



13 September 2013

Mr Blair Comley
Chair, SCER Officials
Department of Resources, Energy and Tourism
GPO Box 1564
Canberra ACT 2601

Dear Mr Comley

Draft energy legislative amendments – AER information gathering and publication

APA Group (APA) welcomes the opportunity to comment on the proposed changes to the National Electricity Law and National Gas Law regarding powers of the Australian Energy Regulator (AER) to collect and publish data from regulated energy businesses.

APA is a major ASX-listed energy infrastructure business, owning and/or operating over \$12 billion of assets. These assets include significant gas transmission and distribution interests, as well as investments in the Murraylink and Directlink electricity interconnectors which operate in the National Electricity Market.

Consistency between electricity and gas regimes in respect of information gathering

APA recognises the recent significant changes made to the National Electricity Rules (NER), in particular (for this process), the increased focus and reliance on gathering and publishing benchmarking information in order to understand and assess the efficiency of electricity network service providers (NSPs). APA further recognises that the current drafting of the National Electricity Law (NEL) may act as a barrier to this information collection process, and therefore, to implement the policy decision of governments and the intent of the new Rules made by the Australian Energy Market Commission, certain amendments to the NEL are required.

While the main driver for changes to the information gathering provisions are related to developments in the NER, APA acknowledges the high level policy position of the Standing Council on Energy and Resources (SCER) to retain consistency between the electricity and gas laws in respect of certain provisions, including information gathering. This consistency, however, does not necessarily mean that the powers will be used identically across the sectors. Much of the use of these powers is linked to the specific provisions in the respective rules, as recognised in the proposed drafting of the new information gathering provisions for section 64(1a) of the National Gas Law (NGL) and section 28V(1a) of the NEL, which link to the Rules.

APA notes that at the rules level there are significant differences between the regulatory frameworks for electricity and gas, the most relevant here being the explicit requirement to undertake benchmarking of electricity NSPs under the NER, and administrative steps included in that regime to provide procedural fairness to electricity NSPs where



benchmarking data is intended to be used as part of price resets.¹ These same rules and processes are not features of the National Gas Rules (NGR). The procedural checks and balances contained in the NEL are arguably important to the appropriate adoption of benchmarking techniques - something that should be considered before benchmarking is adopted as part of the assessment of access arrangement proposals.

As a result it should be expected that the information gathering powers of the regulator, while consistent across the NEL and NGL, will be applied differently across the sectors because of the differences between the NEL and NGR.

Providing reasons for confidentiality claims

APA accepts that service providers should identify any confidential aspects of information that it submits to the regulator, and to provide reasons for those confidentiality claims. APA considers that regulated businesses can be expected to do this as it is in their interest to have confidentiality claims accepted by the regulator, and the absence of clear reasons why information should be considered confidential increases the risk that the regulator will determine to disclose information under section 28ZB of the NEL or section 329 of the NGL. Specific amendments to the NEL and NGL to require reasons therefore do not appear necessary.

Notwithstanding the current incentives on service providers to justify confidentiality claims, APA notes that the AER currently has powers under both the NEL and NGL to require information sought under a regulatory information instrument to be provided to the AER in a form or in a manner prescribed by the AER.² The AER states in its Explanatory Statement for its draft Confidentiality Guidelines that it intends the same processes that it is developing in that guideline (which will be binding on electricity NSPs) to be applied to the gas sector through the use of these existing powers.³ It would therefore appear unnecessary for the NEL or NGL to be revised to include obligations for service providers to identify and provide reasons for the protection of confidential information, as these powers are arguably already bestowed on the regulator.

Identifying the public benefit of disclosure

APA does not support the proposed changes to the NEL and NGL to require service providers to demonstrate why disclosure of confidential information is not in the public interest.

In relation to information that is confidential to a service provider, while that service provider is likely to be able to provide the regulator with information as to the likely costs or detriment to itself of the disclosure of confidential information, it would not be able to assess the likely public benefit of disclosure. This assessment necessarily involves an understanding and assessment of broader public policy and regulatory impacts of disclosure, including the likely impacts of disclosure on other decisions before the AER. This type of information is not

¹ These procedural steps in the NEL include the need to develop and prepare an expenditure assessment guideline, the framework and approach stage of decision making which sets out the proposed application of the expenditure assessment guideline to the service provider, the early release of an issues paper in the regulatory decision making process, and the need to prepare and publish annual benchmarking reports.

² National Gas Law section 55(c) and National Electricity Law section 28M

³ Australian Energy Regulator 2013, *Better Regulation: Explanatory Statement Draft Confidentiality Guideline*, August, p 12



available to the service provider, and therefore the service provider is not able to make such an assessment with the benefit of all the relevant considerations that the AER might bring to bear to this decision.

APA therefore considers it is inappropriate to require a service provider to provide information to the AER in relation to the likely public benefit of disclosure, as this information would be incomplete, and would not negate the AER's obligation to undertake its own assessment of the public benefit based on information available to it but not the service provider.

This issue is also currently the subject of a consultation process with the AER. In this process, the AER's draft decision in respect of the Confidentiality Guideline reversed a position put in its earlier Issues Paper related to whether service providers should be required to comment on the likely public benefit of disclosure. In the draft Explanatory Statement the AER states:

In our issues paper we proposed that in addition to identifying detriment NSPs must also specify that this detriment is not outweighed by the public benefit in disclosing the information. NSPs submitted that the legal obligation under the NEL to undertake an assessment of whether disclosure of the information is or is not outweighed by the public benefit in disclosure is upon the AER and should not be a requirement placed on NSPs.

In consultations with NSPs they suggested that public benefit could be very broad. It might include various public policy considerations beyond their expertise in providing network services. That was not our intention. Rather, we intended to give NSPs the opportunity to comment on a consideration that is important to our determining whether to use our formal information disclosure powers.

Given NSPs' concerns we propose not to require them to address the public benefit as part of the confidentiality template.⁴

The AER has clearly reached this draft decision in relation to its Confidentiality Guideline after the benefit of consultation. APA considers that the AER has reached an appropriate conclusion that recognises its legislative obligations and the information that the AER would bring to bear on such decisions. The NEL and NGL should also reflect this position.

Identifying the likely detriment of disclosure

Service providers can also be in a position where they must disclose information to the regulator that is confidential to another party. This can include information related to a prospective user's investment intentions (supporting an augmentation project, for example), or details of product prices not available to a supplier's competitors. In these cases, the service provider is unlikely to suffer a detriment from public disclosure, but the detriment to another party (that party to whom the information is confidential) may outweigh the public benefit. As currently drafted, the NEL and NGL also protect this type of confidential information.

In this circumstance, not only would the service provider not be able to provide details as to the public benefit of disclosure as described above, it is also unlikely to be able to provide information as to the likely detriment of public disclosure. This information is better provided by the person to whom the information is confidential.

⁴ AER 2013, *Better Regulation: Explanatory Statement Draft Confidentiality Guideline*, August, pp 22-3



Recommended revisions to legislative package

APA considers that the features of the NEL and NGL in relation to the identification and disclosure of confidential information suggest that the proposed revisions set out in the new sections 57A(1)(b) of the NGL and 28OA(1)(b) of the NEL are not required because of:

1. The existing incentive on service providers to identify confidential information and provide the AER with reasons for confidentiality claims;
2. The AER's current powers to require information submitted in response to a regulatory information instrument to be provided in a particular form, which would allow the AER to require confidentiality claims to be made in a particular way, including through the use of a template;
3. The limited ability for service providers to adequately identify and quantify the public benefit of disclosure of confidential information;
4. The need for the AER to undertake an assessment of the public benefit in any case in order to satisfy its public disclosure obligations; and
5. The existence of circumstances where the service provider would not be able to identify or quantify the likely detriment of disclosure.

APA therefore recommends that the SCER revise its proposed legislative amendments for both the NEL and NGL to remove requirements for service providers to include information and reasons as to why any detriment associated with the disclosure of confidential information may be considered as outweighing the public benefit of disclosure.

Please contact Alexandra Curran, Regulatory Manager on 02 9275 0020 if you would like further information on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Bolding', written in a cursive style.

Peter Bolding
General Manager Regulatory & Strategy