



AUSTRALIAN
ENERGY
REGULATOR

Final Report

**Confidentiality Guidelines for
Dispute Resolution under
clause 8.2 of the National
Electricity Rules**

July 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. Submissions received in response to the consultation draft were considered and addressed in the draft report and draft confidentiality guidelines, which were published for consultation in June 2006.

One submission was received in response to the AER's draft guidelines, from Integral Energy. That submission is available on the AER's website at <http://www.aer.gov.au/content/index.phtml/itemId/702352/fromItemId/702347>.

The key issues raised in the submission, and the AER's response to those issues, are summarised below.

The confidentiality guidelines attached to this report have been revised in response to the submission from Integral Energy, and are now issued by the AER under clause 8.2.10(c) of the Rules.

2 Responses to the AER's Draft Confidentiality Guidelines

Only one submission was received in response to the AER's draft confidentiality guidelines.

That submission, from Integral Energy, raised two key issues.

2.1 Obligations of the Adviser

While the guidelines are not binding on participants, the adviser or third parties, Integral Energy notes that the guidelines do provide guidance in relation to the confidentiality of information obtained, used or disclosed for the purposes of resolving a dispute.

Integral Energy observes that in order to ensure the effective resolution of a dispute, particularly in stage one of a dispute, it may be necessary for the Adviser to maintain the confidentiality of information. By way of example, the submission suggests that this may extend to the Adviser not disclosing NEMMCO's notice of a dispute under clause 8.2.4(g) of the Rules, or not disclosing any information to parties not involved in the dispute until a dispute is referred to a dispute resolution panel (DRP) in stage two of the dispute resolution process.

Integral Energy goes on to note that, while the confidentiality provisions in clause 8.6 of the Rules do not apply to the Adviser, the Rules do not prevent the Adviser from being a party to an appropriate confidentiality deed with the parties to a dispute.

Integral Energy therefore suggests an amendment to the guidelines, requiring the Adviser to enter into a confidentiality deed with parties to a stage one dispute where the parties to the dispute agree that this is appropriate.

While clause 8.2.10(c) allows the AER to issue guidelines in relation to the confidentiality obtained, used or disclosed for the purposes of resolving a dispute, these guidelines are no more binding on the Adviser than on registered participants, members of a DRP or third parties. The guidelines can not be used to impose requirements on the Adviser, either in relation to the confidentiality of information or otherwise.

Integral Energy is correct in noting that the confidentiality provisions in clause 8.6 of the Rules do not apply to the Adviser. The Rules make no explicit provision in relation to the confidentiality of information obtained or used by the Adviser for the purposes of resolving a dispute.

The Adviser is appointed by the AER under the Rules on the basis of the Adviser's detailed understanding and experience of dispute resolution procedures, capacity to determine procedures best suited to the circumstances of a dispute, and understanding of the electricity industry. The Rules make it clear that it is for the appointed Adviser to attend to any matters necessary to ensure the effective operation of the dispute resolution process, in both stage one and stage two of a dispute. This is the Adviser's primary function under clause 8.2.2(c) of the Rules.

As noted in the report accompanying the draft confidentiality guidelines, the AER does not consider that it is authorised under the Rules to bind or direct the Adviser in the performance of functions assigned to the Adviser under the Rules, or in the exercise of discretion in the performance of those functions. To the extent the Rules

do not prescribe a particular practice or course of action for the Adviser to follow, the AER considers that the appropriate practice or course of action is a matter for the Adviser to determine, on the basis of the Adviser's expertise in the field of dispute resolution practices and procedures.

2.2 Powers of the DRP to direct the exchange of information

Clause 8.2.6C(a)(3) of the Rules authorises the DRP to issue a direction requiring the parties to a dispute to exchange documents. Clause 8.2.6C(c) empowers the DRP to give to the parties to a dispute such directions relating to the use and disclosure of information obtained from other parties to the dispute, including a direction to keep information confidential, as the DRP considers necessary in the circumstances.

Integral Energy submits that the draft guidelines do not limit the disclosure of confidential information to the DRP and to the parties to a dispute only.

As noted in its draft report the AER does not consider it appropriate to constrain or otherwise direct the DRP in the exercise of its powers under the Rules. To avoid any potential for confusion, the wording in section 4.2.1 of the guidelines has been revised to more closely reflect that in the Rules.