



# **Response to the AER Draft Confidentiality Guidelines**

**September 2013**

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## 1 Executive summary

The Energy Networks Association welcomes this opportunity to provide a submission in response to the Australian Energy Regulator's (AER) Draft Confidentiality Guideline.

The ENA is supportive of the AER's intention to establish an open and transparent process for making confidentiality claims by Network Service Providers (NSPs) that would strike an appropriate balance between protecting and disclosing information. The ENA also notes that the guidelines have a role in enhancing stakeholder understanding of confidentiality matters and facilitating improved stakeholder engagement in the regulatory determination process.

The ENA broadly supports the approach that the AER proposed in its Draft Confidentiality Guideline and Explanatory Statement, including a proposal to extend the application of the guidelines to all information provided to the AER. In this submission, the ENA makes a number of recommendations which are directed at enhancing the process around information handling and ensuring that the guideline is suitable for broader application. Specifically, the ENA recommends that:

- The *Explanatory Statement* should place greater emphasis on collaborative engagement after a NSP makes a formal claim of confidentiality:
  - It should recognise that the AER can elect to notify the NSP about confidentiality issues and request further details regarding why information should be protected, before exercising its formal disclosure powers; and
  - It should encourage consumer stakeholders to raise their concerns with the relevant NSP directly, enabling the resolution of as many confidentiality issues as possible and developing collaborative relationships between stakeholders and NSPs.
- Given that NSPs will not be able to include sensitive information in the confidentiality template; there should be an opportunity for the NSP to engage with the AER, in rare instances where it would be difficult for the NSP to substantiate its claim without disclosing sensitive information. There is some concern that in such circumstances, not being able to provide sensitive information could potentially weaken the NSP's confidentiality claim. The ENA suggests that this issue could be addressed by NSPs engaging with the AER during pre-lodgement discussions to reach an agreement on the level of reasons to be included in the confidentiality template if such matters arise.
- The AER should include a category of "Proprietary information of a NSP or third party" in the list of recognised confidentiality categories. The AER recognised that there may be good reasons for this information to be protected from disclosure. It would be logical to introduce an appropriate category to deal with this kind of information rather than try to stretch the definitions to make it fit into another category.
- A number of enhancements to the AER's confidentiality undertaking template should be made to introduce additional safeguards. This would better protect the confidential nature of any information provided, and would also incorporate appropriate flexibilities in the confidentiality undertaking to enable it to adapt to circumstances of appropriate disclosure that are likely to arise. The alternative drafting of the confidentiality undertaking template is provided within [Attachment 1](#).

In the *Explanatory Statement* the AER suggested that it will extend the scope of Confidentiality Guideline to all regulatory information instrument responses. The ENA agrees that it would be a pragmatic approach to assume that the guideline apply to all confidential information provided to the AER. However, the ENA notes that the binding nature of the guideline relates only to their application for regulatory and revenue proposals under the National Electricity Rules. This matter is further discussed in section 4.2 of this submission.

## 2 Background

The Australian Energy Market Commission's (AEMC) Rule Determination in respect to Economic Regulation of Network Service Providers, published in November 2012, introduced a requirement for the AER to develop and consult on electricity distribution and transmission confidentiality guidelines.

The relevant provisions contained within *National Electricity Rules* (Rules) provide that the guidelines must specify the manner in which regulated businesses may make confidentiality claims in relation to the content of their initial and revised regulatory (distribution) and revenue (transmission) proposals. The guidelines will be binding on both businesses and the regulator in accordance with 6.14A (d) and 6A.16A (d) of the Rules.

## 3 Information handling process

In the *Explanatory Statement* the AER outlined its revised process for information handling. The key area of difference relative to the AER's existing approach is that it provides for a greater focus on collaboration and stakeholder engagement at Stage One of the process. The AER does not propose any changes to Stage Two of information handling. That is, the AER will assess claims of confidentiality on a case by case basis. Where it disagrees that the information should be protected it will use its formal information disclosure powers.

The AER's approach to work collaboratively with NSPs during Stage One rather than post-lodgement is understandable insofar as it would avoid consuming the limited time devoted to the assessment of regulatory and revenue proposals. At the same time it will enable the resolution of a number of confidentiality claims, thereby reducing its task post-lodgement. The ENA notes that such an approach will allow both parties to know the areas of disagreement regarding disclosure prior to the NSP making a formal claim of confidentiality.

Whilst the ENA recognises that collaboration on confidential information prior to lodgement is necessary, it should be noted that it may not always be possible for all areas of disagreement to be known in advance of lodgement. Subsequently, the ENA maintains its view that there should be an opportunity to engage with the AER post-lodgement. In our view, adopting such an approach would assist in resolving confidentiality matters in a more constructive and efficient way, rather than the AER having to automatically resort to using its formal disclosure powers. It would be useful if the AER recognised the possibility of taking this approach in the final *Explanatory Statement*.

The ENA considers it important that the AER recognises that NSPs will not be able to engage with all stakeholders on confidentiality matters prior to submitting their proposals. This is because even with effective consumer engagement an NSP cannot predict all of the stakeholders that may be affected by an NSP's decision to claim confidentiality over certain information. Consequently, the ENA considers the final *Explanatory Statement* should emphasise that it is open to stakeholders to raise their concerns with the relevant NSP directly at any stage of the regulatory process. In many instances NSPs would agree to provide stakeholders with detailed information on request and subject to confidentiality undertakings. This represents a pragmatic approach that would further the aim of resolving as many confidentiality issues as possible and developing collaborative relationships between stakeholders and NSPs.

The ENA notes that the *Explanatory Statement* provides that during Stage Two of information handling the AER can exercise its formal powers in a way that would involve limited disclosure of confidential information to particular stakeholders, e.g. eligible stakeholders who lodged an application with the AER. The ENA wishes to indicate that the NSPs' preference is to be the first point of contact prior to any application to access information being lodged with the AER by the stakeholder.

## 4 Manner in which NSPs may make confidentiality claims

### 4.1 Confidentiality template

The ENA supports adoption of a confidentiality template in the guideline. The presentation of confidentiality claims in an organised manner and with sufficient level of detail would streamline the process of claiming confidentiality and assist the AER in assessing claims.

The AER draft guideline requires that for each piece of information that an NSP claim as confidential, the following information is provided:

- Title of the document containing confidential information;
- Page and paragraph number of the document containing confidential information;
- Description of the confidential information;
- Topic the confidential information relates to;
- Confidentiality category that the information falls within;
- Brief explanation as to why the information falls into the selected category;
- Reasons supporting how and why detriment may be caused from disclosing the identified information; and
- Any reasons supporting why the identified detriment is not outweighed by the public benefit.<sup>1</sup>

The ENA considers that the level of information required in the AER's confidentiality template is sufficient for the AER to perform its assessment and supports the template in its current form.

The ENA appreciates the consideration that the AER has given to addressing industry concerns in relation to the AER's proposal to require NSPs to undertake a public benefit test with regard to confidentiality claims.<sup>2</sup> The ENA considers that making a requirement to address public benefit optional is in alignment with the existing regulatory framework and will reduce the administrative burden that otherwise would be imposed on NSPs.

Further, the ENA supports the AER's intention to publish completed confidentiality templates on its website, thereby facilitating consumer stakeholder understanding of confidentiality matters. It should be noted, however, that in some circumstances it may be difficult to complete confidentiality templates without disclosing sensitive information, e.g. where information relates to network security arrangements, emergency and terrorism response plans. In these instances, the articulation of potential detriment to an NSP might be provided at a reasonably high level of detail. The ENA considers that these concerns can be resolved during pre-lodgement discussions with the AER by reaching an agreement on the high level of reasons to be included in the confidentiality template. It is expected that there will not be many issues of this nature.

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<sup>1</sup> AER, *Draft Confidentiality Guideline*, Attachment 1, p.10.

<sup>2</sup> AER, *Issues Paper, Distribution and Transmission Confidentiality Guidelines*, p.16.

## **4.2 Manner in which information is to be provided**

In addition to completing a confidentiality template, the draft guideline specifies requirements regarding how confidential information should be presented to the AER. In particular, the NSPs will be required to:

- In confidential versions of documents, highlight the confidential information in yellow shading;
- Provide a public version of the documents which contain the confidential information. The public version must clearly identify the information the NSP wants to protect by redacting or 'blacking out' the information. Public versions must retain the same formatting and page numbers as the confidential version;
- Submit the confidentiality template in Microsoft Word format; and
- Specify on electronic documents' filenames whether the document is "public" or "confidential".<sup>3</sup>

The ENA considers these requirements to be reasonable for confidentiality claims in NSPs' regulatory or revenue proposals. In the *Explanatory Statement* the AER suggested that it will extend the scope of Confidentiality Guideline to all regulatory information instrument responses.<sup>4</sup> The ENA agrees that it would be a pragmatic approach to assume that the guideline apply to all confidential information provided to the AER, however, obviously the guideline is only binding in respect of regulatory and revenue proposals.

In order to ensure that the guideline approach is practical in most circumstances, it would be useful if the AER can clarify the following concerns:

- It is unclear how NSPs would need to present the documents in support of their regulatory or revenue proposal, where release of these documents in the public domain will lead to a breach of copyright. For example, it is not clear how the NSP would need to redact a journal article it may wish to provide in support of its regulatory or revenue proposal if such an article represents proprietary information. The ENA notes that most of these documents are already available in the public domain and access to them typically involves taking up a subscription or paying a one-off fee.
- Some documents may contain a large proportion of confidential information so that a redacted version would be of limited utility to a reader. In these circumstances it would make no sense to submit both public and confidential versions of the document. The ENA suggests that NSPs should discuss with the AER whether a public version is required or not during pre-lodgement stage of information handling.

The ENA considers that a distinction should be drawn (and made explicit in the guideline) between confidentiality claims where the guideline is legally binding and instances where it is applied as policy. The AER should approach issues of compliance on this basis.

## **5 Categories of confidential information**

The ENA strongly supports the AER's decision to include categories of confidential information in its draft guideline. The establishment of categories will further the aim of streamlining the process of making confidentiality claims and reduce the administrative burden on the AER in assessing confidentiality claims.

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<sup>3</sup> AER, *Draft Confidentiality Guideline*, p.8.

<sup>4</sup> AER, *Explanatory Statement: Draft Confidentiality Guideline*, p.12.

The ENA reviewed the list of categories proposed by the AER and considers that most confidential information can be classified within these categories. The ENA also notes that the AER's proposed list is not exhaustive, recognising that there may be other pieces of confidential information which do not fall within listed categories but nevertheless constitute legitimate reasons for claiming confidentiality.

One area in which the ENA disagrees with the AER conclusions on categories of confidential information relates to the decision to reject the confidential category of "Proprietary information of an NSP or third party". It would not be expected to release sophisticated models developed at significant expense to a NSP – such as demand forecasting models – into the public domain. Although, in many instances the NSPs would agree to provide this information by request, subject to confidentiality undertakings.

The AER's explanation as to why it decided to reject this category relates to concerns that there is the potential to claim a lot of information as confidential by reference to this category. The ENA considers that there are a number of problems with such an explanation. In particular:

- Such a reason is dismissive of the whole assessment process that the AER will use to check NSPs' confidentiality claims, e.g. the AER will assess confidentiality claims contained within confidentiality templates on the case by case basis;
- The AER retains the regulatory discretion to reject a claim of confidentiality, despite the information being within an established category; and
- The AER's suggestion that intellectual property could fall under the "market sensitive cost inputs" or "strategic information" category is misleading as intellectual property does not conform to such definitions.

The *Explanatory Statement* suggests that the AER considers it permissible to put intellectual property within another category, recognising that there may be good reasons for this information to be protected from disclosure. The ENA considers that a more logical way to deal with this type of information is to allow for an appropriate category in the guideline. This would provide NSPs with certainty that the intellectual property factor will be assessed on its own merits, which would not be possible if intellectual property is subsumed into another category.

The AER in its *Explanatory Statement* has provided its view on the types of documents that should generally be in the public domain. The ENA notes that the AER has accepted that these documents may also contain information which the AER should protect i.e. there is not an expectation that the documents listed will necessarily be fully disclosed.<sup>5</sup>

## **6 AER information disclosure powers**

### **6.1 Disclosure powers under the NEL**

There is a distinction to be drawn between information that the AER does not consider confidential and that which is confidential but nonetheless should be disclosed. The *National Electricity Law* (NEL) identifies two circumstances when confidential information can be released by the AER:

- Under s. 28ZB(b), where disclosure of the information would cause detriment to a person who provided it to the AER; however public benefit in disclosing it outweighs that detriment; and
- Under s. 28Y(c), for the purposes of according natural justice to a person affected by a decision of the AER.

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<sup>5</sup> AER, *Explanatory Statement: Draft Confidentiality Guideline*, p.16.

The AER proposes to make greater use of its power under s. 28Y(c) in future. This section provides that the AER is authorised to disclose information given to it in confidence for the purposes of according natural justice to a person affected by a decision of the AER under the NEL or the Rules. In order to disclose information pursuant to s. 28Y(c) the AER would need to be satisfied that it is disclosing information:

1. For the requisite purpose. The AER can only disclose the information where it is necessary to do so for the purposes of according natural justice. In essence what natural justice (or procedural fairness) requires is that a decision-maker who is affecting a person's rights must give that person a chance to put their side of the case before a decision is taken; and
2. To a person affected by a decision. The term "person" is defined in the NEL as "includes a body politic or a body corporate as well as an individual".<sup>6</sup> The term "body politic" is generally understood to comprise people constituting a political unit within government. In order to be "affected" by a decision, the person would need to have more than a mere general interest in the subject matter of the decision.

In seeking to disclose confidential information pursuant to s. 28Y(c), the AER will need to give careful consideration to the form of disclosure that it considers necessary to afford natural justice. The obligation of disclosure is not absolute, and in circumstances where disclosure has the potential to cause harm, disclosure of the substance and not the detail of the information may be sufficient to satisfy the obligation of disclosure.<sup>7</sup> The High Court has noted that the application of the principles of procedural fairness in a particular case "must always be moulded to the particular circumstances of that case".<sup>8</sup> This may mean, for example, that disclosure of the material is only to the professional advisers of the person concerned<sup>9</sup>, or subject to appropriate arrangements being in place to ring-fence the relevant information from being used for other purposes such as the procurement of services or in commercial negotiations.

## **6.2 Confidentiality undertaking template**

The AER proposed that confidentiality undertakings will be used when the AER seeks to use its powers under s. 28Y(c) and proposed a template undertaking as set out in Attachment 4 of the *Explanatory Statement*. The ENA supports the use of appropriate undertakings where the AER has determined that the various matters in s. 28Y have been satisfied and it will disclose information under that section. The ENA considers that enhancements to the template would assist in ensuring that confidentiality of information disclosed pursuant to the AER's powers is maintained.

In particular, the ENA proposes that the following amendments be incorporated in the confidentiality undertaking template to ensure that there are sufficient protections to assist in preventing inadvertent disclosure of the confidential information:

- Require that any confidentiality undertaking required by the AER when it exercises its powers of disclosure be executed by a natural person. The *Explanatory Statement* provides that the AER will require signed undertakings from both the organisation and the individuals representing it

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<sup>6</sup> National Electricity Law, Schedule 2, cl. 10.

<sup>7</sup> See for example: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 741 (Merkel J), [29], [48] and [50]. Merkel J noted that the requirements of procedural fairness are flexible and it is possible to meet those requirements by disclosing, in an appropriate manner, the gravamen of the relevant material without disclosing the relevant sensitive information.

<sup>8</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 99[25].

<sup>9</sup> See for example: *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, at 197 (Neaves J) and 223 (Gummow J).



who want access to the confidential information.<sup>10</sup> The ENA considers that the requirement that the organisation sign an undertaking is not needed when it understands that the intention of the AER is that only authorised individuals who have provided an undertaking will have access to the confidential information. By only having individuals execute any undertaking ensures that it is clear that there are appropriate limits on the use and disclosure of confidential information rather than any potential misinterpretation that the information may be accessible by an organisation at large.

- Incorporate a list of the confidential information in a schedule to the undertaking. The ENA proposes that each of the documents comprising the confidential information be labelled with a unique identifier to ensure that the AER, and the NSP, can keep track of the documents disclosed pursuant to the undertaking. The above ensures that there is certainty and transparency in the information which is subject of the undertaking.
- Broaden the definition of “Confidential Information” to include any document or things (or parts of the documents or things) constituting, recording or containing any of the confidential information in the third party’s possession, custody or control. This amendment makes clear that if the confidential information is reproduced (for example, the information is presented in a different way in analysis undertaken by the third party), the third party’s obligations of confidentiality extend to that analysis.
- Require that third parties accessing confidential information:
  - ensure that there are appropriate measures in place to safeguard the confidential information, as well as requiring the third party to return or destroy the confidential information after ceasing to use the information for the approved purpose at the request of the AER; and
  - do not reproduce or make any copy of the confidential information without prior written consent of the AER.

These obligations ensure that there is no doubt about the limitations that are placed on the third party subject of the undertaking. In particular, if the third party wanted to scan the document onto its computer then the AER’s consent would be required, and it would be upon the third party to demonstrate to the AER that it had sufficient safety measures to protect that information from unauthorised access on its network.

Further, the ENA proposes that acceptable disclosure includes, in addition to the AER and its staff, other persons who have executed a confidentiality undertaking in the same terms. To that end, the ENA’s proposed amendments to the template include a schedule which may list other persons who have executed an undertaking relating to that information, as well as provide flexibility for other persons, who at the time of the execution of the undertaking were not bound by confidentiality obligations in respect of the confidential information. This amendment acknowledges that in practice, an organisation may have a number of internal staff, as well as external advisers, who may need to access the confidential information for the authorised purpose of making a submission in respect of the relevant regulatory decision. If the relevant people have executed a like-undertaking then the ENA considers it appropriate for documents which have been sent to one individual bound by confidentiality obligations to be provided to other such individuals.

Other minor amendments proposed by the ENA include to:

- Insert an acknowledgment that the obligation to keep information confidential does not apply to information which is in the public domain.

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<sup>10</sup> AER, *Explanatory Statement: Draft Confidentiality Guideline*, p.25.

- Require the signature of the individual executing the deed poll to be witnessed by a person who is not a party to the deed (ideally, not an associated party, representative or employee of that individual). The witnessing of the execution of the deed poll by an individual (such as a legal practitioner or Justice of Peace) who is not a party to the deed is critical to ensure due execution.

These requirements are relevant to the enforceability of the undertaking.

The ENA also considers that while the attached template may be an appropriate starting position, each situation will be unique and the AER should take a flexible approach when requiring an undertaking by any third party to be executed. Therefore, amendments to the template may be appropriate in order to tailor the undertaking to the particular circumstances. In pursuit of good regulatory practice, the development of the undertaking in each case should be done in consultation between the AER, the NSP and the third party.

The ENA has attached to the submission a copy of its proposed amendments to the AER's confidentiality undertaking template. Insertions are shown in green doubled underlined text and deletions in red strike through.

# Attachment 1 Revised confidentiality undertaking template

## Confidentiality undertaking

*For organisations*

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

[ORGANISATION NAME (if applicable)]

[ORGANISATION ADDRESS (if applicable)]

(a) acknowledge that:

(i) all information provided to [ORGANISATION NAME] me by the Australian Energy Regulator ('the AER') pursuant to section 28Y of the National Electricity Law or section 326 of the National Gas Law contained in the documents listed in Schedule A ('the Confidential Information') was provided by the AER in confidence;

(ii) each document comprising the Confidential Information has been allocated a unique identifier (as shown in Schedule A) for the purposes of the AER maintaining a record of the Confidential Information; and

(iii) the Confidential Information includes:

6.2.1.1 the Confidential Information as incorporated in submissions as permitted under subclause (b)(i) below; or

6.2.1.2 any documents or things (or parts of documents or things) constituting, recording or containing any of the Confidential Information, including any data analysis or other work undertaken from which the Confidential Information can be identified or derived;

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

(i) that [ORGANISATION NAME] I will use the Confidential Information only for the purposes of producing and providing submissions to the AER regarding the decision of the AER entitled, [INSERT NAME OF DECISION AND RELEVANT REGULATORY PERIOD] ~~distribution determinations, transmission determinations or access arrangements as defined in~~ made under the National Electricity Law and National Gas Law (Approved Purpose);

and

(ii) that ~~[ORGANISATION NAME]~~ subject to the terms of this undertaking, I will keep confidential at all times the Confidential Information that is in my possession, custody, power or control and not to disclose, publish or communicate to any person other than the AER or otherwise make public, either directly or indirectly the Confidential Information, with the exception of the following persons:

(A) a person listed in Schedule B and any other person who has been approved to receive the Confidential Information and who has signed and served on the AER a confidentiality undertaking in the terms of this undertaking; or

(B) the AER, its staff and legal advisers and any other persons assisting the AER;

~~(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.~~

(iii) that I will not reproduce or make any copy (including any electronic copy) of the Confidential Information without the prior written consent of the AER;

(iv) that I will establish and maintain security measures, or ensure that security measures have been provided for, to safeguard the Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information;

(v) upon ceasing to require the Confidential Information for the Approved Purposes, I will promptly comply with any request by the AER to return the Confidential Information to the AER or destroy the Confidential Information; and

(vi) if in accordance with subclause (v) I am required to destroy the Confidential Information, will provide a written notice to the AER identifying the Confidential Information destroyed.

(b) To avoid doubt, this undertaking does not:

(i) prevent ~~[ORGANISATION NAME] from disclosing, publishing or communicating its~~ the disclosure, publication or communication of submissions permitted under subclause (a)(iii)(A) provided that the Confidential Information is redacted from such submissions; or

(ii) impose any obligation upon any person in respect of information which is in the public domain.

Executed as a Deed Poll on .....

Signed, Sealed and Delivered by:

Name.....

Signature.....

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

Witnessed by:

Name.....

Signature.....

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## Schedule A – Confidential Information

No	Document name	Date
A1		
A2		
A3		
A4		
A5		

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## Schedule B – Authorised Persons

No	Name	Title, Organisation Name (if applicable)
1		
2		
3		
4		
5		