



Major Energy Users Inc.

Australian Energy Regulator

Better Regulation Program

Confidentiality Guideline

MEU Comments on the draft guideline

Submission by

The Major Energy Users Inc

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1. Introduction

The Major Energy Users Inc (MEU) welcomes the opportunity to provide comments on the AER draft confidentiality guideline released in August 2013.

The guideline is being established under the recently approved revised network Rules. The amended rules recognise that the networks are incentivised to constrain release of information under the guise of “commercial in confidence” and in doing so, minimise active and informed stakeholder involvement in the revenue reset process.

The guidelines are part of an overall work program to improve energy regulation and enhance consumers’ long term interests.

The MEU has reviewed both the draft guideline and the explanatory statement accompanying the draft guideline and notes that there is considerable variation in scope between the two documents. This is concerning and the MEU highlights these in the following sections.

As a general observation, the MEU observes that the more information that is classed as confidential, the more this prevents active stakeholder involvement in the regulatory process. The new Rules make it clear that active stakeholder (especially consumer) involvement in the regulatory process is essential to ensure that equitable outcomes are achieved. However, the more the regulatory review process is based on information kept confidential from stakeholders, the less the outcome will be equitable because stakeholders are prevented from substantiating their views on aspects where they can demonstrate flaws in the claims of NSPs.

The MEU has long been of the view that “confidentiality” has been used by regulated network service providers (NSPs) to maximise the amount of information that is considered to be “commercial in confidence” as this limits the amount of stakeholder engagement in a revenue reset process and, by doing so, maximises the revenue an NSP will receive from the regulator.

NSPs claim that release of information about the NSP, its operations and its activities could allow their competitors to use the information to the detriment of the NSP. The MEU rejects this as, being monopoly providers (that is why they are regulated), they have no competitors. The MEU has observed that a claim for confidentiality is often used to assist in gaining an otherwise unsustainable increase in revenue.

Equally, the MEU accepts that some information submitted by an NSP should not be made widely available because its release could harm consumers’ interests and those of third parties where release could harm their competitive position.

The MEU continues to be of the view that the amount of information that truly needs to be kept confidential is quite modest and the process for claiming confidentiality needs to be predicated on the basis that all information should be made available, with the NSP having to substantiate any claims for confidentiality, complete with reasons why its release would cause harm and to whom.

The MEU has also noted that in the past NSPs have been required to release information which they initially claimed as confidential. However, the NSP causes the time to enforce this release to result in an outcome where the release is too late for stakeholders to use it. The MEU considers that the guideline should address this aspect and makes some suggestions as to how this “game” can be overcome.

2. The AER approach

The explanatory statement details the process the AER proposes to undertake with regard to confidentiality as well as outlining how the NSP must claim confidentiality.

The process describes two stages – the first where the AER and the NSP discuss, prior to the submission of the NSP’s application for a reset, the extent of the information that the NSP will seek to have remain confidential. As part of the lodgement of its application the NSP will be required to provide an explanation of what information is to be confidential and the reasons for wanting the information to remain confidential.

The benefit of this statement of what is confidential and why, will allow stakeholders to have a better understanding as to whether the withholding of this confidential information; stakeholders can also assess the impact of this information not made available on their ability to provide a comprehensive response to the application. If stakeholders disagree with the NSP’s decision on confidential information, the stakeholder can request the AER to investigate further, following the process currently in place, but with a better ability to provide arguments for its release.

Based on its own assessment and if a stakeholder requests release of the confidential information, the second stage of the process will be for the AER to seek acceptance of the NSP for the information release and, if this is not forthcoming, to use its regulatory powers to require the requested confidential information to be released. This second stage is essentially what occurs under the current arrangements.

Fundamentally, the new AER approach is based on the current approach plus two extra steps:

- Discussion with the NSP prior to releasing its application (stage 1), presumably seeking for the minimum amount of information to be kept confidential
- Imposing on the NSP the onus to explain for all (AER and stakeholders) what has been kept confidential and why (the confidentiality template).
- The confidential version of the application must be highlighted to show what is not provided in the public version of the application.

Presumably it will be during the stage 1 process that the AER makes it clear to the NSP how the AER expects the NSP to focus on the detail of what is in fact confidential rather than impose “blanket” confidentiality coverage on large parts of their application. The AER notes on page 11 of its explanatory statement how it considers this better focus might be applied by

- “narrower confidentiality claims
- limited redactions in public versions of documents
- provision of detailed information adjusted to protect sensitive elements
- limited release of confidential information to particular parties, such as through confidentiality undertakings”

The MEU considers this is a sound approach to the issue and supports the AER proposals, although it provides some additional features to be added (see section 3).

The AER will require the NSP to formally provide details of what is considered by the NSP should be confidential and for the NSP to explain why this is the case – the confidentiality template. The MEU considers that this new requirement is a significant improvement in the process and places the onus on the NSP to clearly demonstrate what is confidential and the reasons for it. The MEU is fully supportive of this new requirement.

The confidentiality template provides stakeholders details of what has been kept confidential and why, allowing stakeholders a better understanding of what has been kept confidential and providing the basis of seeking disclosure of the information either openly or through entering into a confidentiality arrangement with the NSP.

Requiring the confidential version of an application to highlight what is excluded from the public version allows the AER to better understand what has been excluded provides the AER with a much better appreciation of what has been deleted and the import of the information excluded. This additional requirement is supported.

3. Comments on the draft Guideline

The draft guideline itself details the preparation of the template outlining the information that is confidential and why, where the information has been redacted and other information which supports the view of the NSP why the information needs to be confidential.

As far as it goes, the MEU generally considers that what is provided in the draft guideline reflects the explanatory statement in that it details the requirements for the development of the confidentiality template and the need to highlight in the confidential submission the information kept confidential.

However, the MEU considers that the guideline does not provide adequately what the explanatory statement details

3.1 The draft guideline is deficient compared to the explanatory statement

The MEU Notes that the scope outlined in the explanatory statement is much greater than completing the template and highlighting which are in the draft guideline.

The explanatory statement makes it clear that:

- There will be a stage 1 process where the AER will discuss with the NSP what is to be claimed as confidential. This discussion will take place before the issue by the NSP of its application and release of its confidentiality template
- The AER will not readily accept blanket confidentiality claims over entire documents, but that only the actual information that is confidential may be redacted from the public documentation
- Informal communications will not be subject to the guideline
- The reasons why certain categories of information are not implemented are based on assessments that the information, broadly, should be made available.
- The AER considers that limited release of confidential information will be encouraged when backed up by an undertaking of confidentiality

The MEU considers that the guideline should provide all details of what the process will be, rather than just outline the development of the confidentiality template. The guideline should be a stand alone document rather than have a need to continually refer back to the explanatory statement

3.2 The stage one process – pre-lodgement discussions

The first element of the AER approach is to discuss with the NSPs the expected documentation to be subject to confidentiality.

The principle behind the AER approach is that this discussion will result in the AER and NSP more or less agreeing on what should be classed as confidential information. Failure of the NSP agreeing to work cooperatively with the NSP is not addressed.

The implication of such failure will be that stakeholders will be no worse off as they are now with the AER having limited time to use their powers to release the withheld information. This state of affairs is unacceptable.

The AER must develop some approach to the imposition of sanctions should the NSP be intransigent because the lack of information results in a lessening of stakeholder involvement in the regulatory process.

The MEU considers that the stage 1 process should be expanded to include an extra step. The stage 2 process requires the NSP to provide a template of information that is considered by the NSP to be confidential. The MEU considers that the AER should require the NSP to provide this template (the "draft template") during the stage 1 process and for this to be released to stakeholders for comment. The value of generating the template during the stage 1 process is twofold:

- The template provides the AER with a comprehensive explanation of the NSP thinking and allows the AER a focus for its discussions and an understanding of where and what confidentiality will be claimed
- Releasing the draft template for stakeholder comment can provide the AER with additional information and argument supporting greater release of information.

The MEU considers moving forward in time the requirement for NSPs to provide details of their intentions allows the AER and stakeholders to provide arguments for release of the information well before it might be used. This overcomes the current problem that NSPs can delay the release of useful information until its release loses its value to stakeholders.

3.3 What is confidential information?

The explanatory statement, in attachment 3 outlines documents that should be made available albeit with some redactions. The Explanatory Statement (page 16) states that this listing usually contains the information central to justifying NSP proposals, even though they may contain some elements that might be confidential. On this basis the AER considers that they should be made public with some redaction.

It would be preferable that this listing should be included in the guideline.

The MEU considers that this inclusion is a key element of a guideline as a guideline should be able to stand alone with little or infrequent need to refer to the explanatory statement that accompanied it.

The AER notes that consumers also sought for other information to be explicitly listed as requiring to be made public, including:

- “information on data acquired for benchmarking
- related party transactions/arrangements
- non-regulatory activities
- street lighting maintenance data.”

The AER has stated that inclusion of these elements will be treated on a case by case basis, although it is addressing allowing access (in some form) to its database on benchmarking and expenditure information.

While accepting the limitations on some of these activities and that allowing access to the database information is being separately assessed, the MEU is still very concerned about release regarding the documentation on related parties.

The MEU is very much aware that related party transactions have the ability to siphon off considerable amounts of money, seemingly for the provision of regulated services, yet in practice such transactions are an alternative route to the related parties gaining increased profits. Excluding documentation on related party arrangements results in less transparency and therefore can result in consumers paying more for the services than is intended by the building block approach to setting regulatory allowances.

3.4 The template – Public benefit vs NSP detriment

The MEU notes that, although there is a specific requirement that the NSP “must” provide the information specific to each column in the template, the requirement to provide reasons why the NSP considers the release of the information is not outweighed by the public benefit is optional on the NSP (the NSP “may” provide the explanation).

The MEU considers that this option should be removed and the NSP required to provide this explanation. In the previous column, the NSP is required to outline the detriment caused by the release of the information. This can be a readily n easy hurdle to overcome and only requires the NSP view of just a minor detriment. The basic reason for allowing information to be kept confidential ultimately comes down to the balance between the benefit of disclosure and its detriment; there are many instances where the public benefit of disclosure is considerably greater than a minor detriment to an NSP.

A requirement to explain why a detriment is greater than a public good, must be imposed to prevent the NSP from claiming a narrow detriment against a wide public benefit

3.5 Proportion of information made confidential

The AER states that it will require an NSP to provide an assessment of the amount of information that is classified as confidential. The MEU supports this approach and the technique proposed by the AER to quantify the extent that confidentiality is claimed.

The MEU is bemused that the AER intends not to include this requirement in the confidentiality guideline but to be a separate requirement. This seems inconsistent with what the confidentiality guideline is intended to achieve. The MEU considers that a single stand alone guideline should be developed and there should not be multiple documents to detail the requirements.

3.6 The Confidentiality Undertaking template

The AER has recognised that it may be appropriate to release some confidential information to stakeholders providing the stakeholder enters into a confidentiality undertaking with the AER and the NSP. The MEU recognises that allowing release of confidential information in this way has the potential to maximise the useful input from stakeholders, and supports this approach.

The AER has provided a template for allowing this release of information to occur. The MEU supports the use of a standard wording of an Undertaking. The MEU is concerned that if there is not a standard wording then there is the option for an NSP to impose more onerous conditions on a stakeholder than is needed and thereby either prevent the release of the confidential information or otherwise prevent the most effective use of the confidential information.

The MEU considers that the standard template should be included in the guideline.

The MEU is also concerned at how the AER might recognise the use by a stakeholder of such confidential information it acquires through this process. Traditionally, the AER has noted that it is inclined to place less weight on information provided in submissions where the information is kept confidential. The MEU understands the reasons for this but in the case where the stakeholder uses confidential information provided through the Confidentiality Undertaking to enhance the submission it makes to the AER, the Confidentiality Undertaking requires the stakeholder to keep such information confidential in its submission.

If the AER applies less weight to aspects that must be kept confidential because the information used was released under a Confidentiality Undertaking, then the benefit of entering the Confidentiality Undertaking is diminished and effectively reduces the value of the process.

The MEU considers that the AER should recognise that those aspects of a submission which are kept confidential because they use confidential information acquired through a Confidentiality Undertaking should receive the same weight as if they were not classed as confidential by the stakeholder. This should be made clear in the guideline.

3.7 Variation between NSPs as to what is confidential

The MEU has noted over the year that different NSPs have different considerations as to what is considered to be confidential, resulting in differing constraints being applied by the NSPs.

The MEU considers that the AER should continually monitor what each NSP claims is confidential and compare these over time. Effectively this would result in the AER being able to benchmark what is the minimum amount and type of information that is demonstrably confidential. Having this data available will enable the AER in its stage 1 discussions to be able to refute arguments provided by NSPs as they seek to maximise confidential information.

The MEU notes there are instances where the AER has identified disparity between the views of different NSPs regarding confidentiality. The MEU considers that the AER should formalise this process and maintain a register of what information each NSP considers confidential and make all parties aware that this register exists and that the AER will use this register as a tool for assessing the reasonableness of future claims for confidentiality.

4. The MEU view

The guideline should include the entire process not just detail the development of the confidentiality template.

In particular the guideline should detail:

- The two stage process
- A requirement that the NSP will provide a draft confidentiality template for AER and stakeholder comment as part of the stage 1 process
- The listing of documents that the AER considers do not consider should be confidential although some minor redactions might be accepted for such documents

- The requirement that specific parts of documents are to be deleted from public documents rather than blanket exclusions of documents
- How the AER is going to address the claims of confidentiality for related party transactions because of the implications that related party transactions provide a mechanism to include inefficient costs
- A requirement that demonstrates how the detriment of keeping information confidential is not exceeded by the benefit of its public release
- The inclusion of the calculation of the proportion of information retained as confidential
- The application of the Confidentiality Undertaking and the template agreement
- The AER process for maintaining a register of classifications of information deemed confidential by each NSP and its subsequent use for assessing future claims of confidentiality.

The MEU also considers that the AER should track what is kept confidential by all NSPs and use the fact that some release more information than others as the basis for future assessments.

However despite these additional requirements, the MEU is still concerned that NSPs can still game the process and release useful information too late for useful stakeholder input.

Overall, the AER should continue to monitor the success (or otherwise) of the new requirements