



20 September 2013

Mr Chris Pattas
General Manager, Network Operations and Development
Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001

Dear Mr Pattas

AER Draft Confidentiality Guideline and Explanatory Statement

APA Group (APA) welcomes the opportunity to comment on the Australian Energy Regulator's (AER's) draft Confidentiality Guideline and Explanatory Statement.

APA is a major ASX-listed energy infrastructure business, owning and/or operating over \$12 billion of assets. These assets include significant gas transmission and distribution interests, as well as investments in the Murraylink and Directlink electricity interconnectors which operate in the National Electricity Market. APA therefore responds to the draft Confidentiality Guideline and Explanatory Statement in respect of both its regulated gas transmission and distribution assets, and its electricity transmission assets.

Inclusion of categories in the Guideline

APA notes the AER's draft decision to include defined categories of confidential information in its Guideline. APA further notes that even where information falls into one of these categories, the AER intends to undertake a case-by-case assessment of the public benefit of disclosure of that information.¹

APA considers that the AER's decision to assess each confidentiality claim separately somewhat negates the case for including mandatory categories in the Guideline. Notwithstanding this and consistent with APA's earlier submission, the identification of potential categories of confidential information improves the clarity of the Guideline by setting out the types of information that the AER may consider to be confidential. The inclusion of categories in the Guideline is therefore supported by APA.

Categories of confidential information

APA considers that some revision is required to the AER's proposed categories to be consistent with the national energy laws. In particular, APA considers that the AER has unduly focused on the classification of information that is confidential to the service provider, and to whom disclosure would cause detriment. The National Electricity Law (NEL) does not limit the scope of detriment from public disclosure to the service provider. Instead the NEL refers to the detriment to either the person giving the information to the

¹ Australian Energy Regulator 2013, *Better Regulation – Draft Confidentiality Guideline Explanatory Statement*, August, p 14



AER, or the person from whom that person received that information.² This is also the case under the National Gas Law (NGL).³ The assessment to be undertaken by the AER therefore extends beyond consideration of detriment to the service provider, and also includes third parties to whom the release of confidential information may cause detriment.

The descriptions of some of the AER's categories in the Guideline do not appear to contemplate detriment to third parties. For example, the proposed "Market sensitive cost inputs" category is described as "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" [emphasis added]. Also, the "Market intelligence" category focuses on "information that may provide an advantage to a *NSP's competitors*" [emphasis added].⁴

Relevant to this issue, APA raised in its submission on the Issues Paper concerns over the need to protect certain information that was confidential to users or prospective users, or which was confidential to suppliers or other contractors.⁵ In both cases this was because the release of information would be detrimental to that user or business in the market in which it operates.

APA does not consider that the AER has adequately addressed APA's concerns in its draft Guideline.

The AER's response to APA's concerns in respect of user information was to link this to its proposed category of "Personal information".⁶ As currently described, APA does not consider that this category would encompass information that was commerciality sensitive to a user or prospective user, such as information related to investment intentions (supporting an augmentation project, for example) that might damage its position in a market in which that user competes. The category instead appears limited to privacy issues.

The AER's response to APA's concerns in respect of supplier and contractor information was to link this to the "market sensitive cost input" category.⁷ As noted above, this category appears limited to cost inputs that are sensitive to a service provider, rather than a service provider's supplier or contractor.

To address this issue, APA recommends the redrafting of the "Market intelligence" and the "Market sensitive cost inputs" categories to encompass both the release of information that would cause detriment to a service provider, and the release of information that would cause detriment to the person that provided that information to the service provider.

Identification of detriment

The AER's proposed template includes an obligation for the service provider to specify reasons supporting how and why detriment may be caused from disclosing the identified information.

² National Electricity Law section 28ZB(1)(a)

³ National Gas Law section 329(1)(a)

⁴ AER 2013, *Draft Confidentiality Guideline Explanatory Statement*, p 13

⁵ APA Group 2013, AER Confidentiality Guidelines: Issues Paper – APA submission, 14 May, pp 2-3

⁶ AER 2013, *Draft Confidentiality Guideline Explanatory Statement*, p 15

⁷ AER 2013, *Draft Confidentiality Guideline Explanatory Statement*, p 14



In relation to information that is confidential to a service provider, the service provider is likely to be able to provide the AER with information as to the likely costs or detriment of disclosure to itself. As noted above, however, service providers can be in a position where they must disclose information to the AER that is confidential to another party. In these cases, the service provider is unlikely to suffer a detriment from public disclosure, but the detriment to another party (that party to whom the information is confidential) may outweigh the public benefit.

The AER's Guideline, Template, and discussion on page 22 of the Explanatory Statement do not appear to contemplate potential detriment to a party other than the service provider. As noted above, the information disclosure provisions of the NEL and NGL are not limited to considering detriment to the service provider.

APA therefore recommends that the Guideline, Template and Explanatory Statement be amended to include scope for the identification of detriment to parties other than the service provider.

Where the detriment of disclosure relates to a third party, the service provider is unlikely to be able to provide significant information as to the likely detriment of public disclosure. This information is better provided by the person to whom the information is confidential. APA recommends that the identification of detriment be an optional aspect of the guideline (or be limited to providing information 'to the extent reasonably possible') to address this issue.

APA considers that service providers can be expected to provide information on the likely detriment of disclosure as it is in their interest to have confidentiality claims accepted by the regulator. The absence of clear reasons why information should be considered confidential increases the risk that the regulator will determine to disclose information. Specific obligations through the Guideline or information instruments to require reasons therefore do not appear necessary.

Public benefit test for disclosure

APA supports the AER's decision in the draft Guideline not to require service providers to provide details as to the public benefit of disclosure.

As noted in the Explanatory Statement, an assessment of the public benefit necessarily involves an understanding and assessment of broader public policy and regulatory impacts of disclosure, potentially including the likely impacts of disclosure on other decisions before the regulator.⁸ This type of information is not available to the service provider, and therefore the service provider is not able to make such an assessment with the benefit of all the relevant considerations that the regulator might bring to bear to this decision.

APA is concerned that, as part of a concurrent consultation process on proposed changes to the NEL and NGL information disclosure provisions being conducted by the Standing Council on Energy and Resources (SCER), this issue appears to be moving in favour of requiring service providers to quantify the public benefit of disclosure.⁹ In light of the AER's conclusions in relation to this issue, which were arrived at with the benefit of public

⁸ AER 2013, *Draft Confidentiality Guideline Explanatory Statement*, p 22

⁹ Standing Council on Energy and Resources 2013, *Draft Statutes Amendment (National Electricity and Gas Laws – Information Collection and Publication) Bill 2013*, sections 6 and 18



consultation, APA encourages the AER to advise SCER of its consideration on this matter, and its conclusions in relation to the Confidentiality Guideline that imposing such an obligation on service providers is not appropriate.

Use of confidentiality undertakings

APA is concerned over the AER's proposal to make greater use of its ability to disclose information for the purpose of according natural justice to a person affected by a decision of the AER.

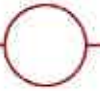
APA has three key concerns in relation to this proposal. The first centres on the AER's proposed use of confidentiality undertakings to enable disclosure of confidential information to requesting stakeholders. APA considers a confidentiality undertaking may not provide sufficient protection for a service provider's confidential information. This is because service providers will have limited remedies for breach, and in any event, once a breach has occurred, confidentiality will be extinguished and the service provider is likely to be adversely affected. In addition, it is difficult to conceive that the beneficiary of confidential information pursuant to a confidentiality undertaking will, even subconsciously, not use that information for purposes outside those set out in the undertaking. The foregoing is a risk inherent in all confidentiality arrangements, but when dealing with parties which have no commercial incentive to keep information confidential, the risk is likely to increase.

APA's second concern relates to the AER's determination of a person affected by a decision of the AER. APA considers that the AER's proposed approach does not provide sufficient detail regarding how it will determine whether a person is sufficiently affected by a decision to activate natural justice concerns.

In accordance with general principles, APA submits that whether or not a person is adversely affected by a decision and therefore afforded natural justice should depend upon whether the decision affects a right or interest of the person beyond what an ordinary member of the public, or the public generally would suffer. For example, simply being a customer of a particular network may not be sufficient, particularly where the information being sought is not directly relevant to prices (for example, where the information relates to system security).

APA's third concern is that the AER's proposed approach in relation to the release of confidential information via confidentiality undertaking does not contemplate information that is confidential to a party other than the service provider. It is unclear whether the AER intends to use confidentiality undertakings to disclose information that is confidential to a party other than the service provider.

If the AER intends to adopt the proposal it has put forward, APA considers the AER should also publish guidance setting out who may be affected by a decision and what a stakeholder must prove to show they are affected and entitled to disclosure. It would appear appropriate that stakeholders seeking confidential information as an "affected person" should be required to provide the AER with information supporting this claim, including details of the reasons as to why they may be adversely affected by not having access to such information, how they will likely benefit from access to that information and why they are adversely affected beyond what an ordinary member of the public would suffer.



APA supports the AER's proposal to afford a service provider the ability to provide comment on an application by a stakeholder for disclosure, should the whole proposal be adopted.

Please contact Alexandra Curran, Regulatory Manager on 02 9275 0020 if you would like further information on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Bolding', written in a cursive style.

Peter Bolding
General Manager Regulatory & Strategy