosure powers, including the 28ZB test. If the AER is considering whether to disclose the information under s 28ZB,

we issue the NSP (and appropriate third parties) with an initial disclosure notice. This notice outlines:²⁶

- a. our intention to disclose the information
- b. the nature of our intended disclosure
- c. short, document-by-document reasons as to why we believe:
 - i. disclosing the information will not cause detriment to the NSP; or
 - ii. the public benefit in disclosing the information outweighs any detriment.
- d. that within the timeframe specified, the NSP (or third party) may make representations to us on why we should not disclose the information.

We must give the information provider (or third party) a minimum of five business days to respond to the initial disclosure notice.²⁷ But, the actual time we allow depends on the volume and complexity of information we propose to disclose.

If within the prescribed timeframe, the NSP (or third party) responds to the initial disclosure notice, we consider the response. We disclose any information the NSP has consented to placing in the public domain. Also, where we agree with the response, we protect that information. Where we disagree, we issue a further disclosure notice which outlines:²⁸

- a. our intention to disclose the information;
- b. the nature of the intended disclosure
- c. reasons as to why we consider that:
 - i. disclosing the information will not cause detriment to the NSP; or
 - ii. the public benefit in disclosing the information outweighs any detriment to the NSP.

A NSP (or third party) can seek merits review of a further disclosure notice.²⁹ To date, this has not happened. As a result we have disclosed the information five business days after the further disclosure notice.³⁰

If someone seeks merits review, the Australian Competition Tribunal has 20 business days to decide the issue. Otherwise, the AER may disclose the information.

It is clear that stage two of the process is very formal, resource intensive and places an additional administrative burden on NSPs, third parties and us. We would prefer to avoid stage two. Therefore, we are aiming for the confidentiality guidelines to strengthen our existing stage one processes. The confidentiality guidelines would put in place a set of clear and well understood procedures that outline the way in which NSPs may make confidentiality claims in their submissions. Also, we aim for the confidentiality guidelines to provide NSPs with a clear understanding of information we will generally

²⁶ NEL, s.28ZB(2).

²⁷ NEL, s.28ZB(5).

²⁸ NEL, s.28ZB(6).

²⁹ NEL, s.71S(4). A NSP has within five business days after the date of the further disclosure notice to seek merits review of our further disclosure notice.

³⁰ NEL, s.28ZB(1) and s.28ZB(8).

protect and disclose. In turn, the confidentiality guidelines may reduce the need for us to use the stage two information disclosure powers.

4 Developing the confidentiality guidelines

The confidentiality guidelines must specify the manner in which NSPs may make confidentiality claims in their regulatory proposals, revenue proposals and proposed pricing methodologies. This may include specifying categories of confidential information by reference to which NSPs must classify any confidentiality claims.³¹ Also, we must publish a notice on our website that sets out the proportion of material in a NSP's regulatory proposal, revenue proposal or proposed pricing methodology that is subject to a claim of confidentiality compared to that which is not.³² This process also applies to a NSP's revised revenue proposal, revised regulatory proposal and revised proposed pricing methodology.³³

This section discusses all of the above and other issues we consider relevant to NSPs making confidentiality claims.

4.1 Manner in which NSPs may make confidentiality claims

As discussed above, the confidentiality guidelines must specify the manner in which NSPs may make confidentiality claims. Recently, we have used a template which outlines how NSPs are to identify and make confidentiality claims. Based on this template (attachment 1), we propose a template for NSPs to apply when making confidentiality claims in accordance with the confidentiality guidelines.

Under this approach we would require NSPs to:

- clearly identify by page and paragraph number the sections of documents which contain information they consider we should protect;
- submit a public and confidential version of the document.
 - the public version must clearly identify the information the NSP wants us to protect. It must redact or 'black out' that information. So as to retain the same formatting and page numbers as the confidential version NSPs must not delete the redacted information. Apart from the redacted information, the public version must be identical to the confidential version;
 - the confidential version must clearly identify the parts of the document which contain information the NSP wants us to protect. This is to be done by highlighting the confidential information in yellow shading;
 - for electronic documents specify in the filename whether the document is "public" or "confidential";
- identify any category the information falls under (see section 4.2); and
- provide reasons why the NSP considers we should protect the information. Reasons should explain how disclosure would cause detriment to the NSP and why the public benefit in disclosing this information does not outweigh this detriment.

³¹ NER, cl. 6.14A(b), cl. 6A.16A(b).

³² NER, cl.6.9.2A(b) & cl.6A.11.2A(b).

³³ NER, cl.6.10.3(c1)(2) & cl.6A.12.3(e1)(2).

Question 1

What are stakeholders' views on requiring NSPs to make confidentiality claims using the template in Attachment 1?

4.2 Categories or lists of confidential information

The confidentiality guidelines may include categories of confidential information. If it does, a NSP must classify the information it claims confidentiality over into these categories.

We are considering whether it is appropriate for the confidentiality guidelines to include categories. Ultimately, the law will determine whether we may disclose information. Whether or not an NSP classifies its confidentiality claims into categories does not change how we must apply the law, including the 28ZB test.

Also, it seems unlikely that there are many categories of information that we should always protect or always disclose. Rather, in any given category, there will simultaneously be some information we should protect and some we should disclose. For example, we consider that we should disclose many consultants' reports. We consider they often provide commentary to support a NSP's proposal, rather than information which, if disclosed, might cause detriment to the NSP or consultant. But, some parts of some consultants' reports do contain information, such as very detailed cost information, which we would generally protect.

Also, classifying confidentiality claims into categories would create an additional administrative burden on NSPs. That said, using categories may provide greater certainty to NSPs on how they should make confidentiality claims and how we would treat them. At this stage we are unsure that requiring classification into categories produces sufficient benefit to justify the additional administrative burden.

On balance, currently, we are leaning towards not requiring NSPs to classify claims for confidentiality into categories.

Question 2

Should the confidentiality guidelines specify categories of information by which NSPs must classify any claims of confidentiality?

Regardless of whether the confidentiality guidelines include categories, providing clarity to NSPs is a key objective. Therefore, in any case, we intend the confidentiality guidelines to include a list of items which will provide guidance to NSPs.

Our current list of items we are considering protecting includes:

1. 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.
2. Market sensitive cost inputs - information such as supplier prices and internal labour costs and information which would affect the NSPs ability to obtain competitive prices in future infrastructure transactions, such as tender processes.
3. Market intelligence - information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities.

4. Strategic information – information such as the acquisition of land and easements, where the release of this information might adversely impact the NSPs ability to negotiate a fair market price for these items.
5. Personal information - information about an individual whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

Question 3

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should protect?

4.2.1 Information we should disclose

We must apply our information disclosure powers on a case by case basis. In the past we have decided to disclose items including:

- consultant reports
- asset management plans
- financial models
- forecast and actual expenditure (including by category)
- weighted average cost of debt (actual)
- financial statements
- changes in provisions
- efficiency benefit sharing scheme data
- demand management incentive scheme reports
- network performance data
- network metrics
- network demand
- asset installation data and commentary that explains data or a NSP's position and justification for its expenditure proposal.

More generally, we also consider that the public benefit in transparency will outweigh any claimed detriment resulting from embarrassment or such similar concerns. For example, we consider the public benefit in transparency would often outweigh any detriment an NSP might suffer from negative, but accurate, comments about a NSP's performance or business decision making.

Question 4

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should disclose?

4.3 Website notices

We must publish a notice on our website that sets out the proportion of material in a NSP's regulatory proposal, revenue proposal or proposed pricing methodology that is subject to a claim of confidentiality compared to that which is not.³⁴ This process also applies to NSPs' revised revenue proposal, revised regulatory proposal and revised proposed pricing methodology.³⁵

We consider that NSPs are best placed to assess the proportion of information they submit is subject to a claim of confidentiality compared to that which is not. Therefore we propose the confidentiality guidelines include a template (attachment 2) which requires NSPs to specify the number of pages it submits over which it has made a confidentiality claim and the number of pages which it consents to placing in the public domain.

Question 5

What are stakeholders' views on requiring NSPs to use the template in Attachment 2 to determine the proportion of information over which they have claimed confidentiality?

4.4 Blanket confidentiality claims

We consider that there are few documents which need to be protected in full. We consider that most documents need either partial protection or can be completely disclosed. This is because, in our experience, most documents we receive contain both information we should protect and information we should disclose.

NSPs often provide us with documents that contain both confidential and non confidential information. Whilst an NSP may claim confidentiality over the entire document, the majority of the document's content does not need protection. We refer to this as 'blanket confidentiality claims'. Blanket confidentiality claims are broader than is necessary to provide appropriate protection. Furthermore, blanket confidentiality claims reduce the information available for public scrutiny and informed comment from other stakeholders. From an assessment perspective they are very time and resources intensive and the outcome of our assessment is generally that the evidence does not support a blanket claim.

We have a general policy to treat submissions as public documents which we will publish on our website.³⁶ Other than in exceptional circumstances, we do not accept blanket confidentiality claims. Recently, we have made greater use of our information disclosure powers in stage two of our information handling process³⁷ to overcome blanket confidentiality claims. This places the onus on the NSP to justify its confidentiality claims in full. Our experience is that doing so results in more information entering the public domain. This helps all stakeholders access an appropriate amount of information to participate effectively in AER processes. However, this process is formal and is time and resource intensive for all parties.

In response to using our information disclosure powers more, certain NSPs have begun to limit confidentiality claims to only that information which we should protect in accordance with the 28ZB

³⁴ NER, cl.6.9.2A(b) & cl.6A.11.2A(b).

³⁵ NER, cl.6.10.3(c1)(2) & cl.6A.12.3(e1)(2).

³⁶ ACCC-AER information policy: the collection, use and disclosure of information, 23 October 2008, available at www.aer.gov.au.

³⁷ NEL, s.28ZB.

test. We are keen to see this trend become the standard all NSPs apply. Therefore, we propose that the confidentiality guidelines require NSPs making blanket confidentiality claims provide reasons showing why we should protect each individual aspect of the relevant document. If we consider a blanket claim for confidentiality does not meet this requirement, we may exercise our powers to reject the proposal in its entirety.³⁸

Question 6

What are stakeholders' views on our proposed measures for dealing with blanket confidentiality claims in the confidentiality guidelines?

4.5 Third party documents

Often NSPs include in their submissions information they have obtained from a third party such as a consultant report or an auditor report. Often, the third party makes a blanket confidentiality claim over this information. In these circumstances we may disclose the information if we are satisfied it should be disclosed under the 28ZB test.³⁹ This process places extra administrative burden on us and the third party.

Therefore, in the guidelines, we are considering requiring NSPs to provide the same reasoning for third party documents as for any other blanket confidentiality claim. We consider this approach would provide an incentive for NSPs to take responsibility for verifying third parties' confidentiality claims. It would also assist in making sure that that third party documents do not have confidentiality claims broader than is appropriate. We would consider third party information in the same way as any other material provided to us by NSPs.

Question 7

What are stakeholders' views on our position that NSPs should verify all third party confidentiality claims that are included in their submission?

4.6 Scope and Coverage

The confidentiality guidelines apply to electricity NSPs' initial and revised regulatory proposals, revenue proposals and proposed pricing methodologies. We consider that there is significant value in having a single well accepted approach to dealing with all information we receive. Therefore, as a matter of policy, we are considering applying the confidentiality guidelines to all information we receive from electricity NSPs. This would include responses to Regulatory Information Notices, information requests and submissions on proposals. We would also seek to apply the policy to all information we receive from gas service providers.

³⁸ NER, cl. 6.9.1(a), cl. 6A.11.1(a)

³⁹ There may be alternative bases for disclosing the information (e.g. if the information is already in the public domain, we may disclose it under s.28ZA of the NEL). If we are considering disclosure under the 28ZB test and the person who gave the information in confidence in turn received the information from another person, and we are aware of that other person's identity and address, we must, before disclosing the information give that other person a notice in accordance with s28ZB(3). For example, where a DNSP submits its initial revenue proposal which includes a report from its auditor and the auditor has made a blanket confidentiality claim over its report, for us to disclose the auditor's report, we must initiate the 28ZB test and issue the auditor with an initial disclosure notice.

Question 8

Should we apply the confidentiality guidelines, as a policy, to all information we receive from NSPs and gas service providers? If not, what information handling procedures should we use to deal with this information?

4.7 Compliance costs

We are aware that our proposed approach may increase NSPs' compliance costs. For example over the course of a reset, compliance with the confidentiality guidelines may result in additional administrative resources for NSPs.

Question 9

What are stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs?

4.8 Limited release of information

From time to time other organisations, such as the ACCC, have facilitated the release of confidential information to third parties for the purpose of making a submission. For example, in the telecommunication context, a carrier would agree to disclose its confidential information to certain parties provided they signed a confidentiality undertaking. The confidentiality undertaking specified the purpose for which the recipient may use the confidential information and that they must not disclose the confidential information to anyone else without the carrier's consent. The ACCC made available on its website the confidentiality undertaking for parties to sign and details of how the parties could submit the confidentiality undertaking to the carrier.

To facilitate better stakeholder engagement in our regulatory decision making process, we are considering including a similar approach to that described above. That is, NSPs may disclose their information to certain stakeholders for the purpose of the stakeholder making a submission on the NSP's proposal.

Question 10

Should we facilitate NSPs disclosing information to certain stakeholders for the purpose of making a submission to the AER?

5 Next steps

As noted in our recent open letter⁴⁰, we will engage closely with the sector to develop a series of guidelines over the next year. In most instances this will commence with a guideline specific stakeholder forum and then on-going workshops.

Based on the suggestions in this issues paper, we expect that the initial forum will collate stakeholder views on the scope and timing of issues to consider. We expect that this will be affected by the availability of stakeholders with particular expertise, the complexity of particular issues to be considered and having to coordinate the timing of other guideline consultations. Table 1 lists the timeframes anticipated for the working group stage of consultation, leading into the prescribed steps and timing of consultation under the NER procedures for transmission and distribution.

Table 1 **Timeline for confidentiality guidelines development**

Date	Topic	Description
18 March	Issues paper published	Explain issues and preliminary thoughts on approach to the distribution and transmission confidentiality guidelines. Invitation for written submissions.
4 April	Working group meeting	Discussion on aspects of the issues paper.
14 May	Submissions on issues paper due	Formal response to issues paper as well as anything discussed during working meetings close.
9 August	Draft confidentiality guidelines published	Set out AER's draft confidentiality guidelines.
20 September	Submissions on draft confidentiality guidelines due	Formal response to draft confidentiality guidelines close.
29 November	Publish final confidentiality guidelines	Final confidentiality guidelines published along with any supporting material.

⁴⁰ <http://www.aer.gov.au/node/18824>

Attachment 1

Template outlining the manner in which stakeholders are to make confidentiality claims under the confidentiality guidelines

Document containing confidential information	Page and paragraph number of the document which contains confidential information	Reasons supporting how and why disclosure of the information would cause detriment which is not outweighed by the public benefit in disclosing the information	Has the confidential information been identified by highlighted yellow shading? If not, please provide reasons	Has a public version of this document been provided? If not please provide reasons

Attachment 2

Proportion 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 are subject to a claim of confidentiality	Number of pages of submission that are not subject to a claim of confidentiality	Total number of pages of submission	Percentage of pages of submission that are subject to a claim of confidentiality	Percentage of pages of submission that are not subject to a claim of confidentiality