



SUBMISSION

Prepared for submission to:

Australian Energy Regulator (AER)

GPO Box 520

Melbourne VIC 3001

Distribution and Transmission Draft Confidentiality Guideline

Prepared by:

Etrog Consulting Pty Ltd

Melbourne

Australia

+61 403 444141

dprins@etrogconsulting.com.au

www.etrogconsulting.com.au

Date: 18 September 2013

Author: David Prins

18 September 2013

DISCLAIMER

This document has been prepared for submission to the Australian Energy Regulator (AER). Etrog Consulting and its authors make no representation or warranty to any other party in relation to the subject matter of this document as to the accuracy or completeness of the material contained in this document.

The information in this document is of a general nature. It is not intended to be relied upon for the making of specific financial decisions.

TABLE OF CONTENTS

1. INTRODUCTION.....	1
2. APPLICATION OF THE GUIDELINE TO GAS DISTRIBUTION AND TRANSMISSION BUSINESSES AND BEYOND REGULATORY PROPOSALS	2
3. WHAT MIGHT CONSTITUTE CONFIDENTIAL INFORMATION	2
4. PRICING PROPOSALS FROM NSPS IN THE YEARS BETWEEN PRICE DETERMINATIONS.....	4

1. INTRODUCTION

This submission is a response from Etrog Consulting Pty Ltd (Etrog Consulting) to the AER's *Draft Confidentiality Guideline* and accompanying *Explanatory Statement*, which were published for stakeholder comment on 9 August 2013. We previously provided a submission on the AER's *Confidentiality Guideline Issues Paper* which was published for stakeholder comment on 18 March 2013.¹

The AER is developing its Confidentiality Guideline as part of the Better Regulation program of work. This follows changes to the National Electricity Rules and the National Gas Rules that were published by the Australian Energy Market Commission on 29 November 2012. The AER's approach to regulation under the new framework will be set out in a series of guidelines to be published by 29 November 2013.²

Etrog Consulting is a specialist consultancy in energy and utilities, focusing on regulatory policy and the interplay between regulation and competition in energy and water industries and markets. The director of Etrog Consulting, David Prins, who is the author of this submission, has 24 years consulting experience in this field.

Etrog Consulting is not currently engaged by any client on the subject of this submission. The views put forward in this submission are the views of Etrog Consulting and its author, and are not intended to represent the views of any client of Etrog Consulting.

In July 2013, David Prins, the director of Etrog Consulting, was appointed to the AER's Consumer Challenge Panel (CCP) for an initial three year term, to help ensure that decisions on energy network costs across Australia incorporate the interests of consumers. This submission is provided independently of the CCP role.

Subject to any other client commitments or conflicts, we will be happy to discuss our views further with the AER or with any other stakeholders or interested parties that read this submission.

In our previous submission on the Issues Paper, we noted that our comments could apply equally to all information that the AER receives from electricity Network Service Providers (NSPs) and gas service providers. The same applies to our comments in this submission.

¹ Further information on the AER's work on developing its Confidentiality Guideline, including documents published for stakeholder comment and submissions received can be found on the AER website at www.aer.gov.au/node/18888. A copy of our previous submission is also available on our website at www.etrogconsulting.com.au/networks.html.

² Further details on the consultation processes and other guidelines work streams are available at www.aer.gov.au/Better-regulation-reform-program.

2. APPLICATION OF THE GUIDELINE TO GAS DISTRIBUTION AND TRANSMISSION BUSINESSES AND BEYOND REGULATORY PROPOSALS

The Confidentiality Guideline applies only to electricity NSPs and not to gas service providers. However, the accompanying Explanatory Statement states that the AER proposes as a policy to apply the Confidentiality Guideline to gas service providers as well. The Confidentiality Guideline will be binding directly on electricity NSPs and the AER for all Regulatory Proposals, and will be applied in other circumstances, including equivalent application to gas service providers, through the use of regulatory information instruments.

Beyond Regulatory Proposals, the Confidentiality Guideline might also be applied to pricing proposals from NSPs in the years between price determinations (which are discussed in a separate section below) and audit reports.

We support the AER's proposal to use its power to apply the proposed confidentiality template to all regulatory information instrument responses for gas and electricity. This would include requiring gas service providers to make confidentiality claims using the AER's confidentiality template for access arrangement proposals (including additions or amendments) and access arrangement information. We support the AER achieving this objective through the appropriate use of its various powers.

3. WHAT MIGHT CONSTITUTE CONFIDENTIAL INFORMATION

The previous Issues Paper stated that the AER intended its Confidentiality Guideline to include a list of items which would provide guidance to NSPs, and provided the following list of items that the AER stated that it was considering protecting:

1. Information affecting the security of the network – information which if made public may jeopardise security of the network or a NSP's ability to effectively plan and operate its network.
2. Market sensitive cost inputs – information such as supplier prices and internal labour costs and information which would affect the NSP's ability to obtain competitive prices in future infrastructure transactions, such as tender processes.
3. Market intelligence – information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities.
4. Strategic information – information such as the acquisition of land and easements, where the release of this information might adversely impact the NSP's ability to negotiate a fair market price for these items.

18 September 2013

5. Personal information – information about an individual whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

This list is now included in the Draft Confidentiality Guideline as confidentiality categories, along with a sixth category:

6. Other – information which the NSP claims is confidential but does not fit into one of the above categories.

In our previous submission on the Issues Paper, we supported in principle:

- Item 1: information which if made public may jeopardise security of the network or a NSP’s ability to effectively plan and operate its network;
- Item 2: information which would affect the NSP’s ability to obtain competitive prices in future infrastructure transactions;
- Item 4: information that might adversely impact the NSP’s ability to negotiate a fair market price for the acquisition of land and easements; and
- Item 5: information about an individual whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

We stated that we had reservations about item 3: Market intelligence – information which may provide an advantage to a NSP’s competitors for non-regulated or contestable activities. We feared that this may be too broad.³

We supported the statements of the AER on page 10 of the Issues Paper:

Unlike businesses in competitive markets, network service providers are natural monopolies or have significant market power. This can mean that information on an NSP’s operations, such as most of its detailed supply costs, will not typically be as commercially sensitive as for businesses in a competitive market. In a competitive market, such details could undermine competitive rivalry and fair market conduct. Exceptions to this view would mainly relate to information which may compromise an NSP’s commercial tender processes or affect its ability to obtain a competitive input price.

³ As a point of detail, we note that the Explanatory Statement accompanying the Draft Guideline stated that Etrog Consulting “Submitted that category 2 is too broad and could result in fundamental data items being taken as data that would enhance a competitor’s ability to compete against a NSP for the provision of a very wide range of services”. “Category 2” should have read “Category 3”, as it was Category 3 on which we raised this concern.

18 September 2013

Our concern arose because the same information may support monopoly and contestable services. The broadest interpretation of item 3 could mean that such fundamental data items such as historic and forecast numbers of customers on each tariff, amounts of energy consumed and maximum demands, could be taken to be data that would enhance a competitor's ability to compete against the NSP for the provision of a very wide range of services. Almost all the information published by the AER could be used by competitors to NSPs.

We suggested that the AER might reconsider the inclusion of item 3 in the list of items that it was considering protecting.

The Draft Guideline retains this item as a confidentiality category. The Explanatory Statement states:

Consumer stakeholders were also concerned the category Market Sensitive Cost Inputs could be too broad. There was concern this category could see fundamental data withheld from stakeholders. Consistent with the overview of our policy position, we share this concern. However, our case by case approach should mitigate it.

We will consider a NSP's classification when assessing confidentiality claims. However, as we will be taking a case by case approach, we may not agree with the classification. Also, we may agree that the information fits into the category but, nonetheless, the public benefit in disclosure may outweigh the detriment. Central to our consideration will be the reasons a NSP provides for its confidentiality claims.

The concern that we raised, as an independent stakeholder rather than as a consumer stakeholder, was that the category *Market intelligence* was too broad, rather than that the category *Market sensitive cost inputs* was too broad.

We support the AER's proposal to assess confidentiality claims on a case by case basis. Under this approach, the AER may not agree with the NSP's classification, or may agree that the information fits into the category but, nonetheless, the public benefit in disclosure may outweigh the detriment. This approach should apply to all confidentiality categories.

4. PRICING PROPOSALS FROM NSPS IN THE YEARS BETWEEN PRICE DETERMINATIONS

In our previous submission on the Issues Paper, we supported the statement of the AER that it will be looking to achieve a balance between protecting certain information because of its sensitive nature and the need to disclose information for an open and transparent regulatory decision-making process that allows all stakeholders to engage effectively.

18 September 2013

We noted that decision-making processes include the AER's acceptance of pricing proposals from NSPs in the years between price determinations, and we stated that the spreadsheets that underlie those annual pricing proposal should be available to stakeholders to enable them to verify the AER's annual pricing decisions.

We also pointed out that as well being used in decision-making processes, information that is not confidential can usefully be used for research purposes and to assist interested parties in making efficient investment decisions, in accord with the National Electricity Objective and the National Gas Objective. Unnecessarily withholding information on the grounds of confidentiality when that is not appropriate may thwart the realisation of a wide range of benefits in support of these Objectives, as well as being detrimental to the conduct of regulatory decision-making processes.

The Confidentiality Guideline applies to a NSP's initial and revised regulatory proposal, initial and revised revenue proposal, proposed and revised proposed negotiating framework and, proposed and revised proposed pricing methodology (collectively referred to as Regulatory Proposals). We understand that this does not extend to pricing proposals from NSPs in the years between price determinations and price resets. However, the AER can use other powers to implement policy to apply the Confidentiality Guideline to these pricing proposals. As stated above, we support the AER's proposal to use its powers to apply the proposed confidentiality template to all regulatory information instrument responses for gas and electricity, and we believe this should extend to pricing proposals.

Pricing proposals including models of regulatory revenue income for network businesses, and show how the business has complied with the terms and conditions of their access arrangements in making annual or other periodical changes to their tariffs.

We accept that there may be some tariffs that are specific to some very large energy users, and if the details of the energy supplied under those tariffs were released it could be releasing data that is confidential to those users. Beyond those specific small numbers of cases, we see no reason why the rest of the contents of the models should not be released.

Releasing the models allows interested to stakeholders to verify independently that the network businesses are complying with their access arrangements. The information in the models can also be used for research purposes and statistical analysis. The information includes aggregate amounts of energy supplied (or forecast to be supplied) in each band and component of each network tariff. Where tariffs have fixed charge components, the model shows customer numbers on each tariffs, and where there are other tariff elements such as demand charges they are also shown.

18 September 2013

This information is very useful for modelling purposes. Often investment planning and policy development requires access to verified information and trends. For example, changes in household and business consumption can be compared at an aggregate level across different network areas. Where network tariffs support flexible tariffs or time of use tariffs, the consumption in each band can be seen, and over a period of years any trends in load shifting that be attributed to tariffs can be modelled. The growth of feed-in tariffs can be modelled, and the data can also be used as part of modelling of retail costs and margins. These are just some of the uses of the pricing proposal models; we can expand further on request if that may be of use to the AER.

Many times we see assumptions made about the energy usage of residential and small business customers, which may or may not be justified, and which could be better supported if these models were available.

These models used to be made available by jurisdictional regulators, and we would like to see them released by the AER.