



Response to the AER Distribution and Transmission Confidentiality Guidelines – Issues Paper

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Part A: Response to the Issues Paper

1 Executive Summary

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

The guidelines must specify the manner in which regulated businesses may make confidentiality claims in relation to the content of their initial and revised regulatory proposals (as well as any accompanying documents). The guidelines will be binding on both businesses and the regulator in accordance with 6.14A (d) and 6A.16A (d). The AER published its Issues Paper in relation to the development of confidentiality guidelines in March 2013.

The Energy Networks Association (ENA) agrees with the AER that the objective of the guidelines should be to streamline the process of making confidentiality claims by businesses, thereby facilitating appropriate information disclosure and protection. The guidelines should make the process of claiming confidentiality more predictable and well-understood by all stakeholders. It is reasonable to assume that having such guidelines in place will result in higher quality of reasoning and justification as to why particular information should be protected. Notwithstanding this, the guideline should also comply with the existing legal framework.

While the ENA supports the general approach outlined in the AER's Issues Paper, the ENA considers that a number of enhancements to the AER's proposed approach will further the aim of achieving the right balance between protecting and disclosing information and facilitating improved stakeholder engagement. Specifically, we consider that:

- A greater emphasis could be placed on collaboration between the NSP and the AER rather than reliance on formal information disclosure powers. NSPs consider that formal disclosure powers should be used as a last resort due to their resource intensive nature. Consistent with the AER's stated aims we have proposed an improved approach in section 3.3 below. NSPs would prefer to work collaboratively with the AER to determine whether information for which confidentiality is being claimed and which the AER is seeking to disclose could be disclosed on a limited or restricted basis.
- Including categories or lists of the types of confidential information will enable more efficient and consistent application of claims of confidentiality in order to streamline the process.
- The guidelines should comply with the legal framework established by *Competition and Consumer Act 2010* (Cth) (s 44AAF) and the National Electricity Law (NEL) that ensures that claiming confidentiality is not contingent upon meeting certain procedural requirements. Imposing compulsory requirements to the manner in which confidentiality may be claimed would appear to be in conflict with the confidentiality framework, including the right to provide information on an in-confidence basis.
- NSPs accept that the provision of reasons as to why the disclosure of confidential information will cause detriment will assist the AER in assessing claims for confidentiality and it is reasonable to expect in the ordinary course of claiming confidentiality NSPs would do so. However, given that the above legislation neither requires NSPs to establish the detriment nor provides details how this will occur, the provision of such information should be at the option of the NSP and the AER should not seek to extend the law through the guidelines by making such requirements mandatory.
- Providing sufficient flexibility within the guidelines will enable a streamlined approach to occur. For example, not in all cases will it be sensible to provide public versions of documents where the extent of exclusion of confidential information would make such documents meaningless. Accordingly, the requirement to provide both public and confidential versions of documents should not be mandatory but rather only where this is practical to do so.

- NSPs should present third party confidentiality claims in the same way as for other documents as the focus of the guidelines should be on the nature of the information and not the type or origin of the document.
- Allowing the suggested system for a limited disclosure of confidential information to third parties has potential to address some of the balance of appropriate protection and facilitate improved stakeholder engagement.
- The AER should not be seeking to derogate their responsibilities to NSP's. Specifically:
 - whilst the opportunity should be afforded for NSPs to provide information on any public benefit aspects of a confidentiality claim it should not be a mandatory requirement.
 - NSPs should not be required to undertake the analysis of detriment as against public benefit as the legislation places this responsibility on the AER.
 - the task of determining the proportion of confidential information in the regulatory proposal (pursuant to 6.9.2A of, the NER) as the rules place this task on the AER.

The ENA also notes that the AER has sought views on whether the guidelines should have broader application. The ENA is open to consider a broader application and seeks further indications from the AER on this matter. The ENA notes that the binding nature of the guidelines relates only to their application for regulatory proposals under the National Electricity Rules (NER). Where a broader application is agreed, it should necessarily be on the basis that such application would be to assist regulatory processes but not be binding on businesses.

2 Background

The revised National Electricity Rules require the AER to develop distribution and transmission confidentiality guidelines. The guidelines must specify the manner in which regulated businesses may make confidentiality claims in relation to the content of their initial and revised regulatory proposals (as well as any accompanying documents). The guidelines will be binding on both businesses and the regulator.

Further, under the NER, the NSP is required to include its confidentiality claims in the regulatory proposal in accordance with the confidentiality guidelines. By virtue of clause 6.8.2(c)(6) and 6A.10.1(f)(2) of the Rules, a regulatory proposal submitted by a NSP must include an identification of any parts of the regulatory proposal the NSP claims to be confidential and wants suppressed from publication on that ground in accordance with the confidentiality guidelines.

The *Competition and Consumer Act 2010* (Cth) (s 44AAF) and the National Electricity Law (Division 6 of Part 2) recognise that the AER will be provided with information in confidence and together provide a protective regime for such information. Whilst s 44AAF imposes an obligation upon the AER to protect such information from unauthorised disclosure, the NEL restricts the AER from releasing such information unless specific circumstances have been met or a proper process has been followed.¹ These provisions were included to provide balance to the far reaching information gathering powers conferred upon the AER.

Section 28Z of the NEL recognises the right of any person (including a regulated business) who provides information, either under legal requirement or voluntarily to provide that information in confidence. Under the current framework, a NSP is required to provide an indication of the parts of its proposal (if any) that it claims to be confidential and wants suppressed from publication on that

¹ The AER is permitted to disclose information to the Australian Competition and Consumer Commission (ACCC), the Australian Energy Market Commission (AEMC), the Australian Energy Market Operator (AEMO), or any other consultant engaged by those bodies. It is also permitted to disclose information in connection with the exercise of its statutory obligations, where it has received written consent, in connection with court or tribunal proceedings or to afford a party procedural fairness. See *Competition and Consumer Act 2010*(Cth), s 44AAF; National Electricity Law, s18 and ss 28W-28Y.

ground.² Once information is so identified, the AER must take all reasonable measures to protect that information from unauthorised use or disclosure.³

3 Developing confidentiality guidelines

3.1 Objectives and content of the guidelines

The objective of the guidelines that the AER proposed in its Issues Paper is broadly consistent with the ENA's views. If appropriately focused, confidentiality guidelines will reveal the benefits identified in the AER's Issues Paper, such as:

- Providing appropriate protection of confidential information, while maximising stakeholder ability to scrutinise;
- Facilitating greater accountability of regulated businesses to the confidentiality claims they make; and
- Ensuring appropriate distilling of information into confidential and non-confidential.

Further, the ENA considers that the AER's confidentiality guidelines should include the following elements:

- The confidentiality guidelines should be developed in alignment with the confidentiality framework enshrined in the Competition and Consumer Act 2010 (Cth) (s 44AAF) and the NEL. Neither the Competition and Consumer Act 2010 (Cth) nor the National Electricity Law, require as a prerequisite, that a NSP provide reasons supporting how and why disclosure of the information would cause detriment, nor does it require the NSP to undertake a public benefit test in order for the protective regime to apply;
- The confidentiality guidelines should aim to strike a balance between protecting confidential information and disclosing information so as not to undermine the integrity of the public consultation process;
- The confidentiality guidelines should focus on the nature of information and on the establishment of categories of confidential information for which a genuine claim of confidentiality can be made. The suggested list of categories is provided in section 4 of this submission;
- Where submitted documents contain confidential information, the NSPs will need to fill in a revised template that is presented in [Table 1](#) of this submission (refer section 3.3);
- Consistent with the AER's stated aim the guidelines should place greater emphasis on collaboration between the NSP and the AER rather than reliance on formal information disclosure powers. The NSPs consider that formal disclosure powers should be used as a last resort due to their resource intensive nature. The ENA has proposed an enhanced approach in section 3.3 below. NSPs have a preference to work collaboratively with the AER to determine whether information for which confidentiality is being claimed and the AER is seeking to disclose could be disclosed on a limited or restricted basis; and
- The guidelines should place greater emphasis on the disclosure of confidential information on a limited or restricted basis rather than the use of the AER's formal information disclosure powers. As noted by Geoff Swier, as a consultant to the ENA during the AEMC rule change

² National Electricity Rules (NER) clause 6.8.2(c)(6) and 6A.10.1(f)(2).

³ *Competition and Consumer Act 2010(Cth)*, s 44AAF(1); National Electricity Law, s 18.

process, this option appears to have ‘the best potential to address the underlying issues by enabling access to all confidential documents by stakeholder representatives and experts’.⁴

3.2 Manner in which NSPs may make a confidentiality claim

While the ENA agrees with many elements of the AER's goals as identified in the Issues Paper, members of the ENA have concerns with the AER's initial proposed approach to the process of making confidentiality claims. Specifically:

- It appears that the AER is currently considering an approach that is directed at the ability to claim confidentiality being contingent upon certain procedural requirements. The AER provides a list of these procedural requirements in section 4.1 of its Issues Paper and suggests enforcing them through requiring the NSPs to fill in a template contained in the Attachment 1; and
- The confidentiality guidelines should be developed in alignment with the confidentiality framework established under the *Competition and Consumer Act 2010* (Cth) (s 44AAF) and the National Electricity Law, which provides for a regime of protecting confidential information, and gives the regulator discretionary powers to disclose information provided in confidence subject to certain pre-conditions being met. Imposing requirements that are contained in Attachment 1 as compulsory is inconsistent with the existing regulatory framework.

The ENA considers that these matters can be addressed to meet the broader confidentiality framework whilst allowing a more balanced approach to protecting the NSPs' rights to provide information on an in-confidence basis and enhancing the process for scrutinising confidentiality claims. The ENA proposes the following modifications to the manner in which NSPs make confidentiality claims:

- Whilst it may be appropriate and prudent in many cases for a NSP to provide reasons supporting how and why disclosure of the information for which confidentiality is being claimed would cause detriment it should not be prerequisite to making a claim for confidentiality and provision of such information should only be to the extent that it is reasonably practical to do so. NSPs accept that the provision of such information will assist the AER in assessing claims for confidentiality and it is reasonable to expect in the ordinary course of claiming confidentiality NSPs would do so. However, given that the legislation neither requires NSPs to establish the detriment nor provides details how this will occur, the provision of such information should be at the option of the NSP and the AER should not seek to extend the law through the guidelines by making such requirements mandatory;
- The legal obligation to undertake a public benefit test in regard to a confidentiality claim is with the AER and should not be sought to be derogated to the NSP's through these guidelines. NSPs should have the opportunity to provide information on such public benefit where they wish to do so; and
- NSPs should identify parts of the document that are claimed to be confidential, as well as provide both public and confidential versions of documents where it is sensible to do so. Where certain documents contain a large proportion of confidential information or indeed the whole of a document is confidential then a public or a redacted version of the document may be meaningless and present limited if any information to the public. Sufficient flexibility should exist in the guidelines to allow NSP's to explain this when making a confidentiality claim. In such cases, a mandatory requirement for public versions is not likely to deliver a sensible outcome.

The suggested amendments above are targeted to ensure that the NSPs make their best effort to justify confidentiality claims in a streamlined and transparent manner. Further suggestions as to how the process of claiming confidentiality can be enhanced for the benefit of all stakeholders are provided in this submission. This includes a proposal to use categories of confidential information in order

⁴ ENA, Response to AEMC Directions Paper – Economic Regulation of Network Service Providers, Attachment F, 16 April 2012, p.43.

place greater emphasis on the the nature of information under consideration, as well an alternative template to that proposed by the AER.

3.3 Manner in which NSPs may make a confidentiality claim - proposed enhanced template and information handling process

The ENA considers that the focus of the confidentiality guidelines should be on identifying categories of information which will generally be recognised as confidential. The ENA considers that such an approach will streamline the process for making confidentiality claims and will ease the administrative burden on the AER in assessing each confidentiality claim. Further comments on specific categories are contained in section 4.

Focusing on developing categories of confidential information is more appropriate than seeking to identify types of confidential documents, as ultimately whether a confidentiality claim is made or not will depend on the content of the material in a document rather than the document type. Further, the establishment of categories of confidential information will provide NSPs with a clear understanding on the nature of information which the AER will generally consider to be confidential. This in turn, should reduce the number of unnecessary confidentiality claims received by the AER and should facilitate more open and transparent regulatory decision making.

Consequently, the ENA considers that a more favourable approach for making a confidentiality claim would be for the NSP to clearly identify the information for which confidentiality was being claimed, the relevant confidentiality category, a brief explanation for why the information falls within that category, and identify the specific detriment where it is reasonably practical to do so. This approach is consistent with the AER's commentary in section 4.1 of its Issues Paper, which contemplates the use of categories. Consequently the ENA proposes removing column three of the AER's template and adding two additional columns as outlined in [Table 1](#) below.

Table 1 Template outlining the manner in which stakeholders are to make confidentiality claims under the confidentiality guidelines – ENA proposed alternative

Column1	Column2	Column 3	Column 4	Column 5	Column 6	Column 7
Document containing confidential information	Page and paragraph number of the document which contains confidential information	Does the information for which confidentiality is being claimed fall within any of the recognised confidentiality categories? If so please specify which category or note 'other'	Provide a brief explanation of the category If information falls within 'other' please provide further details on why the information should be treated as confidential	Please specify the detriment which may be caused from information disclosure, to the extent that it is reasonably practical to do so	Has the confidential information been identified by highlighted yellow shading? If not, please provide reasons	Has a public version of this document been provided? If not please provide reasons

The ENA considers that the above approach to confidentiality claims strikes an appropriate balance between the legitimate rights of NSPs to maintain confidentiality of certain information and the rights of other stakeholders having access to confidential information in circumstances where that information should be subject to scrutiny. Also, the above approach is consistent with the approach

envisaged by the AEMC in its draft and final determination of the economic regulation of network service providers rule change proposal.⁵

ENHANCED APPROACH TOWARDS INFORMATION HANDLING PROCESSES

The ENA suggests that the AER consider adopting an information process, which places greater emphasis on working collaboratively with NSPs to manage issues surrounding information protection and disclosure. Members of the ENA consider the AER's current two stage information handling process does not facilitate sufficient collaboration. To address this issue, the ENA have proposed an enhanced information handling process, which largely builds upon the AER's existing process.

Stage 1: NSP makes a claim of confidentiality to the AER

During this stage, the NSP submits a claim of confidentiality according to the template proposed by the ENA (see [Table 1](#)).

Stage 2: AER assesses the NSP's claim of confidentiality

Upon receipt of a claim of confidentiality, the AER must assess the claim and form a view as to whether it is satisfied that the NSP has provided sufficient reasoning to substantiate a claim. In assessing the NSP's claim the AER may accept the claim; determine that the claim is unsubstantiated; or alternatively forms the view that the information should be disclosed so not to undermine the integrity of the public consultation process.

Step 3: AER enters into informal discussions with the NSP

If the AER accepts the NSP's reasons for claiming confidentiality then the protective regime applies. However, if the AER is not satisfied with the reasons provided by the NSP or forms the view that the information should be disclosed to allow stakeholders to engage effectively, then the AER should notify the NSP and ask it to provide either:

- further details regarding why the information should be protected;
- an indication as to whether the NSP would consent to limited release of the information or releasing the information on an aggregated basis; or
- consent to the information being disclosed.

During this stage, if the AER does not initially accept the claim of confidentiality, both the NSP and the AER should actively engage with one another to try and reach a resolution.

Step 4: AER moves to formal processes

If the AER and the NSP cannot reach an agreement informally, and the AER is still of the view that the information should be disclosed, then the AER may choose to exercise its discretion and use its information disclosure powers.

The ENA considers that the above information handling process will place the AER in a better position to strike an appropriate balance between protecting information and disclosing it. The proposed process places greater emphasis on the AER and NSP working collaboratively together to resolve information protection and disclosure issues. Further the proposed process provides the NSP and AER with more flexibility to reach an outcome which benefits both parties, than under the AER's current two stage process. The ENA would prefer to avoid the AER having to exercise its formal information disclosure powers, as the associated process is cumbersome and resource intensive. The proposed process also encourages greater use of limited disclosure and aggregation. This could be used to improve stakeholder engagement by allowing information which should be protected to be disclosed on a limited basis to stakeholder representatives.

⁵ AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p168.

4 Categories of confidential information

The ENA considers that confidentiality guidelines should provide a list of categories of information, which by their nature, should be treated as confidential. The NSPs will need to relate the information they claim is confidential to a particular category specified in the guidelines at the time the claim is made. It is expected that NSPs will be required to provide some explanation of how the information falls within the recognised confidentiality category. It is important that the identified categories of information should not be considered exhaustive, as there is a broad range of reasons for which the information may be legitimately confidential. This is also consistent with the approach by the AEMC in its draft and final determination of the economic regulation of network service providers rule change proposal.⁶

In ENA's response to the AEMC's Directions Paper on the AER's rule change proposal, the ENA proposed a number of categories of information which should be considered as confidential.⁷ The categories proposed were recognised by the AEMC as "clearly legitimate reasons for claiming confidentiality as they relate to commercial sensitivities, protection of security, or privacy".⁸ The proposed categories are as follows:⁹

- *Confidential contractual terms* - the disclosure of which would put the NSP in breach of contract or would adversely impact on its contractual compliance if the disclosure occurred outside the regulatory disclosure regime. This is most likely to arise where a counterparty has requested that all or parts of the contract be kept confidential but may also arise in relation to contracts of insurance with respect to such matters as insurance layers and excess levels. Examples of these types of agreements are access agreements for the National Broadband Network, customer agreements and insurance contracts;
- *Market sensitive cost inputs* - such as supplier's prices and internal labour costs, the disclosure of which may adversely impact upon the NSPs ability to negotiate the most efficient price or rate for goods and service, or its ability to compete in a competitive market for network services;
- *Information provided by a third party on a confidential basis* - the disclosure of which would adversely affect the interests of that third party or the public interest more generally. For example, proposed major connections and proposed public infrastructure development, not currently in the public domain;
- *Proposed strategic property acquisitions* for the transmission or distribution system, for example, easements for lines and purchases for substations, the disclosure of which is likely to adversely impact on the NSP's ability to negotiate a fair market price for the acquisition;
- *Planning for negotiation of industrial agreements* - where disclosure of such information is likely to adversely impact upon the NSP's ability to negotiate industrial agreements;
- *Proprietary information of a NSP or a third party* – for example, sophisticated models developed at significant expense to a NSP either itself or by its consultant. This is the type of confidential information that might be subject to disclosure if suitable undertakings have been given which protect the proprietary or commercially sensitive nature of the model;
- *Information which if made public may jeopardise security of the network or a NSP's ability to effectively plan and operate its network* – for example, network security arrangements, emergency response plans include terrorism response plans.

⁶ AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p168.

⁷ ENA, *Response to AEMC Directions Paper – Economic Regulation of Network Service Providers*, 16 April 2012, p 71.

⁸ AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p168.

⁹ ENA, *Response to AEMC Directions Paper – Economic Regulation of Network Service Providers*, 16 April 2012, p 71.

- *Information which identifies the personal affairs of customers or individuals – for example, customer pricing information, terms and conditions of employment relevant to individual employees; and*
- *Other – which needs to be specifically defined by the NSP in its proposal.*

The ENA also notes that the information accepted as confidential should only be used for the purposes of regulatory determination for the NSP who provided this information to the AER. It would not be appropriate to use confidential information as input to any cross-industry benchmarking, even if it is done at the aggregated level. The use of confidential information for benchmarking purposes can result in an inability of NSPs to replicate the analysis and reduce confidence in benchmarking outcomes.

5 Conclusion

In this submission, the ENA has provided a number of improvements to the AER's proposed approach and content for handling confidential information. The ENA is confident that adoption of the ENA's proposals will deliver an enhanced and simpler approach to streamlining the efforts in identifying, lodging and assessing confidentiality claims in way the remains compliant with the broader confidentiality framework, and applies a collaborative approach to achieve a balance between protecting and disclosing information.

Part B: Responses to the Issues Paper Questions

Manner in which NSPs may make confidentiality claims

Question 1

What are stakeholders' views on requiring NSPs to make confidentiality claims using the template in Attachment 1?

The ENA supports the AER's preference that the issues around the protection and disclosure of information be managed collaboratively. However the AER's guidelines must operate within the context of the statutory framework for the provision of confidential information and not derogate away from that framework which provides a right to persons providing information to the AER to do so on a confidential basis.

Consistent with this, the ENA supports the use of a template to make confidentiality claims. It is considered that the use of a template could:

- streamline the process for making confidentiality claims;
- alleviate the administrative burden on the AER in assessing claims; and
- assist in addressing the issue of unnecessary confidentiality claims.

However, the ENA does not support the template proposed by the AER nor the AER's underlying approach towards developing confidentiality guidelines due to the reasons explained in section 3 of Part A of this submission.

Consequently, we propose removing column three of the AER's template and adding two additional columns so that the template contains the following:

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
Document containing confidential information	Page and paragraph number of the document which contains confidential information	Does the information for which confidentiality is being claimed fall within any of the recognised confidentiality categories? If so please specify which category or note 'other'	Provide a brief explanation of the category If information falls within 'other' please provide further details on why the information should be treated as confidential	Please specify the detriment which may be caused from information disclosure, to the extent that it is reasonably practical to do so	Has the confidential information been identified by highlighted yellow shading? If not, please provide reasons	Has a public version of this document been provided? If not please provide reasons

Categories or lists of confidential information

Question 2

Should the confidentiality guidelines specify categories of information by which NSPs must classify any claims of confidentiality?

The ENA disagrees with the AER's position that classifying information according to categories would be more administratively burdensome than requiring NSPs to specify the detriment that would be suffered from disclosure and undertaking an assessment of the public benefit from disclosure. As noted in response to Question 1, the ENA strongly supports the use of categories of confidentiality as providing a more appropriate focus for the confidentiality guidelines than the current approach proposed by the AER. We consider that the establishment of categories of information would:

- streamline the process for making confidentiality claims;
- provide NSPs with guidance and clarity on the nature of information which could be considered confidential, thus reducing the number of unnecessary or excessive confidentiality claims;
- alleviate the administrative burden on the AER in assessing confidentiality claims by identifying basis' for which confidentiality is being claimed, enabling the AER to easily assess whether the confidentiality claim is genuine and whether the information is of a nature that should be subject to public scrutiny;
- retain the regulatory discretion for the AER to reject a claim for confidentiality, despite the information being within a recognised category; and
- be more simplistic and less complicated than the AER's proposed approach.

In the response to the AEMC's Directions Paper on the AER's rule change proposal the ENA proposed a number of categories of information which should be considered as confidential.¹⁰ The categories proposed were recognised by the AEMC as "clearly legitimate reasons for claiming confidentiality as they relate to commercial sensitivities, protection of security, or privacy."¹¹ However, the AEMC also noted that the use of categories of confidential information should not be exhaustive¹² and that there may be other categories of confidentiality claims for information not listed, which legislation would still require the AER to protect from being disclosed.¹³ Therefore, specifying categories of confidential information in the guidelines should not limit the ability for an NSP to claim confidentiality for the information that does not fall under any of the listed categories, nor should it limit the obligation on the AER to protect it from being disclosed.

Question 3

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should protect?

The ENA notes that the AER has proposed five categories of items that it considers should be protected. We note that these categories broadly align with the categories originally proposed by the ENA, however, the ENA notes that the AER has not included:

¹⁰ ENA, Response to AEMC Directions Paper – Economic Regulation of Network Service Providers, 16 April 2012, p 71.

¹¹ AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p168.

¹² *Ibid.*

¹³ *Competition and Consumer Act 2010(Cth)*, s 44AAF.

- Confidential contractual terms the disclosure of which would put the NSP in breach of contract or would adversely impact on its contractual compliance if the disclosure occurred outside the regulatory disclosure regime. This is most likely to arise where a counterparty has requested that all or parts of the contract be kept confidential but may also arise in relation to contracts of insurance with respect to such matters as insurance layers and excess levels. Examples of these types of agreements are access agreements for the National Broadband Network and insurance contracts;
- Information provided by a third party on a confidential basis the disclosure of which would adversely affect the interests of that third party or the public interest more generally. For example proposed major connections and proposed public infrastructure development, not currently in the public domain. This category is not intended to relate to consultant reports provided to NSPs to support regulatory proposals; and
- Proprietary information of a NSP or a third party e.g. sophisticated models developed at significant expense to a NSP either itself or by its consultant. This is the type of confidential information that might be subject to disclosure if suitable undertakings have been given which protect the proprietary or commercially sensitive nature of the model.

The ENA considers that these categories should also be included in the confidentiality guidelines as they constitute legitimate reasons for claiming confidentiality. Should the AER not agree, ENA requests that the AER articulate why these categories do not constitute an appropriate basis for a confidentiality claim.

Question 4

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should disclose?

As noted in our response in Part A of this submission, the AER's focus should not be on the format in which information is presented (i.e. documents, reports, or models) but rather on the actual information contained therein in respect of which the NSP is seeking to claim confidentiality.

Website notices

Question 5

What are stakeholders' views on requiring NSPs to use the template in Attachment 2 to determine the proportion of information over which they have claimed confidentiality?

The task of determining the proportion of confidential information in the regulatory proposal (pursuant to 6.9.2A of, the NER) is a clear obligation on the AER. This obligation does not lend itself to any simple and accurate method. In particular, identifying how many pages of the regulatory proposal contain one or more pieces of confidential information does not necessarily reflect the degree that confidentiality claims might inhibit stakeholder understanding of that regulatory proposal. If the AER were to choose to discharge this obligation by a page count, the AER should provide a clear statement about the limitations of interpreting the information or undertaking any direct comparisons between NSPs based upon it.

Blanket confidentiality claims

Question 6

What are stakeholders' views on our proposed measures for dealing with blanket confidentiality claims in the confidentiality guidelines?

The ENA broadly agrees with the AER's position on blanket confidentiality claims. However, it should be acknowledged that certain documents may contain a large proportion of confidential information, to the extent that a public or a redacted version of the document may be meaningless or will present information out of context. In this case sufficient flexibility should exist in the guidelines so that a public version of such documents is not required.

Third party documents

Question 7

What are stakeholders' views on our position that NSPs should verify all third party confidentiality claims that are included in their submission?

The ENA considers that the NSPs should present third party confidentiality claims in the same way as for other documents noting the ENA has proposed amendments to the AER's proposed approach to the way all, confidentiality claims are made.

The key consideration should be the nature of the information in respect of which confidentiality is claimed, that is, the information should be treated the same in terms of confidentiality, regardless of who prepared or provided it.

The ENA agrees with the AER's position that NSPs should verify all third party confidentiality claims. However, it should be noted that NSP's may be potentially constrained from disclosing all third party information, given the third party's rights to protection of confidentiality information.

Scope and coverage

Question 8

Should we apply the confidentiality guidelines, as a policy, to all information we receive from NSPs and gas service providers? If not, what information handling procedures should we use to deal with this information?

The ENA would like to seek clarification as to the specific processes the AER intends to apply the confidentiality guidelines to, in particular whether the confidentiality guidelines would apply to Q&A correspondence during the NSPs revenue reset and informal, *ad hoc* communication between the AER and NSPs.

The ENA accepts in principle applying the confidentiality approaches, as a policy, to formal submissions the AER receives from NSPs (including gas service providers) as part of their initial and revised regulatory proposals. However, the ENA notes that this is contingent on the actual content on the AER's future guidelines being consistent with the industry position outlined in this submission.

The ENA notes that the binding nature of the confidentiality guidelines relates only to their application for regulatory proposals under the NER. Should any broader application be agreed, it would

necessarily be on the basis that such application would be to assist regulatory processes but not be binding.

Compliance costs

Question 9

What are stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs?

Any additional compliance costs to NSPs as a result of the confidentiality guidelines will ultimately be borne by customers. Therefore, to maximise the benefit to customers, the guidelines should aim to minimise administrative costs while ensuring the appropriate balance between protecting confidential information and the public disclosure of information. In particular, a process that results in increased administrative costs should only be adopted where the additional benefits of the approach exceed the additional costs.

The ENA considers that the AER's proposed approach should be modified in a way which will facilitate appropriate disclosure of information whilst minimising administrative costs. As discussed above, identifying categories of information which are likely to be considered confidential will reduce the administrative burden on NSPs in the following ways:

- reduce the time spent in determining whether to submit a confidentiality claim, and
- reduce the chances that a confidentiality claim will be rejected, necessitating modifications to claims and associated redactions.

It will also increase certainty for NSPs and consumers over the AER's views on the 'appropriate disclosure of information'.

Limited release of information

Question 10

Should we facilitate NSPs disclosing information to certain stakeholders for the purpose of making a submission to the AER?

The ENA broadly supports the role of the AER in facilitating the disclosure of information to third parties where an NSP agrees to this. However, releasing confidential information (i.e. information that has been subject to a confidentiality claim by the business, and this has been accepted by the AER) to any third party should be at the full discretion of the NSP and under confidentiality agreement with the third party if required by the NSP.