



AUSTRALIAN ENERGY REGULATOR – BETTER REGULATION PROGRAM CONFIDENTIALITY – ISSUES PAPER

COMMENTS

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Introduction

We refer to the above Issues Paper and thank the Australian Energy Regulator (AER) for providing us with an opportunity to respond to the issues raised therein. We also appreciate that the AER has given us an extension of time to do so given that we have only recently had funding approved by the Consumer Advocacy Panel (CAP) to participate in the AER's Better Regulation Project (BRP). This has necessitated a considerable amount of 'catch up' in a relatively short space of time.

COSBOA is representing the interests of the small business sector in the BRP and its involvement has enabled the range of consumer interests involved in the BRP to extend beyond large business and low income consumers to also include small business. Small businesses often do not have the time, resources and expertise required to be alert to the myriad of legislative and regulatory changes that affects them. COSBOA's efforts are focussed on providing accurate and timely input into decisions which affect small businesses. Our members provide essential input to ensure the quality of our representation, as well as the substance and the credibility to back it up. A list of COSBOA's members is attached this submission.

A significant reason for COSBOA's interest in the BRP is undoubtedly the significant recent increases seen in electricity prices in all parts of Australia and also in gas prices. We expect that outcomes from the BRP will help to ensure that future energy prices are fairer to customers, including small business. We strongly support the need to have effective network regulation and the treatment of network confidentiality claims is important to this.

Energy Networks & Confidential Information

Given the privileged natural monopoly position of energy networks, COSBOA strongly supports regulation that operates in the long term interests of energy consumers, including through the treatment of confidential information. The AER's powers in this regard need to reflect both the monopoly status of networks and the interests of consumers, including that:

- There must be a presumption that information from the networks will be made public unless they can show good cause to the AER why it should not be.
- The consideration of confidentiality claims must include consideration of the need for the AER to have a transparent public process for network determinations and pricing proposals.
- It must also consider the need for consumers to have access to as much information as possible if they are to participate effectively in AER network regulatory and pricing processes.

Being monopolies, the amount of commercial information too sensitive to release to the public would be of a quite limited nature. We note and endorse the AER's comment that:

"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. 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.” (Issues Paper, p. 15)

In this regard, we are concerned that, to date, it appears to us that far too much information provided to the AER by networks has been claimed as and treated as confidential, and therefore not released for public scrutiny. Our impression is also that NSP claims that this information should be held confidentially have been questionable and have been based on loose interpretations of the detriment to them with a very risk averse approach applied by the NSP involved. We do not believe that this has achieved a good balance in terms of the test applied under Section 28ZB (see section immediately below). We note the data included in Table 1 of the Issues Paper for the Victorian DNSPs, which shows that for the current regulatory determination 70 per cent of the information submitted to the AER by the DNSPs was confidential, as measured by the total number of pages. In one case, the DNSP claimed confidentiality over 92 per cent of its information.

We are also concerned by the AER's comment that:

“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.” (Issues Paper, p. 16)

This gives the appearance that the NSPs involved are not taking their obligations under the confidentiality provisions of the NEL seriously enough and could well be seeking to strategically game the processes for their own benefit, to the detriment of the public, consumers and the regulator.

It is appropriate that the AER achieve a better balance in the new confidentiality guideline – one that serves the purpose of the Section 28ZB test and the National Electricity Objective (NEO) – and improves regulatory decisions. They have COSBOA's strong support for this.

Comments on Specific Issues

We comment below on several specific issues, mostly ones raised in the Issues Paper.

Section 28ZB Test

Whilst the test, which seeks to balance the detriment caused to an NSP through disclosure against the public benefit in the matter of the AER determining confidentiality, is embedded in the National Electricity Law (NEL) and therefore not under review in the BRP, it is worth placing on record that

COSBOA supports the intent of this test. However, it may be worth the AER considering setting out in its guideline how it will interpret the words “detriment” and “public benefits” for purposes of administering this test. This will clarify for consumers and NSPs how the test will be applied.

Purpose & Objective of the Guideline

COSBOA supports the objectives outlined in the Issues Paper, namely:

- Assisting in delivering better regulatory decisions. We are particularly concerned that the guideline improve access to information for consumers and help to attain the NEO.
- Achieve the right balance between disclosing and protecting information according to Section 28ZB. We note that confidentiality has hitherto favoured the NSPs.
- Make NSPs accountable for their confidentiality claims by requiring them to provide clear and logical reasons for them according to Section 28ZB. We are concerned that some NSPs have ignored the need to do so to date.
- The AER making clearer how they will assess claims in future through its procedures, by outlining what information it is likely to accept as confidential and by providing a “streamlined process”.

Application of Single Guideline

COSBOA believes it is sensible to apply a single guideline to all information received by the AER. This includes Transmission and Distribution NSPs (TNSPs & DNSPs), regulated gas networks, as well as Regulatory Information Notices, information requests and submissions from others. We therefore support the AER’s intension to do this. We note that TNSPs, DNSPs and regulated gas networks are all monopolies, and that the regulatory and pricing arrangements for them are similar. We therefore see little sense in developing separate guidelines, which would probably look very similar anyway.

We also believe that it would be sensible to have a single guideline for both regulatory determinations and pricing methodologies and can see no reason to treat other information received by the AER differently.

Streamlining & Avoiding Stage 2

The Issues Paper sets out that the AER is seeking to streamline the process for NSP confidentiality claims and that it particularly prefers to avoid stage two of the current process, which it says is “very formal, resources intensive and places an additional administrative burden on NSP,s third parties and us.” (Issues Paper, p. 21) It further notes the aim of resolving as many confidentiality issues as possible before information is received after which there is less time and more resource pressure in assessing confidentiality claims. COSBOA supports the AER’s objectives in streamlining and resolving issues as early as possible, noting the importance of the regulator and consumers having time to consider the voluminous information involved in regulatory determinations.

Use of Templates

We support the use of a template such as that proposed by the AER for NSPs to make confidentiality claims. We particularly support that the information to which confidentiality claims applies should be clearly specified, that clear reasons for confidentiality be provided and that there be a clear statement setting out why detriment to the NSP is greater than the public benefits from release of the information. In our view, it is also important that these claims make clear the nature of the information over which confidentiality is being claimed. This will help consumers to understand better the basis for the claim.

We believe that a template approach has the virtue of standardising to some extent the information relating to confidentiality claims and helping to ensure that NSPs provide certain types of information. It will also be clearer to them what information is required by the regulator and should assist in the timing and efficiency of confidentiality claims as well as their consideration by the AER.

Categories of Information

COSBOA does not see the need for the AER to classify information for confidentiality claims into categories. As the AER notes this would increase the administrative burden on NSPs and there are unlikely to be many categories of information that will always need to be protected or disclosed. This suggests more of a case-by-case approach, although we believe that there could well be use in the AER outlining in the guideline some types of information that it would normally be prepared to consider accepting as confidential and some that it would normally release. This would provide guidance to NSP (and consumers) and may dissuade some NSP from making claims in the first place.

The Issues Paper contains a list of information that the AER would normally consider protecting: network security; sensitive cost inputs; contestable activities; strategic acquisitions, such as land and easements; and personal information. We have no particular objection to this list but believe that the AER should make clear that it will not automatically grant confidentiality to such information but rather will have to consider each request on its merits and that not all such information will necessarily be taken as confidential (i.e., the Section 28ZB test will still apply).

The AER also provides a list of information it will normally disclose and we support this list. We would also add that we believe it should be made clear that the presumption will be that this type of information will be disclosed as the public benefits of doing so greatly outweigh any detriment to the NSP. In fact, without access to complete information on the matters listed, consumers would find it very difficult to participate in the AER's processes in any meaningful way.

In addition to the items listed for publication, we would suggest clarifying that the following will normally be released:

- All information related to the return on and of capital.
- Data related to benchmarking the future capex and opex of the NSPs.

- Capital Efficiency Sharing Scheme (CESS) data (when introduced).
- Service level data including for the STPIS.
- Capitalisation polices.

Website Notices

We support the publication on the AER's website of information on the proportion of material over which an NSP is claiming confidentiality. We also support the use of a template along the lines of that in Attachment 2 to the Issues Paper and that NSPs be required to complete this for their regulatory and pricing proposals. In addition, COSBOA would propose that this information be supplemented by a brief statement, from the AER, outlining the scope, nature and subject matter contained in the confidentiality claim. This will help consumers to better understand the nature and importance of the claim, including their ability to adequately assess the NSP's claim and raise objections if necessary.

Blanket Confidentiality

We urge that the guideline ban blanket confidentiality claims. We can see no justification for such claims. NSPs ought to be made to justify confidentiality claims in full for relevant parts of a document.

Third Party Documents

We do not accept that entire documents from third parties, e.g., consultants or auditor's reports, should be permitted as confidential. We agree that the NSP involved should be responsible for not only verifying, but also establishing, any such claim. We also agree that third party information should be treated in the same way as other material provided by an NSP.

Compliance Costs

We believe that any additional compliance costs caused by the approach outlined in the Issues Paper will be limited. We note that there are some ways in which the approach outlined by the AER may actually reduce compliance costs, e.g., the AER's proposals to avoid the complex and resource intensive Stage 2 and settle confidentiality issues earlier. Of course, NSPs can always keep compliance costs down by limiting the claims they make for confidentiality.

Release of Information to Third Parties

We believe that there would be benefits from allowing the disclosure of confidential information to third parties who are willing to sign a confidentiality undertaking specifying the purpose for which the third party will use the information and that they will not disclose it to anyone else. This would allow willing consumer representatives to have, for example, an improved understanding of regulatory material. However, it should be made clear that this approach cannot be used to circumvent the more general aspects of the AER's confidentiality powers and guideline.

Regulatory Information Notices

COSBOA is of the view that the AER should stand ready to issue Regulatory Information Notices (RINs) where an NSP is not demonstrating a willingness to provide information or otherwise cooperate with the AER's information requests. The AER should also place NSPs under reasonable, but limited, time constraints bearing in mind the demands of its processes and the information needs of consumers participating in their processes (noting that consumer representatives are even more resource constrained than the AER).

ATTACHMENT: List of COSBOA Members

Australasian Association of Convenience Stores
Australian Booksellers Association
Australian Digital Television Association
Australian Equipment Lessors Association
Australian Hairdressing Council
Australian Human resources Institute
Australian Livestock and Rural Transporter Association
BPW Australia (Australian Federation of Business and Professional Women)
Business Enterprise Centres Australia
CITT (Council of Information Technology & Telecommunications)
Commercial Asset Finance Brokers Association of Australia
Convenience and Mixed Business Association
Fitness Australia
FSV
Independent Retailers Organisation
Institute of Public Accountants
National Financial Services Federation
National Independent Retailers Association
Pharmacy Guild of Australia
Pittwater Business Limited
Real Estate Institute of Australia
Stocktakers Institute of Australia
Tasmanian Small Business Council
University of Western Sydney