

## **Consumer Challenge Panel**

### **Confidentiality and freedom of information guidance**

**Document updated: 19 September 2016**

## Introduction

As part of your appointment to the Australian Energy Regulator's (AER) Consumer Challenge Panel (CCP) you will need to complete and sign the confidentiality deed at Attachment A. To assist you in dealing with and understanding your obligations in relation to information provided to you in your capacity as a member of the CCP, we have prepared this document and its attachments.

This document sets out our approach to dealing with confidential information provided to us by third parties. Claims of confidentiality and confidential information provided to us by network service providers (NSPs) will be dealt with in accordance with our confidentiality guideline, once finalised. For completeness, we also set out the principles of legal professional privilege (LPP) as you may encounter issues that relate to LPP as a CCP member.

As a Commonwealth government agency, it is almost impossible for us to guarantee that we will be able to protect the confidentiality of information provided to us by third parties. Confidential information may be released in response to applications made under the *Freedom of Information Act 1982* (Cth) (FOI Act) or pursuant to a discovery order in the course of litigation. This document provides an introduction to the FOI Act. Whilst we think it unlikely, should you, as a CCP member, become involved in litigation, we will provide you with information regarding your discovery obligations at an appropriate time.

## Confidentiality

We have a duty to third parties to protect information that was provided in confidence.

This applies to information provided voluntarily or under compulsion in response to a statutory notice, for example, a notice served under section 28 of the National Electricity Law.

### **AER duty to third parties to preserve confidentiality**

We are obliged to protect documents and information provided in confidence by third parties to us. Therefore, as a CCP member, you will need to be aware of the confidential status of all documents and their contents.

Section 44AAF of the *Competition and Consumer Act 2010* (CCA) imposes obligations on us with respect to the protection of information that was:

- given to us in confidence, or in connection with, the performance of our functions or the exercise of our powers; or
- obtained by compulsion in the exercise of our powers.

It is important to remember that confidential information provided by a third party could have been extracted or reproduced in documents prepared for our internal use, including documents created for the purposes of briefing you in your role as a CCP member. Other examples include file notes, emails and staff papers. The information, as it is contained in such documents, also remains confidential.

## Was the material provided in confidence?

Confidentiality claims over information provided by the NSPs will be assessed in accordance with our confidentiality guideline.

If a third party provides documents or information voluntarily to us and it is not clear from the face of the document that it is confidential, please assume that it was provided in confidence unless it is otherwise clear that it was not.

Examples of situations where it may be reasonable to take the view that information was not provided in confidence include where:

- publicly available documents or information were provided, for example, media articles, press releases, customer catalogues; or
- the information or documents were those that the third party would ordinarily make available, or has made available, to others.

## Legal Professional Privilege

### General Principles

In order for a document to attract LPP, it must satisfy two tests:

- It must be confidential (discussed above); and
- It must have been created for the dominant purpose of providing or obtaining legal advice or for the purposes of anticipated litigation.

### A cautionary note

As a CCP member, you will likely receive a range of confidential information. Should you receive any confidential documents provided by third parties (including NSPs) that appear to contain legal advice (for example, on legal letterhead) please do not read the document. You must first confirm that it is not subject to LPP. While it is possible to argue that, by providing the document, the third party waived their privilege, if the waiver was inadvertent, we may be required to exclude you from working on the matter in question.

## The AER's confidentiality guideline

### Outline

Our confidentiality guideline<sup>1</sup> set out how electricity NSPs must make confidentiality claims over information they submit to us as part of their regulatory proposals. Our aim is for stakeholders to have access to sufficient information on issues affecting their interests.

NSPs must submit extensive amounts of information on their expenditure plans to support the expenditure proposals that they put to us in the course of a revenue determination. Publishing this

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<sup>1</sup> Australian Energy Regulator, *Confidentiality guideline*, November 2013.

information promotes a transparent regulatory process. However, some of this information must remain confidential.

In the confidentiality guideline we set out a two stage process for managing NSPs' confidentiality claims.<sup>2</sup> In the first stage, we aim to reach agreement with the NSP on what information is confidential before we receive any proposal. This may result in a range of outcomes, including narrower confidentiality claims and a limited release of confidential information to certain stakeholders subject to a confidentiality undertaking.

The second stage is when an NSP submits its proposal. The NSP must complete the confidentiality template published with the confidentiality guideline. The template requires the NSP to outline what information is confidential, explain why, and identify which confidentiality category the information falls within.

The confidentiality guideline contains a number of confidentiality categories that NSPs must use to classify confidential information. Examples include information affecting the security of the network and strategic information, for example, in relation to land acquisition. However, classification into one of these categories does not guarantee protection.

Where we cannot reach agreement with an NSP about confidentiality, we may decide to use our powers under the National Electricity Law to disclose the information. For example, we can disclose information an NSP claims is confidential if we consider the public benefit in disclosing the information outweighs any detriment disclosure might cause the NSP.

### **Implications for CCP members**

As a CCP member, you will have access to all of the (confidential and public) information received from an NSP that is relevant to the issues on which you are advising us. Accordingly, a large amount of NSPs' information is expected to be publicly available. You will therefore need to be mindful of information to which you have access to that is not in the public domain and treat it accordingly.

In the event that we disagree with an NSPs' confidentiality claim, we may seek your views as to the likely public benefits of disclosure of the information.

### **The ACCC-AER Information Policy**

The ACCC has formally set out how it collects, uses and discloses information in the Australian Competition Consumer (ACCC)/AER Information Policy. A copy is attached at attachment B for your information.

In summary and consistent with the policy, the ACCC/AER's approach is that information, including confidential information, collected by the ACCC/AER may be viewed by ACCC/AER members, staff and consultants such as legal or economic advisers. The ACCC may then use that information as part of its performance of its duties and functions. The ACCC is committed to treating confidential information responsibly and in accordance with the law. As discussed in relation to the confidentiality guideline, the ACCC will usually consult with the person who has provided the

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<sup>2</sup> Australian Energy Regulator, *Confidentiality guideline*, November 2013, pp. 4–5.

confidential information about any disclosure of the information beyond ACCC/AER members, staff and advisors such as CCP members.

## **Freedom of Information**

### **General Overview**

As Commonwealth Government agencies, we are subject to the FOI Act. The purpose of the FOI Act is to open government activity to public scrutiny in order to enhance accountability and encourage citizen engagement with the democratic process. Under the FOI Act, agencies are encouraged to proactively publish a range of information, for example, operational information, which sets out how they go about their business. The FOI Act also gives people a legal right to access documents held by government, subject to certain exemptions.

If an FOI request is received, an ACCC decision maker will assess the request in accordance with the provisions of the FOI Act to determine whether the documents should be released or whether any exemptions apply. If exemptions do apply, partial release of the documents may also be appropriate. An FOI applicant that is dissatisfied with a decision may seek review of the decision by another ACCC decision-maker or by the Office of the Australian Information Commissioner.

Documents are generally published on the ACCC's website two weeks after they are released to an FOI applicant. There are also some exceptions to this.

### **Implications for CCP members**

Any documents held by the AER or the ACCC can be sought by an FOI applicant. Any documents that you create as a CCP member, will be documents held by government that could be sought under the FOI Act. In addition, any material in existence or developed by you independently, can also be sought by an FOI applicant if it is held by the ACCC or the AER.

The legal right to access documents held by government is subject to certain exemptions and the ACCC/AER will work with you to determine if any of these exemptions apply to any material you create or provide that is sought by an FOI applicant. Documents that may be exempt include those subject to LPP, documents that disclose trade secrets or commercially valuable information, documents that relate to business affairs and those that set out deliberative processes relating to an agency's function.

As noted above, we cannot guarantee that we will be able to maintain the confidentiality of any documents in our possession. While we will do our best to ensure that any documents that appropriately come within one of the exemptions in the FOI Act remain confidential, we cannot provide a blanket assurance in this regard. Moreover, documents cannot be exempted on the basis that they may cause embarrassment or confusion. We would therefore recommend that, in creating documents in your role as a CCP member, you consider whether, if the document were to be made public, it would cause embarrassment to you, to the CCP or to us. As a rule of thumb, if you think your document would cause embarrassment if it were made public, do not create it.

## **Discovery**

In the event that a matter that you have worked on becomes the subject of litigation, the court may make an order for discovery. That is, each side must give documents that are relevant to the case to the other side. There is limited ability to maintain confidentiality over documents (such as LPP) that would otherwise have to be disclosed in the discovery process. However, in general most documents will need to be given to the other side. This would include Contract and Existing Material. Once again, documents cannot be withheld on the basis that they are embarrassing or confusing. For example, documents that use hypothetical data to test a model should be clearly labelled as such. In a discovery process, such documents cannot be withheld from the other side on the basis that the hypothetical data may cause confusion.

## **Further questions and discussion**

Lawyers in the Regulatory Law Unit within the ACCC's Legal Group are available to work with you and AER staff to address any specific queries or concerns you may have. If you have any detailed issues you would like to raise, please talk to Tanja or Kurt so that they can arrange a meeting.

## Attachment A – Confidentiality Deed

### DEED POLL - CONFIDENTIALITY UNDERTAKING

I (name).....of

[COMPANY NAME] .....

[COMPANY ADDRESS] .....

- (a) acknowledge that all information and material provided by the Australian Competition and Consumer Commission (“the ACCC”) or the Australian Energy Regulator (“AER”) for the purposes of the provision of services by ..... [CONTRACTORS NAME] pursuant to membership of the Consumer Challenge Panel was provided by the ACCC or AER in confidence, unless expressly stated otherwise;
- (b) undertake to the ACCC :
- (i) to use information provided by the ACCC only for the purposes of the services; and
  - (ii) not to disclose, publish or communicate to any other person or otherwise make public:
    - (1) any such information or material provided by the ACCC; and
    - (2) any information produced in connection with or by the performance of the services;

except as permitted by the terms of the contract or otherwise with the prior approval in writing of the ACCC;

- (c) undertake to the AER :
- (i) to use information provided by the AER only for the purposes of the services; and
  - (ii) not to disclose, publish or communicate to any other person or otherwise make public:
    - (1) any such information or material provided by the AER; and
    - (2) any information produced in connection with or by the performance of the services;

except as permitted by the terms of the contract or otherwise with the prior approval in writing of the AER.

Executed as a Deed Poll:

Signed, Sealed and Delivered by:

Name.....

Signature.....

Date.....