

OFFICE OF THE TASMANIAN ECONOMIC REGULATOR
POLICY ON THE TREATMENT OF CONFIDENTIAL SUBMISSIONS
(Version 4 – Effective 26 February 2021)

Regulator’s responsibilities with respect to consultation

Unless the context otherwise requires, references in this document to “the Regulator” include the Regulator under the *Electricity Supply Industry Act 1995* (ESI Act), the *Gas Industry Act 2019* (Gas Industry Act) and the *Water and Sewerage Industry Act 2008* (W&SI Act).

Section 8(1) of the ESI Act provides that:

In exercising powers and functions under this Act, the Regulator must not unfairly discriminate between electricity entities that are authorised to provide similar services, between authorised retailers, between customers for electricity or between other persons.

Section 16(1) of the ESI Act provides that:

The Regulator must preserve the confidentiality of information that –

- (a) could affect the competitive position of an electricity entity or other person; or
- (b) is commercially sensitive for some other reason.

Section 7(2) of the Gas Industry Act provides that:

The Regulator must, in performing any functions of a discretionary nature, endeavour to act in a fair and equitable manner, taking proper account of -

- (a) the interests of licensees; and
- (b) the interests of customers.

Section 16(1) of the Gas Industry Act provides that:

The Regulator must preserve the confidentiality of information gained in the course of administering this Act (including information gained by an authorised officer under Division 2 of Part 6) that –

- (a) could affect the competitive position of a licensee or other person; or
- (b) is commercially sensitive for some other reason.

Section 101(1) of the W&SI Act provides that:

A person who is, or has been, employed in carrying out duties related to the administration of this Act must not disclose information acquired in the course, or as a result, of carrying out those duties if that information is confidential and, at the time it is provided to the person, the person providing it states that it is of a confidential nature except –

- (a) as may be required for the purposes of this Act; or
- (b) as authorised by the person to whom the duty of confidentiality is owed; or

- (c) as authorised or required by the regulations; or
- (d) as authorised or required by a court or other lawfully constituted authority; or
- (e) as authorised or required by the Minister or the Treasurer, as applicable, after consultation with the person to whom the duty of confidentiality is owed.

In respect of the W&SI Act, there are further provisions allowing the Regulator to give consideration to the relevant costs and benefits to the public of disclosing confidential information.

Section 101(3) of the W&SI Act provides that:

The Regulator may, in connection with the performance of functions or the exercise of powers under this Act, disclose confidential information to any person if the Regulator is of the opinion –

- (a) that the disclosure of the information would not cause detriment to the person supplying it or to the person from whom that person received it; or
- (b) that, although the disclosure of the information would cause detriment to such a person, the public benefit in disclosing it outweighs that detriment.

Section 101(4) of the W&SI Act provides that:

Where subsection (3) applies, the person to whom the duty of confidentiality is owed must be afforded an opportunity prior to disclosure to withdraw the relevant confidential information from the Regulator.

The Regulator is of the view that these provisions impose upon the Regulator responsibilities to receive, consider and give appropriate weight to, input from interested parties and to act with administrative fairness. It is to be noted that, in addition to general law remedies for the failure of the Regulator to act fairly, there is a process set out in each of the ESI Act, the Gas Industry Act, and the W&SI Act for the making of appeals with respect to decisions of the Regulator.

The Regulator considers that, in the normal course of events, the discharge of these responsibilities will require publication of submissions made in respect of matters the subject of public consultation by the Regulator. The exception to this is where a claim for confidentiality is made under section 101 of the W&SI Act or on the grounds specified in section 16 (1) of the ESI Act, or section 16(1) of the Gas Industry Act, as applicable.

Having regard to the general responsibility to act openly and the duty to maintain confidence, which may, in some circumstances, conflict, the Regulator has determined that the following principles should apply to the handling by the Regulator of submissions which are claimed to be, in whole or in part, confidential.

Principles governing confidential submissions

- 1 Any information in a submission which the person making the submission considers to be confidential must be identified.
- 2 The person claiming confidentiality is to provide reasons in support of the claim in accordance with the following:
 - (a) For information provided under the ESI Act or Gas Industry Act, the person must explain the potential impact of disclosing the information on the person's competitive position or of the otherwise commercially sensitive nature of the information.
 - (b) For information provided under the W&SI Act, the person must demonstrate that disclosing the information would cause detriment to that person, or to the person from whom that person received the information, and that this detriment would outweigh any public benefit to be gained from the disclosure.
- 3 Material that the Regulator accepts as confidential may be accorded less weight in the decision-making process than material that is published and withstands challenge and exposure to the market.
- 4 If the Regulator does not accept a claim of confidentiality, the Regulator will advise the person making the submission of that decision and provide that person with the opportunity to withdraw the whole or relevant part of the submission.
- 5 The Regulator reserves the right to disregard material for which confidentiality is claimed but which the Regulator does not consider should be treated as confidential.
- 6 The Regulator reserves the right not to publish material, for which confidentiality is not claimed or not accepted, if the Regulator believes that the material is, or could be, derogatory or defamatory.