Australian Gas Infrastructure Group

Dampier Bunbury Pipeline | Multinet Gas Networks | Australian Gas Networks

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Economic Regulation Authority
Level 4
469 Wellington Street
Perth WA 6000

Attention: Tyson Self
Email: publicsubmissions@erawa.com.au

Dear Mr Self

AGIG Submission on Draft Compulsory Notice Guideline

Thank you for the opportunity to make submissions on the Economic Regulation Authority's Draft Compulsory Notice Guideline.

AGIG supports a proportionate, transparent and risk-based information gathering framework that provides procedural certainty for regulated entities while protecting legal professional privilege, confidential information and critical infrastructure information.

While the draft guideline is broadly based on the Australian Energy Regulator's Compulsory Notice Guidelines, AGIG considers that several aspects of the draft should be amended to better balance the ERA's investigative functions with procedural fairness, protection of sensitive information and the compliance burden imposed on regulated entities.

Executive Summary
AGIG's primary recommendations are that the guideline should:

1. Ensure that the ERA is required to specify in its notice why it requires the information sought.
2. Include a dedicated section dealing with the protection and handling of confidential, commercially sensitive and critical infrastructure information.
3. Permit redaction of irrelevant sensitive or confidential information where such information is outside the scope of the notice.
4. Modify the proposed requirements relating to legal professional privilege claims.
5. Enhance procedural fairness safeguards for oral examinations.
6. Expand consultation requirements before compulsory notices are issued.
7. Reinforce that voluntary information gathering should generally be preferred before compulsory powers are exercised.
8. Strengthen the ERA's consideration of compliance burden and regulatory efficiency.
9. Clarify several aspects of the draft guideline, including the criteria for issuing notices and the interaction between section 42 of the NGL(WA) and section 51 of the Economic Regulation Authority Act 2003 (WA).

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1. **Specification of reason for seeking information**

Relevant provisions: Paragraph 2.1, section 42 NGL (WA)

The draft guideline states that a compulsory notice will state that the recipient must provide information, produce documents or give oral evidence on a specified date, time and place. The guideline fails to state that the ERA must set out the basis upon which it requires the information sought. In order to properly exercise s42, the ERA must require the information sought to "for the performance of a function or power conferred under the National Gas Rules". AGIG submits that information about the purpose of the notice and the relevant function or power the information is required for is critical to understand:

- whether the notice is validly issued.
- the scope of the documents to be produced.
- whether the individual or company responding to the notice requires legal representation.

2. Protection of Confidential, Commercially Sensitive and Critical Infrastructure Information

Relevant provisions: Paragraphs 1.2, 2.1.3**,** 2.1.5**,** Section 4

The draft guideline imposes extensive obligations on recipients but provides little guidance regarding how information obtained under a compulsory notice will be protected, stored, accessed, retained or disclosed.

This is important for gas infrastructure businesses in the event they are required to provide confidential information and sensitive operational information[1] such as:

- critical infrastructure information;
- cyber security information;
- operational technology architecture;
- vulnerability assessments;
- critical asset risk management information;
- commercially sensitive pricing and contractual information; and
- third-party confidential information.

The AER guideline contains greater detail about how compulsorily obtained information may be used and disclosed, including reference to confidentiality protections and statutory obligations relating to the protection of confidential information. AGIG submits that the ERA guideline should contain equivalent guidance and recommends that the guideline:

- recognise that respondents may claim confidentiality over commercially sensitive or confidential information;
- explain how the ERA will manage confidential information provided in response to a compulsory notice including by referring to the confidentiality protections in section 57A of the NGL and section 55 of the Economic Regulation Authority Act 2003 (WA);
- explain whether information may be disclosed to other agencies and under what circumstances; and
- outline storage, retention and destruction arrangements.

3. Redaction of Irrelevant Sensitive Information

Relevant provisions: Paragraphs 2.1**,** 2.1.5

The draft guideline states that documents must generally be produced in full and without redaction.

[1] Subject to requirements under the *Security of Critical Infrastructure Act* 2018 (**SOCI Act**).

AGIG accepts that relevant information falling within the scope of a compulsory notice should ordinarily be produced. However, many documents contain sensitive material that is unrelated to the subject matter of the notice.

The requirement to produce whole documents without redaction may result in disclosure of large amounts of irrelevant:

- critical infrastructure information;
- cyber security information;
- personal information;
- commercially sensitive information; and
- third-party confidential information.

AGIG submits that where sensitive information is not relevant to the category of material sought by the notice, the guideline should expressly permit respondents and the ERA to agree appropriate redactions of irrelevant sensitive or confidential material.

This would improve efficiency for both the ERA and Respondent as well as reduce unnecessary disclosure of sensitive information irrelevant to the purpose of the notice.

3. Legal Professional Privilege

Relevant provision: Paragraph 2.1.2

AGIG welcomes the acknowledgment that section 42(8) protects legal professional privilege but notes that despite this, the draft guideline requires recipients "must" provide information substantiating claims for legal professional privilege, including document titles, authors, recipients, dates, locations and privilege categories.

AGIG is concerned that:

- this requirement may itself disclose privileged or sensitive information;
- the obligation is not found in section 42; and
- the ERA draft goes further than the AER guideline, which states only that the AER "expects" recipients to provide particulars supporting a privilege claim.

AGIG submits that the guideline should not impose a mandatory obligation to provide detailed information regarding privileged documents and should avoid requiring disclosure of information that may itself reveal privileged communications and notes that this goes beyond the power in section 42.

4. Oral Examinations and Procedural Fairness

Relevant provisions: Paragraphs 3.5 to 3.9

The conduct of oral examinations has the potential to significantly affect the rights and interests of both examinees and the subject of an investigation.

AGIG considers that the guideline should balance investigative power with procedural fairness.

In particular, AGIG submits that:

- in-house legal counsel should generally be permitted to attend examinations unless the ERA identifies a specific conflict or demonstrable prejudice risk;
- a representative of the company that is the subject of the investigation should generally be permitted to attend examinations, subject to appropriate confidentiality undertakings;

- non-disclosure directions should not unreasonably restrict communications necessary for governance, compliance, insurance, financial reporting or legal advice purposes;
- transcripts should be provided promptly following the examination; and
- the guideline should explain what is meant by examinations being conducted "in private".

AGIG acknowledges that several of the relevant provisions are derived from the AER guideline. However, AGIG considers that the ERA should adopt a more flexible approach that better reflects procedural fairness requirements and the practical realities of corporate investigations. It is not fair or feasible for an employee to have to personally pay for legal representation if a notice is issued to them, nor is it efficient for a company to pay for multiple legal counsel to represent different examinees.

5. Consultation Before a Compulsory Notice is Issued

Relevant provisions: Paragraphs 1.2.1 and 2.1

AGIG suggests that in most cases, early engagement between the ERA and regulated entities should occur before compulsory notices are issued with a view to obtaining information via voluntary provision and ensuring that the scope of information requested is as narrow as possible and the timeframes for provision are not unduly onerous. The AER guideline contains a more detailed discussion of consultation, including consultation regarding document management systems, custodians, production methodologies and document scope.

AGIG recommends that the ERA adopt a similar approach to the AER and provide that it will ordinarily consult with a proposed recipient before issuing a notice unless doing so would prejudice the effectiveness of an investigation.

Such consultation should include:
- scope of the request;
- relevant custodians;
- search methodologies;
- search parameters;
- date ranges;
- production formats; and
- proposed response timeframes.

AGIG submits that this would reduce compliance costs, improve efficiency and minimise the need for variation requests.

6. Preference for Voluntary Information Requests

Relevant provisions: Paragraph 1.2

AGIG supports the use of compulsory powers where genuinely necessary.

However, AGIG notes that the AER guideline expressly recognises that information will generally be sought voluntarily before compulsory powers are exercised and that compulsory notices are not issued lightly. AGIG recommends that the ERA adopt similar language.

Where a party is willing to provide information voluntarily and requires only a reasonable extension of time to locate, review and assess material for privilege or confidentiality concerns, the issue of a compulsory notice may not improve efficiency and may unnecessarily increase compliance costs.

7. Assessment of Burden on Regulated Entities

Relevant provision: Paragraph 1.2.1

The guideline should place greater emphasis on the practical compliance burden and cost associated with responding to compulsory notices.

The AER guideline contains a more comprehensive discussion of burden, including consideration of:

- organisational structure;
- document complexity;
- location and number of custodians;
- digital storage systems;
- compliance cost; and
- whether the recipient is a third party.

AGIG recommends that the ERA adopt equivalent factors and expressly recognise:

- resource constraints;
- operational impacts on regulated infrastructure assets; and
- the costs associated with large-scale document collection, review and production exercises,

and further, takes these matters into account when deciding whether to seek voluntary or compulsory disclosure and the scope of documents sought.

8. Additional Drafting Clarifications

AGIG also recommends several drafting amendments:

Paragraph 1.2

The criterion that: "*A party does not want to cooperate*" should be reconsidered or clarified.
A party may reasonably raise concerns regarding scope, timing, burden or confidentiality without being unwilling to cooperate.

Section 42 and Section 51 Powers

The guideline should clarify the circumstances in which the ERA intends to rely on section 42 of the NGL(WA) rather than section 51 of the Economic Regulation Authority Act 2003 (WA), including any differences in procedural expectations.

A summary of suggested changes to the draft guideline. AGIG appreciates the opportunity to provide these submissions and would be pleased to discuss any of these matters further with the ERA.

Yours sincerely



Roxanne Smith
Executive General Manager Corporate and Regulation

Australian Gas Infrastructure Group

Summary of requested amendments to the draft Guideline

#	Guideline Paragraph	Topic	AGIG Requested Change	Reason / Concern
1.	2.1	Identification of statutory purpose	Require compulsory notices to identify the relevant function or power being exercised by the ERA and what that power or function is being exercised in connection with.	Necessary to assess validity of notice, understand relevance and prepare responses and examinations.
2.	2.1 & 2.1.5	Production of unredacted documents	Permit redaction of irrelevant Sensitive Confidential Information (including SOCI information, cyber-security information, OT architecture, vulnerability assessments, personal information, third-party confidential information and commercially sensitive information).	Current requirement to provide complete unredacted documents may result in disclosure of information unrelated to the notice and expose critical infrastructure and confidential information.
3.	Use of Information	Protection of confidential information	Include express guidance on how confidential information will be stored, protected, retained, shared and accessed; whether storage is onshore; and compliance with confidentiality protections under s57A NGL and s55 ERA Act.	Draft guideline focuses heavily on compulsory production obligations but provides little guidance on protection of confidential information once produced.
4.	2.1.2	Legal professional privilege	Delete requirement to provide document descriptions, privilege categories, authors, recipients, dates, locations and justification for privilege claims.	AGIG considers the requirement goes beyond s42(8), risks disclosure of privileged information and imposes obligations not found in the legislation which risk disclosure of privileged material.
5.	3.5, 3.6, 3.7, 3.9	Conduct of oral examinations	Permit attendance of in-house lawyers and company representatives unless ERA identifies a specific conflict or material prejudice to its investigations. Allow company representatives to attend examinations and receive transcripts.	Current approach may create procedural unfairness and impair a company's ability to understand and respond to an investigation.
6.	3.5	Legal representation	Allow an employee to have legal representation provided by the company	Unfair for the employee to bear the cost of legal representation and lack of procedural fairness
7.	1.2.1 and 2.1	Pre-notice consultation	Strengthen presumption that ERA will consult and seek voluntary production before issuing a notice in the ordinary course	Would reduce burden, improve notice scope, reduce variation requests and encourage voluntary disclosure.
8.	1.2	Scope of consultation	Expand consultation to include matters such as custodians, search parameters, methodology, timeframes, date ranges, production formats and scope narrowing opportunities similar to AER.	Significantly reduce compliance burden and improve efficiency.

9.	1.2	"A party does not want to cooperate" criterion	Delete this criterion.	subjective, duplicative and potentially triggered by legitimate concerns about scope or timing.
10.	2.1.3	Confidentiality claims	Add express statement that respondents may claim confidentiality over commercially sensitive information and that the ERA will apply s57A NGL confidentiality protections.	Better reflects statutory confidentiality protections.
11.	1.2	Delays/protracted negotiations criterion	Clarify that legitimate requests for time extensions, privilege review and document searches do not indicate unwillingness to cooperate.	Prevents premature escalation to compulsory notices.
12.	1.2	Cost and resourcing impacts	Require ERA to expressly consider resource burden, employee time, compliance costs and National Gas Objective impacts before issuing notices.	Better recognises operational impacts on regulated businesses.
13.	General	Relationship between s42 and s51 powers	Clarify when the ERA will use s42 NGL(WA) versus s51 ERA Act information-gathering powers.	Improved regulatory certainty for recipients.