

Draft Report

Confidentiality Guidelines

June 2006

1 Background

The Australian Energy Regulator (AER) is required under the National Electricity Rules (the Rules) to develop and issue guidelines relating to the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute under the dispute resolution process established by Chapter 8 of the Rules.

Under the National Electricity Code (the predecessor of the Rules) it was the National Electricity Code Administrator's (NECA) task to develop and issue the confidentiality guidelines. NECA commenced consultation in accordance with chapter 8 of the National Electricity Code (the Code), with the assistance of the Dispute Resolution Adviser, in 2003, but suspended its consultation due to the transition to the new National Electricity Law regime, and the transfer of responsibility for development of the Guidelines to the AER.

The AER commenced its consultation on the development of the confidentiality guidelines in March 2006, releasing for comment a consultation draft of the guidelines. In developing the consultation draft the AER took into account the previous consultation process and the submissions NECA received.

Four submissions were received in response to the AER's consultation draft. Submissions are available on the AER's website at <http://intranet.accc.gov.au/content/index.phtml/itemId/736045/fromItemId/658631>. Only NEMMCO requested a meeting with the AER to discuss the issues raised in its submission.

The key issues raised in submissions, and the AER's response to those issues, are summarised in this draft report.

The draft confidentiality guidelines attached to this report have been revised in response to submissions, and form the second stage of the public consultation process set out in the Rules.

2 Public consultation process

Interested parties are invited to comment on the draft confidentiality guidelines attached to this report. Parties who have made submissions in response to the AER's initial consultation draft are not required to resubmit those comments to the AER, but are welcome to make further submissions in response to the draft report and revised draft guidelines.

Submissions can be sent electronically to: aer inquiry@ aer.gov.au. Alternatively, written submissions or submissions on disk, in Word 7.0 compatible format, can be sent to:

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The AER prefers that all submissions be publicly available, to facilitate an informed and transparent consultative process. The AER is required by clause 8.9(g) of the Rules to make available to all consulted persons, on request, copies of any material submitted. Submissions received will be made available on the AER's website. Therefore submissions must identify any confidential material.

A copy of the draft report and the draft confidentiality guidelines are available from the AER's web site (www.aer.gov.au).

The closing date for submissions is Friday, 23 June 2006.

If you require further information please contact the AER's Markets Branch on (03) 9290 1436.

3 Responses to the AER's Consultation Draft

Four submissions were received in response to the initial consultation draft of the confidentiality guidelines, and the attached template confidentiality deed, from:

- NEMMCO;
- VENCORP;
- The National Generators Forum; and
- TransGrid.

The submissions raised a number of issues. The issues raised in submissions and the AER's consideration of them, are set out in this draft report.

All submissions raised issues in relation to the content of the guidelines, and the clauses of the template confidentiality deed. Changes have been made to the draft confidentiality guidelines and the template deed to address many of the issues raised.

Some of the submissions identified perceived inadequacies in the Rules provisions relating to confidentiality and to the dispute resolution process generally.

Others suggested that where the Rules do not adequately address issues, the guidelines should provide the missing detail, for example by recommending a best practice approach to the treatment of information provided by or to the Adviser and the DRP as the Rules do not impose obligations on those parties.

The Rules require the AER to develop guidelines in relation to the dispute resolution process as set out in the Rules that are in force at this time. The obligation to develop guidelines allows the AER to explain the operation of the Rules, and to provide guidance in relation to the relevant provisions. The guidelines are not binding. They do not, and can not, impose requirements or obligations on Registered Participants that are inconsistent with, or not already imposed by, the Rules. Nor can they create new or additional functions for the Dispute Resolution Adviser or members of a Dispute Resolution Panel (DRP) appointed under clause 8.2.6A of the Rules, or impose obligations or requirements that would fetter the discretion of the DRA or the DRP in the performance of their functions under the Rules. Essentially, the draft guidelines should be read in context of what is allowed by the Rules.

3.1 Scope of consultation on the confidentiality guidelines

The National Generators Forum (NGF) expressed its disappointment that the confidentiality provisions in clause 8.6 of the Rules do not apply to members of a Dispute Resolution Panel (DRP), the Adviser or the AER.

NEMMCO observed that the provisions of clause 8.2 of the Rules do not address a number of confidentiality issues that arise in Stage 1 of the dispute resolution process.

In the course of the consultation undertaken on behalf of NECA, the Adviser, in consultation with participants, drafted proposed changes to clause 8.2 of the Rules to create a new process by which parties to a dispute could engage the services of a member of the pool to determine disputes in relation to exchange of information. The draft rule change proposal was not submitted to the Australian Energy Market

Commission. VENCORP suggested in its submission that the proposed amendments to the Rules considered in the earlier NECA consultation should be considered as part of the current consultation on the guidelines.

The AER notes that the new national regulatory framework separates the role of the regulator (the AER) from that of the rule-maker (the AEMC). Where NECA previously held responsibility for both the development of the confidentiality guidelines and for considering proposals for changes to the National Electricity Code, the AER's role does not extend to the latter. The initial consultation draft of the guidelines, and the attached amended draft guidelines, have been developed as required by, and in the context of, the Rules as currently in force. The AER does not propose to extend its consultation on the development of the confidentiality guidelines to a review of the provisions of the Rules in relation to confidentiality of information or the dispute resolution process. Any proposal for amendments to the Rules would be more appropriately considered by the AEMC.

3.2 Scope and nature of the guidelines

The NGF conveyed its broad support for the guidelines as drafted and the form of the attached template confidentiality deed. VENCORP, however, considered that the guidelines considered in the NECA consultation, in providing more examples and discussion on the provision and use of confidential information, were more useful to participants than a summary of the obligations under the Rules. The VENCORP submission did not identify the parts of the NECA guidelines they would like to see incorporated into the AER's guidelines, instead they suggested that the content of NECA's draft guidelines be included for review in the current consultation process.

As noted above, and in the release of the initial consultation draft, the AER has had regard to the guidelines developed in the previous NECA consultation and to submissions made in the course of that process. The AER's draft guidelines incorporate the template confidentiality deed developed for NECA in the course of that process, but have not adopted the full text of the NECA guidelines themselves.

Submissions in response to the draft guidelines are not limited to issues that have come to light since the earlier consultation or in the course of the current consultation. Where interested parties consider that the AER's draft guidelines do not address particular issues that were usefully covered in the guidelines developed by NECA, they are encouraged to identify those issues in the course of the current consultation, and propose ways to address them.

3.2.1 Obligations of the AER, Adviser and DRP

NEMMCO argued that the Rules envisage that the guidelines developed by the AER will serve to fill in the detail that is missing from the Rules, and supported a broad construction of clause 8.2.10(c) that did not limit the scope of the guidelines to information exchanged between parties to a dispute.

In particular, NEMMCO submitted that guidelines should give guidance in line with best practice on the treatment of information provided to the Adviser, DRP or other experts, and especially in relation to the return of confidential information.

Clause 8.2.10(c) of the Rules requires the AER to develop guidelines –

“relating to the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute to which clause 8.2 applies”.

Clause 8.2.10(c) does not explicitly limit the guidelines to information obtained, used or disclosed by or to *parties* to a dispute, and could be seen to extend to information obtained, used or disclosed by or to the Adviser, members of a DRP, or any other independent dispute resolution practitioner engaged in the course of a dispute.

The Rules explicitly exempt from the confidentiality provisions in clause 8.6 the disclosure, use or reproduction of information if required in connection with legal proceedings, arbitration, expert determination or other dispute resolution mechanism relating to the Rules, or for the purpose of advising a person in relation thereto. Furthermore, the parties may make their own arrangements, subject to the Rules, with respect to information that may be confidential which is relevant to a dispute. The AER does not propose to suggest additional limitations on the use or disclosure of such information.

The confidentiality provisions in clause 8.6 of the Rules do not apply to the Adviser or the DRP. The Rules make no explicit provision in relation to the confidentiality of information obtained or used by the Adviser, the DRP or other experts for the purposes of resolving a dispute.

Just as the guidelines are not binding on participants, they do not bind the Adviser, members of a DRP or third parties. Clause 8.2.10(c) of the Rules does not allow the AER to step in to create new obligations or requirements where the Rules have not done so. The AER does not consider itself authorised under the Rules to bind or direct the Adviser, the DRP or any other expert engaged in the course of the dispute resolution process in the performance of their functions, either in relation to the confidentiality of information or otherwise.

3.3 Obligations and processes for exchange of third party information

VENCorp noted that many industry participants (particularly NEMMCO and VENCorp), by virtue of their roles in the NEM, hold confidential information obtained from third parties. VENCorp has suggested that both the guidelines and the template confidentiality deed be amended to provide processes and obligations on parties to enable third party information to be released appropriately without unnecessary delay to the management of a dispute.

The guidelines developed by the AER under clause 8.2.10(c) relate to the confidentiality of information that is obtained, used or disclosed for the purposes of resolving a dispute, and not to the process of dispute resolution. Processes and procedures for the timely release of information (third party or otherwise) are outside the scope of this consultation.

The Rules provide for the development and publication of processes and procedures for the management of disputes in Stage 1 through the Dispute Management Systems (DMS) developed by participants, and in Stage 2 through the directive powers of the DRP.

The DMS adopted and implemented by a participant under clause 8.2.3 of the Rules must:

- provide that the party must respond to a request for information relevant to the dispute within 5 business days of receiving the request;
- set out procedures for responding to requests for information; and
- set out any requirements and procedures necessary to ensure that the party is able to comply with the time limits for Stage 1 disputes.

The Adviser is authorised by the Rules to issue guidance notes relating to the form and content of a DMS, and the DMS adopted and implemented by participants must be consistent with those guidelines. The Adviser's *Guidance Note relating to the Form and Content of DMS*, and a sample DMS, are available on the AER's website at <http://www.aer.gov.au/content/index.phtml/itemId/673626/fromItemId/671985>.

The Rules clearly contemplate the inclusion in a DMS of obligations and procedures for timely information exchange. The AER considers that the DMS and the related Guidance Notes issued by the Adviser are a more appropriate avenue to address these concerns.

3.3.1 Notice of disputes under clause 8.2.4(g)

Clause 8.2.4(g) of the Rules requires NEMMCO to immediately notify the Adviser if it either serves a DMS referral notice on the DMS contact of another participant, or is served with a DMS referral notice by another participant. The notification provided by NEMMCO to the Adviser must list each registered participant that NEMMCO considers may have an interest in the dispute, and indicate whether NEMMCO has served a DMS referral notice on that participant or otherwise made them aware of the dispute.

NEMMCO has suggested that, insofar as clause 8.2.4(g) does not require the Adviser to publish notice of a dispute unless the matter is referred to a DRP under clause 8.2.5, disclosure of the existence of a dispute prior to that stage is at the discretion of the Adviser.

The Rules do not expressly require the Adviser to notify other participants of a Stage 1 dispute involving NEMMCO. Nor do they explicitly prohibit the Adviser from doing so. The decision as to when, or if, other participants should be notified of such a dispute is a matter of judgment for the Adviser in each case.

3.4 Restriction of access within organisations

NEMMCO has suggested in its submission that there are different 'levels' of confidentiality, and that the Guidelines should include best practice arrangements for disclosure, storage, and return of confidential information, and for regulation of

access to information within organisations, for example by restricting access to information to certain people, or classes of people.

Clause 8.6.2(b) of the Rules specifically provides that the confidentiality provisions in clause 8.6 do not prevent the disclosure of information by a recipient or the recipient's disclosees to:

- an employee or officer of the recipient or a related body corporate of the recipient; or
- a legal or other professional adviser, auditor or other consultant of the recipient.

The AER is not able to qualify this exception in the guidelines.

The operation of this and other exceptions provided in clause 8.6.2 should, however, be read in the context of the obligations placed on recipients of confidential information in clause 8.6.1:

- Each Registered Participant and NEMMCO (each being a "Recipient" for the purposes of clause 8.6) must use all reasonable endeavours to keep confidential any confidential information which comes into the possession or control of that Recipient or of which that Recipient becomes aware.
- A Recipient:
 - must not disclose confidential information to any person except as permitted by the Rules;
 - must only use or reproduce confidential information for the purpose for which it was disclosed or another purpose contemplated by the Rules; and
 - must not permit unauthorised persons to have access to confidential information.
- Each Recipient must use all reasonable endeavours:
 - to prevent unauthorised access to confidential information which is in the possession or control of that Recipient; and
 - to ensure that any person to whom it discloses confidential information observes the provisions of this clause 8.6 in relation to that information.

The Rules also impose specific obligations on particular participants, to ensure that access to information is not abused:

- Officers of a Transmission Network Service Provider participating in transmission service pricing must not be involved in or associated with competitive electricity trading activities of any other Registered Participant.
- A Transmission Network Service Provider participating in transmission service pricing must provide to any Transmission Network Service Provider or Registered Participant which supplies information for transmission service pricing an undertaking that the Transmission Network Service Provider to which that

information was supplied will comply with the confidentiality requirements set out in clause 6.9.2.

- NEMMCO must develop, and to the extent practicable, implement a policy:
 - to protect information which it acquires pursuant to its various functions from use or access which is contrary to the provisions of the Rules;
 - to disseminate such information in accordance with its rights, powers and obligations in a manner which promotes the orderly operation of any market; and
 - to ensure that, in undertaking any trading activity except the procurement of ancillary services, it does not make use of such information unless the information is also available to other participants.

Information security and document management procedures are matters of internal governance that are, in the AER's opinion, beyond the scope of these guidelines. These matters are subject to a breadth of legal requirements that are not limited to the provisions of the Rules. Participants must take the necessary steps to meet their legal obligations in a way that best suits their organisational structure and needs.

3.5 Duration of obligations

The consultation draft of the guidelines noted that there is no provision in Stage 2 of the dispute resolution process to keep the fact of a dispute confidential once it has been referred to a DRP.

This is in contrast to Stage 1, in which parties to a dispute can agree to keep confidential not only information exchanged between them for the purposes of attempting to resolve the dispute, but also the fact that a dispute exists between them.

TransGrid was concerned to ensure that any confidential information exchanged in the course of the Stage 1 dispute resolution process would not lose its confidentiality when a dispute is escalated from Stage 1 to Stage 2, and sought clarification of this in the guidelines.

The AER does not consider that the Rules imply that information exchanged between parties on a confidential basis in Stage 1 would lose that confidentiality by virtue of the referral of the dispute to Stage 2. However, as TransGrid's submission notes, there are circumstances in which an agreement between the parties to keep information exchanged between them in Stage 1 confidential can be over-ruled under the provisions of the Rules.

As the guidelines note, the Rules exempt from the confidentiality provisions in clause 8.6 disclosure in connection with dispute resolution mechanisms relating to the Rules, so that parties would not be prevented from making necessary disclosures to the DRA, DRP or other parties where the disclosure is required for resolution of the dispute.

The Rules also allow the DRP to issue a binding direction on parties to a Stage 2 dispute to disclose confidential information to other parties to the dispute. In doing so, the DRP is empowered to give such directions relating to the use and disclosure of

information obtained from parties to a dispute as it considers necessary in the circumstances, including a direction to keep the information confidential.

The AER has amended the guidelines to clarify that, while the existence of a dispute that has been referred to a DRP can not be kept confidential, information exchanged for the purposes of resolving the dispute can, subject to the provisions of the Rules and any direction of the DRP.

3.6 Contents of Guidelines

NEMMCO suggests that the Guidelines should reflect that there is no obligation to disclose material that is subject to legal professional privilege, whereas there is an obligation to disclose confidential material.

The draft Guidelines remain consistent with this principle, as neither the Guidelines nor the Rules suggest that there *is* an obligation to disclose information that is subject to legal professional privilege.

The only circumstances under the dispute resolution process in which a participant could be obliged to disclose confidential information are by direction of the DRP under clauses 8.2.6C(a)(3) or 8.2.6C(c). In relation to information described by clause 8.2.6C(c), the DRP is empowered to direct parties to keep the information confidential.

3.7 Template confidentiality deed

Comments made in submissions evidenced apparent concerns about the flexibility and coverage of the template deed. The AER emphasises that parties are not bound to, or limited by, the model clauses provided in the template. As noted in the consultation draft of the guidelines, the nature of any agreement to keep information confidential is for the parties to determine. The template “Mutual Confidentiality Deed” provides sample clauses which parties can tailor or adapt in drafting their own agreement. Parties to a dispute should seek their own advice as necessary before entering into such an agreement, and are not in any way obliged to use the template, or to adopt any of its terms. Nor are they prevented from drafting alternative terms, or indeed an entirely new agreement. The fact that something is in the template deed does not mean that every agreement must include it. The fact that something is not in the template deed does not mean that it can never be included.

Submissions received also contained a number of suggestions relating to particular clauses in the template deed. These are discussed below. Please note that amendments to the Schedules to the template deed have required a renumbering of those schedules, so that:

- There is a new Schedule 1 (Notices)
- Schedule 1A (Conditions and restrictions on disclosure) is now Schedule 2
- Schedule 1B (Express purpose) is now Schedule 3
- Schedule 2 (Representatives) is now Schedule 4
- Schedule 3 (Class of representatives) is now Schedule 5
- Schedule 4 (Confidentiality Undertaking) is now Schedule 6.

Clause 1.1 - Acknowledgement

Clause 1.1 of the template deed provides an acknowledgement by the Recipient that the Confidential Information is valuable to the Provider. Clause 1.2 goes on to provide that, in consideration for the Provider providing the Confidential Information to the Recipient, the Recipient accepts and agrees to be bound by the terms and conditions set out in the Deed.

NEMMCO has suggested that clause 1.1 should be amended to reflect that some confidential information may be valuable to a third party not involved in the dispute.

The template deed is designed to provide a suite of model terms that can be adapted by parties for their own use. As such, it is appropriate that the Deed addresses the minimum set of obligations that may be included in such an agreement. Where additional obligations or clarifications are necessary in the circumstances of a particular dispute, it is open to the parties to tailor the template deed accordingly.

Conditions and restrictions on disclosure

VENCorp's submission identified the potential for confusion in the interpretation of clauses 1.3 and 1.4 of the template deed and conditions set out in Schedule 1A (now Schedule 2).

Currently –

- Clause 1.3 refers generally to conditions imposed by the Provider of information in accordance with clause 1.4;
- Clause 1.4 provides that confidential information may be provided subject to any conditions or restrictions that the provider thinks necessary, as set out in Schedule 1A (now Schedule 2), and provides examples of such conditions;
- Schedule 1A (now Schedule 2) provides for insertion of any conditions or restrictions that apply to the time, manner or form in which disclosure will be given, and lists the example conditions set out in clause 1.4, inviting parties to 'tick' those which will apply, and/or to specify any other conditions.

VENCorp has suggested –

- that Clause 1.3 of the Deed be amended to refer only to conditions set out in Schedule 1A, to avoid confusion arising from the example conditions provided in clause 1.4;
- that the examples be removed from clause 1.4, which should refer only to Schedule 1A (now Schedule 2);
- that the form of Schedule 1A (now Schedule 2) be amended to make it clear that detail of any conditions imposed should be set out in the Schedule;
- that the example condition provided in clause 1.4.1 (that confidential information may be inspected but not copied) may be inconsistent with clause 1.3.5, which provides that the recipient may only copy or reproduce confidential information with the consent of the provider, and subject to any conditions the provider imposes on that consent.

To clarify the relationship between the clauses, the list of example conditions previously included in the Schedule has been deleted, so that the Schedule is now a clean slate upon which parties can detail the agreed conditions of the agreement.

Clause 1.4 has been amended to make it clear that the conditions set out in the Schedule may, *but need not*, include any of the examples listed in that clause. An additional provision, making it clear that parties can include any other provision the provider of confidential information considers necessary in the circumstances, has been inserted.

Insofar as the condition in clause 1.4.1 is an example only, any inconsistency between it and clause 1.3.5 could be addressed in settlement of conditions between parties to the agreement. In any event, the AER notes that if the provider of confidential information does not wish the recipient to copy or reproduce that information, written consent under clause 1.3.5 would not be given, and the condition contemplated under clause 1.4.1 would therefore stand.

Unauthorised access, use or disclosure

Clause 3.2 of the template deed requires the recipient of confidential information to take action where the recipient becomes aware of any unauthorised access to, use or disclosure of confidential information, or any suspected breach of the executed agreement.

VENCorp believes that the requirements in this clause are generally too onerous, and could lead to unreasonable requirements being placed on the recipient, therefore inviting dispute. VENCorp has suggested that the obligations contained in the model clause be qualified in terms of reasonableness.

The AER agrees with VENCorp's suggestions, and has amended the model clause.

Return of confidential information

Clause 5.1 of the template deed requires the recipient of confidential information to immediately return to the provider of that information all material containing the confidential information that is in the possession, power or control of the recipient or any of its representatives, either at the request of the provider or at any time where the information is no longer required by the recipient for the identified purpose.

The NGF has suggested a qualification to Clause 5 that would allow the recipient of confidential information to keep such minimum confidential information as is considered necessary to comply with the law.

The AER agrees that a confidentiality agreement should not require parties to act in a way that is contrary to obligations under law, and has amended the model clause to provide that the obligation to return confidential information to the provider applies only where the recipient is not otherwise required by law to retain it. Corresponding amendments have been made to clause 5.2 on the same basis.

Clause 5.2 – Destruction of confidential information

VENCorp's submission suggested that the requirements for return and destruction of confidential information in clause 5.2 of the Deed be reconsidered on the basis that they are open to extreme interpretation if taken literally. By way of example, VENCorp notes that the clause could be interpreted to require that the hard disk on

which any information was stored may need to be physically destroyed, rather than just deleting the information.

As noted above, parties are free to modify the terms of the template deed in order to tailor it to the types and forms of confidential information that is likely to pass between them. However, the AER agrees that this reading, which is not the intention of the clause, is possible. As such, the attached template deed has been amended in order to remedy this concern.

Continuing obligations

NEMMCO has observed that the template deed does not contain a term that sets out when the obligations commence and when they end. NEMMCO has suggested that the deed should include a requirement on the recipient of information to get back any confidential information they may have given to their representatives when the representative is no longer involved in the dispute. The submission raised as an example a situation in which an individual employed by the Recipient, and representing the Recipient in the dispute, ceases that employment.

Unless specified otherwise, a confidentiality agreement, and the obligations imposed therein, would commence from the date of execution of the agreement. Clause 7 of the template deed provides for survival of obligations, such that the obligations imposed on the recipient under the deed will continue to apply other than to the extent that the provider of the information specifically releases the recipient in writing from any such obligations, or to the extent that the information is no longer confidential. The AER has made a minor amendment to clause 7 of the template deed to clarify that this is the case.

The template contemplates an agreement between registered participants (including NEMMCO) who are parties to a dispute, rather than an agreement between the individuals (eg employees) representing the parties.

To address the behaviour of individual representatives, Schedule 6 of the template deed (previously Schedule 4) provides a template confidentiality undertaking, to be signed by individuals representing the parties to the agreement. By virtue of that undertaking, each representative undertakes to observe all of the provisions in the executed agreement in all respects as if the representative was itself the recipient identified in the agreement. Further, the representative undertakes to observe any additional conditions specified by the provider of the information under the agreement.

To the extent that a provider of information does not consider that the terms of the template deed provide adequately for obligations on representatives of parties to an agreement, it is open to them to supplement the agreement with such conditions as they see fit. The AER does not see a need to amend the template deed for this purpose.

Notices

The initial template deed provided for contact details for notices to be inserted at clause 8.1 of the deed. VENCORP has noted that experience has shown that parties to an agreement sometimes forget to insert details in the middle of documents, and

suggested that the contact details for notices be transferred to a schedule at the end of the template deed.

This is consistent with the general format of the template deed. Contact details for notices are now set out in a new Schedule 1 to the template deed. Consequential amendments have been made to clause 8.1.

Governing law and jurisdiction

VENCorp has suggested that the template deed provide that the governing law and jurisdiction of the deed is that in which the disputed act occurred.

The template deed currently provides a template clause which Parties can complete for themselves by inserting the preferred jurisdiction. It is open to parties to a dispute to select for themselves the jurisdiction in which the disputed act occurred, or another jurisdiction if in the circumstances of a particular dispute it is preferable to do so. The AER does not see a need to amend the model clause to specify an outcome.

Definition of confidential information

NEMMCO has expressed concern that the definition of Confidential Information in clause 9.1 of the template deed needs to be broad enough to cover information that may be confidential to third parties but held by NEMMCO.

The purpose of the template deed is not to limit the types of information over which confidentiality can be claimed. The template provides a suite of model terms: Parties are free to adapt or vary those terms as they see fit, and are not in any way obliged or required to make use of the Deed at all. It was not contemplated that the Deed would provide a comprehensive list of all clauses, or that participants would be limited to clauses provided in the Deed.

Where a party to a dispute discloses information that has been provided to it in confidence by a third party, it is for that party to seek advice as to its obligations and act accordingly. The model definition in the deed can be extended or varied as appropriate to accommodate concerns particular to a dispute, or to a party to a dispute.

Definition of business day

VENCorp has suggested that the definition of 'business day' in clause 9.2.1 of the Deed be aligned to that in the Rules. The AER has amended the definition of business day in the template deed accordingly.

Schedules

Purpose of disclosure

(Note that Schedule 1B has been renumbered Schedule 3 to the template deed)

Schedule 3 of the template deed (formerly Schedule 1B) suggests that parties list in a schedule to the deed the purpose for which the confidential information is disclosed.

VENCorp has suggested that Schedule 3 is redundant, because the information in question will be provided for the sole purposes of the dispute and not for any other purpose, and that this detail is better dealt with in a statement in the recitals to the deed.

Schedule 3 provides for parties to identify the particular dispute for the purposes of which the confidential information was disclosed. This may require a degree of detail that is greater than that typically included in recitals. For that reason, the AER is satisfied that there is merit in including the schedule in the template deed.

As with all parts of the template deed, parties to a dispute can elect to omit the schedule, and include additional provisions in the recitals, as they see fit. The fact that the schedule is included in the template deed does not bind parties to use it.

Representatives and Classes of Representatives

(Note that Schedules 2 and 3 have been renumbered Schedules 4 and 5 to the template deed respectively)

Schedules 4 and 5 of the template deed (formerly Schedules 2 and 3) provide respectively for a list of names representatives to whom confidential information may be disclosed by the recipient, and a list of classes of representatives to whom confidential information may be disclosed by the recipient. The schedules relate to the permitted disclosures outlined in clause 1.5.1 of the template deed itself.

VENCorp has suggested that there is little value in these Schedules, given that a full list of representatives is unlikely to be available at the time the deed is executed, and that individual representatives will in any event be required to complete a confidentiality undertaking.

To the extent that details of the individuals, or classes of individuals, that will be representatives of the parties to an agreement appear to have value to some participants, the AER does not consider it necessary to omit the Schedules from the template deed. All the Schedules to the template deed are optional, and can be omitted if parties do not consider them necessary in the circumstances. The AER notes in this respect that, if parties to an agreement chose to omit Schedules 4 and 5, consequential amendments to clause 1.5.1 would be necessary.

3.8 Currency of the guidelines

Submissions emphasise the need to ensure that the Guidelines remain current and relevant, and encourage regular, consultative reviews of the Guidelines going forward.

The AER recognises that the Guidelines must be responsive to changes in the Rules. Once implemented, the Guidelines will be reviewed and revised by the AER as necessary in response to any subsequent Rule changes. As required by clause 8.2.10(c), such reviews will be undertaken in consultation with participants, in accordance with the rules consultation process.



AUSTRALIAN
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1 Introduction

Clause 8.2 of the National Electricity Rules (the Rules) sets out a dispute resolution regime which applies to disputes involving registered participants, NEMMCO and Connection Applicants, about a range of matters relating to or arising out of the Rules.

Under clause 8.2.10(c) of the Rules, the AER must develop and issue guidelines relating to the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute to which clause 8.2 of the Rules applies.

Clause 8.6 of the Rules sets out confidentiality provisions governing registered participants and NEMMCO that apply for the purposes of information exchanged under the Rules, including information that is obtained, used or disclosed for the purposes of resolving a dispute to which clause 8.2 applies.

The dispute resolution regime set out in clause 8.2 of the Rules establishes procedures for the exchange of information between parties to a dispute. As the subject matter of any dispute under the Rules will, in many cases, be commercially sensitive, it is important to recognise that resolution of a dispute may necessitate the exchange of confidential information. It is therefore necessary that parties are aware of the provisions in the Rules governing the treatment of confidential information. These provisions are integral to the success of the dispute resolution process as they are the basis for an agreement between parties to a dispute as to the appropriate treatment of confidential information.

These confidentiality guidelines provide general guidance relating to the Rules provisions governing the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute under the dispute resolution framework established by the Rules.

These guidelines do not constitute legal advice, and should not be taken to limit or otherwise infringe any existing rights or obligations under law that a person may have in relation to information. Parties to a dispute should inform themselves, and where necessary seek independent legal advice as appropriate before exchanging confidential information.

2 Confidentiality under the Rules

2.1 Definition of ‘confidential information’ in the Rules

The Rules define ‘confidential information’, in relation to a registered participant or NEMMCO, as information which is or has been provided to a registered participant or NEMMCO under or in connection with the Rules, *and* which is either:

- stated under the Rules, or by NEMMCO, the AER or the AEMC, to be confidential information; or
- is otherwise confidential or commercially sensitive.¹

Information that is derived from such information is also confidential for the purposes of the Rules.²

While the definition of confidential information provided by the Rules is broad, parties should note that exemptions to the confidentiality requirements in the Rules have the effect of limiting the nature of information over which a claim of confidentiality will be upheld. For example, the Rules do not prevent:

- the disclosure, use or reproduction of information that is generally and publicly available (other than as a result of breach of confidence by the Recipient or any person to whom the Recipient has disclosed the information)³; or
- the disclosure, use or reproduction of trivial information.⁴

While recognising the commercial sensitivity of information that may be exchanged between parties to a dispute, the Rules will not support a claim of confidentiality that is not warranted. Parties should not claim confidentiality unnecessarily, in relation to information or documents that are not commercially sensitive or otherwise recognised by law as confidential.

¹ *Rules*, chapter 10, glossary.

² *Ibid.*

³ *Rules*, cl 8.6.2(a).

⁴ *Rules*, cl 8.6.2(f).

3 Obtaining, using and disclosing confidential information

3.1 General provisions

Clause 8.6.1 of the Rules imposes obligations on registered participants and NEMMCO, where they are a recipient of confidential information.⁵

A recipient of confidential information:

- must not disclose the confidential information to any person except as permitted by the Rules;⁶
- must only use or reproduce the confidential information for the purpose for which it was disclosed or another purpose contemplated by the Rules;⁷ and
- must not permit unauthorised persons to have access to the confidential information.⁸

In addition, a recipient must use all reasonable endeavours:

- to keep confidential any confidential information which comes into the possession or control of the recipient, or of which that recipient becomes aware;⁹
- to prevent unauthorised access to confidential information which is in the possession or control of that recipient,¹⁰ and
- to ensure that any person to whom it discloses confidential information observes the provisions of clause 8.6 in relation to that information.¹¹

Parties should note that the provisions of clause 8.6 apply to NEMMCO and registered participants, but do not apply to the Adviser, members of a Dispute Resolution Panel (DRP) established under clause 8.2.6A, or the AER. Where the Rules require, authorise or permit the disclosure of confidential information to the Adviser, a DRP or the AER, these parties will be subject to general law confidentiality obligations. The AER is subject to specific legislative requirements set out in section 44AAF of the *Trade Practices Act 1974*.

3.1.1 Exceptions

Clause 8.6.2 provides a number of ‘exceptions’ to the obligations in clause 8.6. In particular, parties to a dispute should be aware that clause 8.6 does not prevent:

⁵ The Rules also impose additional obligations in relation to confidentiality on Transmission Network Service Providers (cl 8.6.1(d), 8.6.1(e), 6.9.2) and NEMMCO (cl 8.6.6, 8.6.7).

⁶ Rules, cl 8.6.1(b)(1).

⁷ Rules, cl 8.6.1(b)(2).

⁸ Rules, cl 8.6.1(b)(3).

⁹ Rules, cl 8.6.1(a).

¹⁰ Rules, cl 8.6.1(c)(1).

¹¹ Rules, cl 8.6.1(c)(2).

- the disclosure, use or reproduction of information to the extent required by law or by lawful requirement of any government (including agencies) or stock exchange with jurisdiction over the Recipient¹²;
- the disclosure, use or reproduction of information if required in connection with legal proceedings, arbitration, expert determination or other dispute resolution mechanism relating to the Rules, or for advising a person in relation thereto¹³; or
- the disclosure of information to the AER, AEMC, ACCC or any other regulatory authority with jurisdiction over the Recipient, pursuant to the Rules or otherwise.¹⁴

4 Dispute resolution process

The appropriate exchange of information (some of which may be confidential) is vital to ensure the efficient resolution of the dispute.

Parties to a dispute should not make use of confidentiality provisions or agreements to hinder or otherwise prevent effective operation of the dispute resolution process set out in clause 8.2. Treatment of confidential information in resolution of a dispute under clause 8.2 should be consistent with the provisions of clause 8.6, and in particular should not attempt to limit the operation of the exceptions in clause 8.6.2. Where disclosure of information is required or authorised by the Rules, parties to a dispute can not act to prevent disclosure on grounds of confidentiality.

4.1 Stage 1

Stage 1 of the dispute resolution process involves an internal, consensual, dispute resolution process within the disputants' organisations, using the dispute management systems (DMS) adopted by registered participants in accordance with clause 8.2.3 of the Rules.¹⁵ Parties to a dispute may request from one another the provision of information that is relevant to the matter under dispute.

The Rules recognise that information that is relevant to, or indeed the subject of, a dispute under the Rules may be commercially sensitive. In Stage 1 of the dispute resolution process, unless NEMMCO is involved in the dispute, parties to a dispute can agree to keep confidential:

- the fact that a dispute exists between them; and

¹² *Rules*, cl 8.6.2(d).

¹³ *Rules*, cl 8.6.2(e).

¹⁴ *Rules*, cl 8.6.2(i).

¹⁵ The Dispute Resolution Adviser is required by the Rules to issue guidance notes relating to the form and content of a Dispute Management System. These are available on the AER's website at: <http://intranet.accc.gov.au/content/index.phtml/itemId/658631>

- any information exchanged between them for the purposes of attempting to resolve the dispute.¹⁶

Clause 8.2.4(g) of the Rules requires NEMMCO to immediately notify the Adviser if it either serves a DMS referral notice on the DMS contact of another participant, or is served with a DMS referral notice by another participant. The notification provided by NEMMCO to the Adviser must list each registered participant that NEMMCO considers may have an interest in the dispute, and indicate whether NEMMCO has served a DMS referral notice on that participant or otherwise made them aware of the dispute.

The Rules do not expressly require the Adviser to notify other named participants of a Stage 1 dispute involving NEMMCO. Nor do they explicitly prohibit the Adviser from doing so. The decision as to when, or if, other participants should be notified of such a dispute is a matter of judgment for the Adviser in each case.

The nature of any agreement to keep these matters confidential is for the parties to determine. A template ‘Mutual Confidentiality Deed’, which provides sample clauses which parties can tailor or adapt in drafting their own agreement, is attached to these guidelines. Parties to a dispute should seek their own advice as necessary before entering into such an agreement, and are not required to adopt the template deed.

In entering into a confidentiality agreement in relation to a Stage 1 dispute, parties should ensure that the terms of the agreement are consistent with the provisions of clause 8.6 of the Rules, and do not purport to obstruct or hinder the effective operation of the dispute resolution process set out in clause 8.2. In particular, clause 8.2 imposes specific rights and obligations on disputants to provide information to the Adviser, including:

- the requirement that NEMMCO immediately notify the Adviser if it serves, or is served with a DMS referral notice under clause 8.2.4. Where NEMMCO is not a party to a dispute, the parties are not required to notify the Adviser that a dispute exists;¹⁷ and
- the right of any party to a dispute to refer the dispute to the Adviser if a dispute has not, or can not, be resolved in Stage 1.¹⁸

The terms of any confidentiality agreement should not be used to limit or otherwise prevent parties to a dispute from exercising their rights under, or meeting the requirements of, the Rules. Where parties to a dispute are unable to reach agreement in relation to the exchange, treatment and disclosure of confidential information in Stage 1, Stage 2 of the dispute resolution process provides formal mechanisms through which such issues can be resolved.

¹⁶ Rules, cl 8.2.4(f).

¹⁷ Rules, cl 8.2.4(g)

¹⁸ Rules, cl 8.2.4(i-k)

4.2 Stage 2

If parties are unable to resolve a dispute in Stage 1, the dispute can be progressed to Stage 2 of the dispute resolution process at the instigation of any party. In Stage 2, parties to the dispute have the opportunity for the dispute to be decided by a DRP (DRP) established under clause 8.2.6A or, by consent, under a process designed by the Adviser (for example, engagement of an independent mediator).

Subject to the provisions of the Rules, information exchanged between parties to a dispute can be kept confidential in Stage 2. However, parties should note that there is no provision in Stage 2 of the dispute resolution process to keep the fact of a dispute confidential once it has been referred to a DRP.

On referring a dispute to a DRP, the Rules require the Adviser to promptly notify all registered participants, NEMMCO, the AER, and the AEMC that the referral has been made.¹⁹

Where the DRP considers that a registered participant or NEMMCO should become a party to the dispute²⁰, or where a registered participant or NEMMCO that has an interest in the dispute opts to become a party²¹, the DRP must provide the relevant DMS contact with the names of the parties to the dispute, a brief history of the dispute and the circumstances giving rise to it, and the results of any previous dispute resolution processes undertaken pursuant to the Rules in respect of the dispute.

4.2.1 Powers of the DRP to direct the exchange of information

While Stage 1 of the dispute resolution process provides a procedure for parties to formally request the provision of information relevant to a dispute, it requires the parties themselves to negotiate the terms of any exchange of confidential information between them. Failure by the parties to agree to the exchange of information can itself have the effect of preventing resolution of a dispute in Stage 1, and may form the basis of referral of a dispute to Stage 2.

The Rules provide the DRP with significant directive powers in relation to the exchange of information in resolution of a dispute. A DRP can, where it considers it necessary for the proper conduct of the proceedings, issue a direction requiring the parties to a dispute to exchange information.²² This point is recognised by clause 1.5.3 of the template deed. As set out above, the terms of a confidentiality agreement should not be used to limit or otherwise prevent parties to a dispute from exercising their rights under, or meeting the requirements of, the Rules. Where protection of the information is warranted, the DRP is empowered to give to the parties such directions relating to the use and disclosure of information obtained from parties to the dispute as it considers necessary in the circumstances, including a direction to keep information confidential.²³ Parties to a dispute must comply with such directions from

¹⁹ Rules, cl 8.2.5(e)

²⁰ Rules, cl 8.2.6B(b)

²¹ Rules, cl 8.2.6B(c)

²² Rules, cl 8.2.6C(a)(3)

²³ Rules, cl 8.2.6C(c)

the DRP. Failure to comply is a breach of the Rules in respect of which the AER may take action in accordance with the National Electricity Law.²⁴

4.2.2 Publication of DRP determinations

The dispute resolution process can ultimately lead to a binding determination by the DRP. The Rules require that copies of its determination be provided to the Adviser.

The Rules also require the DRP to provide a copy of its determination to the AER for publication. Except where otherwise authorised by the Rules, the copy of any determination provided to, and published by, the AER will exclude any confidential information that is included in the determination.²⁵

²⁴ *Rules*, cl 8.2.9(d)

²⁵ *Rules*, cl 8.2.10(a) and (b)

Attachment – Template Confidentiality Deed

Mutual Confidentiality Deed

[Insert party name] [Insert party name]



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Parties

[Insert party name] ABN [insert ABN] of [insert address]

[Insert party name] ABN [insert ABN] of [insert address]

Background

- A The parties have entered into a dispute resolution process in accordance with Chapter 8 of the National Electricity Rules, for the purposes of resolving a dispute between them (**Dispute**).
- B This Deed sets out the terms and conditions on which Confidential Information is provided by each party for the purposes of resolving the Dispute.

Operative provisions

1 *Confidentiality*

Acknowledgement

- 1.1 The Recipient acknowledges that the Confidential Information is valuable to the Provider.
- 1.2 In consideration for the Provider providing the Confidential Information to the Recipient, the Recipient accepts and agrees to be bound by the terms and conditions set out in this Deed.

Confidential Information

- 1.3 Subject to the terms set out in this Deed and any conditions imposed by the Provider in accordance with clause 1.4, the Recipient:
- 1.3.1 must keep the Confidential Information confidential;
 - 1.3.2 must not use Confidential Information for any purpose other than the Express Purpose;
 - 1.3.3 must not disclose or permit the disclosure of Confidential Information to any person other than as permitted under clause 1.5;
 - 1.3.4 must not reverse engineer, decompile or disassemble any Confidential Information; and
 - 1.3.5 may only copy or reproduce Confidential Information with the written consent of the Provider and subject to any conditions the Provider imposes on that consent.

Conditions

- 1.4 The Provider may provide all or specified parts of the Confidential Information to the Recipient in accordance with clause 1.3, subject to any conditions or restrictions that the Provider thinks necessary and that are specified in Schedule 1, which conditions and restrictions may but need not include:
- 1.4.1 a condition that the Confidential Information may be inspected but not copied;
 - 1.4.2 the time and location at which the Confidential Information may be inspected;
 - 1.4.3 whether, how and to what extent, copies or notes of the Confidential Information may be made;
 - 1.4.4 the period for which the Confidential Information is provided;
 - 1.4.5 whether, when and how the Confidential Information is to be returned or destroyed by the Recipient;
 - 1.4.6 any other condition the Provider thinks necessary.

Permitted disclosures

- 1.5 This Deed permits the disclosure of all or specified parts of the Confidential Information by the Recipient in any of the following circumstances:
- 1.5.1 the Provider has consented in writing to the disclosure, the disclosure is made in accordance with clause 2 and any condition imposed by the Provider, and is made to either or both of the following:
 - (a) a Representative or Representatives of the Recipient specified in Schedule 4 to this Deed; or
 - (b) a member of a class of Representatives of the Recipient, specified in Schedule 5 to this Deed; or
 - 1.5.2 the disclosure is required by law; or
 - 1.5.3 the disclosure is directed by a Dispute Resolution Panel ('DRP') in accordance with Clause 8.2.6C(c) of the National Electricity Rules, subject to any conditions imposed by that DRP.

Limitation on disclosure required by law

- 1.6 If the Recipient considers that disclosure is required by clause 1.5.2, it must:
- 1.6.1 immediately notify the Provider of the requirement;
 - 1.6.2 assist and co-operate with the Provider if the Provider seeks to limit or resist the requirement for the Confidential Information to be disclosed;
 - 1.6.3 at the time that the Confidential Information is disclosed, state to the person to whom the Confidential Information is disclosed that it is of a confidential or commercially-sensitive nature; and
 - 1.6.4 prior to disclosing the Confidential Information, use its best endeavours to require the person to whom the Confidential Information is to be disclosed to enter into a confidentiality deed with the Provider in similar terms to this Deed.

2 Disclosure to Representatives

Provision of Confidential Information

- 2.1 The Recipient must ensure that, before any of its Representatives are provided with or have access to Confidential Information, the Representatives are made aware of the confidential nature of the Confidential Information and the terms and conditions set out in this Deed.

Confidentiality undertaking

- 2.2 The Recipient must ensure that its Representatives, who will be provided with or have access to Confidential Information, execute an undertaking in the form contained in Schedule 4 to this Deed and deliver the executed undertaking to the Provider before the information is provided to or accessed by the Representative.

Compliance by Representatives

- 2.3 The Recipient must take reasonable steps to ensure that its Representatives do not do or fail to do anything that, if done or not done by the Recipient, would amount to a breach of the Recipient's obligations set out in this Deed.

Recipient must maintain register

- 2.4 The Recipient must at all times maintain an up to date register of all of its Representatives to whom Confidential Information has been disclosed. On request, the Recipient must promptly provide a copy of the register to the Provider.

3 Protection and security

Security measures

- 3.1 The Recipient must establish and maintain appropriate security measures to protect the Confidential Information against unauthorised access, use or disclosure.

Unauthorised access, use or disclosure

- 3.2 If the Recipient becomes aware of any unauthorised access to, use or disclosure of Confidential Information, or any suspected or possible breach of this Deed, the Recipient must:
- 3.2.1 immediately notify the Provider in writing;
 - 3.2.2 ~~do everything necessary~~ make reasonable endeavours to remedy the unauthorised access to, use or disclosure of the Confidential Information, or to prevent the suspected or possible breach of this Deed;
 - 3.2.3 comply with all reasonable written directions from the Provider in relation to the actual suspected or possible breach of this Deed; and,
 - 3.2.4 give the Provider all reasonable assistance required in connection with proceedings which the Provider may institute against any person for breach of confidence or otherwise.

4 Ownership of Confidential Information

- 4.1 The Recipient acknowledges that the Confidential Information remains the property of the Provider at all times and that this deed does not convey to the Recipient or any of its Representatives any proprietary or other interest in the Confidential Information.

5 Return of Confidential Information

Return of Confidential Information

- 5.1 If the Provider requests the return of the Confidential Information at any time or if the Confidential Information is no longer required by the Recipient for the Express Purpose, the Recipient must, where not otherwise required by law, immediately return to the Provider all material containing Confidential Information in the possession, power or control of the Recipient or any of its Representatives.

Destruction of Confidential Information

- 5.2 If requested by the Provider, the Recipient must, where not otherwise required by law, destroy or irretrievably delete all material containing Confidential Information in the possession, power or control of the Recipient or any of its Representatives.

Material containing Confidential Information

- 5.3 For the purposes of clauses 5.1, 5.2 and 5.3, material containing Confidential Information includes:
- 5.3.1 any material created or generated by the Recipient which contains Confidential Information;
 - 5.3.2 material in any form of storage from which the Confidential Information can be reproduced; and
 - 5.3.3 any embodiment or encoding of the Confidential information, irrespective of its form.

Confirmation

- 5.4 If requested by the Provider, the Recipient must give the Provider a written statement confirming that all material containing Confidential Information has been returned to the Provider or destroyed or deleted in accordance with this Deed.

6 Breach of obligations

Injunctive relief

- 6.1 The Recipient acknowledges that damages may not be an adequate remedy for any breach of this Deed.
- 6.2 The Recipient agrees to consent to:
- 6.2.1 the grant of any injunctive relief sought by the Provider to restrain any conduct or threatened conduct which is or will be a breach of this Deed; or
 - 6.2.2 specific performance to compel the Recipient to perform its obligations

under this Deed,

as a remedy for any breach or threatened breach and in addition to any other remedies available to the Provider.

Indemnity

- 6.3 The Recipient continually indemnifies the Provider against any claim, liability, loss, damage or expense (including legal costs on a full indemnity basis) that the Provider incurs or suffers directly or indirectly as a result of:
- 6.3.1 a breach of this Deed by the Recipient;
 - 6.3.2 anything done or not done by a Representative of the Recipient which, if done or not done by the Recipient, would be a breach of this Deed; or
 - 6.3.3 an unauthorised disclosure by a person who received the Confidential Information from the Recipient or any of its Representatives.

7 Continuing obligations

Survival of obligations

- 7.1 The Recipient's obligations set out in this deed continue to apply other than:
- 7.1.1 to the extent that the Provider specifically releases the Recipient in writing from any such obligations; or
 - 7.1.2 to the extent that any information is no longer confidential.

8 Notices

Giving notices

- 8.1 A notice, consent, information, application or request that must or may be given or made to a party under this Deed is only given or made if it is in writing and is:
- 8.1.1 delivered or posted to that party at its address set out [in Schedule 1](#); or
 - 8.1.2 faxed to that party at its fax number set out [in Schedule 1](#); or
 - 8.1.3 emailed to that party at the address set out [in Schedule 1](#).

Change of address, email or fax number

- 8.2 If a party gives the other party 3 business days notice of a change of its address, email or fax number, a notice, consent, information, application or request is only given or made by that other party if it is delivered, posted, emailed or faxed to the latest address or fax number.

Time notice is given

- 8.3 A notice, consent, information, application or request is to be treated as given or made at the following times:
- 8.3.1 if it is delivered, when it is left at the relevant address;
 - 8.3.2 if it is sent by post, 2 business days after it is posted;
 - 8.3.3 if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number; or
 - 8.3.4 if it is sent by email, as soon as its receipt is acknowledged by the party to whom it is sent.
- 8.4 A notice must be received by 5pm on a business day in the place of the party to whom it is sent, or it is to be treated as having served at the beginning of the next business day.

Costs

- 8.5 Except as otherwise set out in this Deed, each party must pay its own costs in relation to preparing, negotiating and executing this Deed and any document related to this Deed.

Deed to benefit and bind successors

- 8.6 This Deed continues for the benefit of, and binds, a successor in title of a party, including a third party to whom a party's rights and obligations are assigned in accordance with this Deed.

Entire agreement

- 8.7 This Deed contains everything the parties have agreed in relation to the matters it deals with.
- 8.8 No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Deed was executed, except as permitted by law.

Execution of separate Deeds

- 8.9 This Deed is properly executed if each party executes either this Deed or an identical Deed.
- 8.10 If the parties execute identical Deeds, this Deed takes effect when the separately executed Deeds are exchanged between the parties.

Further acts

- 8.11 Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

Governing law and jurisdiction

- 8.12 This Deed is governed by the law of [...]. The parties submit to the non-exclusive jurisdiction of the courts of [...] and courts of appeal from them. The parties will not object to the exercise of jurisdiction by the courts of [...] on any basis.

Joint and individual liability and benefits

- 8.13 Except as otherwise set out in this Deed, any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

Remedies cumulative

- 8.14 The rights, powers and remedies set out in this Deed are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this Deed.

Severability

- 8.15 If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- 8.16 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

Variation

- 8.17 No variation of this Deed will be of any force or effect unless it is in writing and signed by the parties to this Deed.

Waiver

- 8.18 The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another party.
- 8.19 A waiver by a party is only effective if it is in writing.
- 8.20 A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given and it is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

9 **Definitions and interpretation**

Definitions

9.1 In this Deed the following definitions apply:

confidential information means:

- (a) information which:
 - i. is commercially sensitive or valuable in nature, including (without limitation) financial information, reports, product specifications, technical information and forecasts relating to the Provider or its Related Entities or their businesses, products or processes; and
 - ii. will be or has been provided by the Provider or any of its Representatives to the Recipients or any of its Representatives in such circumstances or in such a manner as to indicate to a reasonable person that the information is commercially sensitive and valuable; and
- (b) information derived from such information; and
- (c) the fact that such information will be or has been provided;

but does not include:

- (d) information which is in or becomes part of the public domain, other than through a breach of this Deed or an obligation of confidence owed to the Provider or any Representative of the Provider;
- (e) information which the Recipient can prove by contemporaneous written documentation was independently acquired or developed without breaching any of the Recipient's obligations set out in this Deed.

Dispute Resolution Panel means a panel established under clause 8.2.6A of the National Electricity Rules.

Express Purpose means the purpose for which the Provider is disclosing the information as described in Schedule 3.

National Electricity Rules means the rules as approved by the Ministers of the States of South Australia, Victoria, New South Wales, Queensland and the Australian Capital Territory for the purposes of the National Electricity Law, as amended and in operation for the time being.

Provider means the party providing Confidential Information to the other party.

Recipient means the party receiving Confidential Information from the other party.

Related Entity has the same meaning as under the Corporations Act 2001 (Cth).

Representative means any director, officer, employee or partner of a party or of any agent, contractor, financier, legal adviser or professional adviser of a party.

Interpretation

9.2 In the interpretation of this Deed, the following provisions apply unless the

context otherwise requires:

- 9.2.1 a reference in this Deed to a business day means ~~a day other than a Saturday or Sunday on which all banks are open for business generally in Sydney, New South Wales~~ a day other than a Saturday, Sunday or a day which is lawfully observed as a national public holiday on the same day in each participating jurisdiction of the NEM;
- 9.2.2 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day;
- 9.2.3 an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- 9.2.4 where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 9.2.5 references to the word 'include' or 'including' are to be construed without limitation;
- 9.2.6 a reference to this Deed includes the agreement recorded in this Deed;
and
- 9.2.7 any schedules and attachments form part of this Deed.

Execution and date

Executed as a Deed by

Signed sealed and delivered for and on behalf
of [] in the presence of:

.....
Signature of witness

.....
Signature of authorised person

.....
Name of witness (print)

.....
Name of authorised person (print)

Schedule 1

Notices

A notice, consent, information, application or request that must or may be given or made to a party under this Deed is only given or made if it is in writing and is:

- delivered or posted to that party at its address set out below; or
- faxed to that party at its fax number set out below.
- emailed to that party at the address set out below

[insert party's details]

Name:

Address:

Fax number:

Attention:

Email:

[insert party's details]

Name:

Address:

Fax number:

Attention:

Email:

Schedule 2

Conditions and restrictions on disclosure

(Insert details of any conditions or restrictions that apply to the time, manner or form in which disclosure will be given. See clause 1.4)

Tick as appropriate

- ~~a condition that the confidential information may be inspected but not copied~~
- ~~the time and location at which the Confidential Information may be inspected~~
- ~~whether, how and to what extent, copies or notes of the Confidential Information may be made~~
- ~~the period for which the Confidential Information is provided~~
- ~~whether the Confidential Information must be returned or destroyed by the Recipient, and if so where and how~~
- ~~any other conditions (specify below).~~

Schedule 3

List the purpose for which the Confidential Information is disclosed.

Schedule 4

Representatives

[List named Representatives to whom Confidential Information may be disclosed by the Recipient (See clause 1.5.1)]

Schedule 5

Class of Representatives

[List class or classes of Representatives to whom Confidential Information may be disclosed by the Recipient (See clause 1.5.1)]

Schedule 6

Confidentiality Undertaking

Parties

By:

[name of Representative] of **[address of Representative]**

In favour of: **[name of Provider]** of **[address of Provider]**

Background

- A The Provider and the Recipient have executed the Confidentiality Deed relating to the provision of Confidential Information by the Provider to the Recipient in connection with the Express Purpose.
- B The Provider has agreed to the Recipient disclosing Confidential Information to the Representative on the condition that the Representative executes this Deed and delivers it to the Provider.

Operative provisions

1 Acknowledgement

- 1.1 The Representative acknowledges having received a copy of the Confidentiality Deed and having read the Confidentiality Deed in full.
- 1.2 The Representative confirms that he or she understands each of the obligations of the Recipient set out in the Confidentiality Deed and the restrictions on the disclosure and use of Confidential Information.

2 Undertaking

- 2.1 The Representative undertakes to observe all of the provisions set out in the Confidentiality Deed in all respects as if the Representative was named as the Recipient in the Confidentiality Deed in place of the Recipient.
- 2.2 The Representative undertakes to observe any conditions specified by the Provider in accordance with the Confidentiality Deed.

3 Terms reproduced

- 3.1 To give effect to clause 2.1, all provisions of the Confidentiality Deed are deemed to be set out in full in this Deed on the basis that all references to the Recipient in the Confidentiality Deed are, for the purposes of this Deed, deemed to be references to the Representative.

4 Definitions

4.1 In this Deed the following definitions apply:

Confidentiality Deed means the mutual confidentiality deed between the Provider and the Recipient pursuant to which the parties have disclosed or intend to disclose Confidential Information to each other for the Express Purpose.

Confidential Information has meaning set out in the Confidentiality Deed.

Express Purpose has meaning set out in the Confidentiality Deed.

Recipient means:

.....

.....

[name, ABN and address of Recipient]

Execution and date

Executed as a deed by

Date:

The Representative

.....

Signature of Representative

.....

Name of witness

.....

Signature of witness