



Australian
Competition &
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Commission

Guide to exclusive dealing notifications and excluding information from the public register

This guide provides specific information on the ACCC's approach to requests to exclude information from the public register in the context of exclusive dealing notifications.

Businesses can obtain protection from legal action under the exclusive dealing provisions of the *Trade Practices Act 1974* by lodging an exclusive dealing notification with the ACCC.

The exclusive dealing notification regime established under the Trade Practices Act is an open, transparent and public process involving a public interest test. The Act requires notification to be given in the prescribed form—Form G, which is available from the ACCC website at www.accc.gov.au/FormG.

Under the Act, the ACCC must maintain a public register of all exclusive dealing notifications (including notices that have been withdrawn). The ACCC must also place on the public register all documents furnished to the ACCC in relation to such notices. The purpose of the public register of exclusive dealing notifications is to enable interested members of the public to be informed of the conduct being engaged in by the party giving the notification and of the effects of that conduct, including relevant public benefit claims.

The Act enables a notifying party to request that a document furnished, or oral submission made, in relation to a notice be excluded from the public register.

Accordingly, a notification of exclusive dealing may incorporate the following documents:

- a completed Form G, which must be placed on the public register
- additional or supporting submissions or documentation, which will be placed on the public register
- additional or supporting submissions or documentation that the notifying party requests be excluded from the public register.

Completing the notice

Every question on Form G must be answered. This is because the Trade Practices Act requires the ACCC to assess whether a notification has been validly given. One of the criteria specified in the Act for determining whether a notification is valid is whether the notification contains all the information required by the form.

I have information that I want excluded from the public register — what should I do?

In answering the questions on Form G, a notifying party may wish to include information they consider commercially sensitive. For example, in describing the relevant markets they may wish to include an estimate of their market share or details of their business plan.

If a notifying party wishes to provide confidential information relating to an exclusive dealing notification, this information should be placed in a covering letter or separate document titled, for example, 'Confidential submission'. This document should not be referred to on Form G as an answer, or part of an answer, to any question on the form. A request for exclusion of information from the public register should be accompanied by reasons stating, in as much detail as possible, why the exclusion is sought.

Example

A notifying party considers that the answer to question 3(b)(ii) on Form G—the number of people likely to be affected by the notified conduct within the next year—is commercially sensitive. However, it must still provide an answer to this question on the form. If the estimate is 400, it may choose to answer this question on the form with an indicative range such as 'between 300 and 600'. It could then provide a separate confidential submission or covering letter that sets out the precise estimate, noting that it seeks to have that exact number excluded from the public register and providing reasons for the request.

In assessing such a claim for exclusion, the ACCC seeks to balance genuine concerns about commercial sensitivity with providing sufficient publicly available information to enable people to properly understand the nature and likely effects of the notified conduct.

Can Form G be excluded from the public register?

No. The Trade Practices Act does not allow the notice itself—Form G—to be excluded from the public register, nor does it allow requests that Form G be excluded from the public register for a period of time.

Can a certain answer or section of Form G be excluded?

No. Answers and sections of Form G cannot be excluded from the public register.

Can I provide a public and confidential version of Form G?

No. The Trade Practices Act does not permit confidentiality to be claimed over Form G; therefore, a confidential version cannot be submitted.

Contacting the ACCC

ACCC staff can provide guidance on preparing an exclusive dealing notification and any claim for confidentiality of information you wish to provide with the notification. Discussing confidentiality claims, particularly complex ones, with ACCC staff before submitting an exclusive dealing notification can help you resolve any issues about validity or confidentiality before the notice is lodged.

If you have any questions about excluding information from the public register, please contact the Adjudication Branch at adjudication@acc.gov.au.

A more general guide, Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes, is available at www.accc.gov.au/exclusionguidelines.

A general guide to exclusive dealing notifications is available at www.accc.gov.au/exclusivedealingguide.

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Important notice

The information in this publication is for general guidance only. It does not constitute legal advice and should not be relied on as a statement of the law relating to the *Trade Practices Act 1974*. You should obtain legal advice if there is doubt about whether any conduct may breach the Act, or whether laws in your state or territory impose other requirements or responsibilities on you.

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