



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# ACCC guidelines— Use of section 155 powers

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Australian Competition and Consumer Commission  
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# Introduction

The *Competition and Consumer Act 2010* (the CCA) contains compulsory information-gathering powers under s. 155 that enable the Australian Competition and Consumer Commission (ACCC) to obtain information, documents and evidence in relation to its enforcement functions, certain authorisation and notification decisions and regulatory matters detailed below.

In particular, s. 155 powers are crucial to the ACCC's ability to carry out its enforcement role and investigate possible contraventions of the CCA and the Australian Consumer Law (ACL) (including covert conduct). These investigations necessarily centre on the search for evidence to determine whether conduct contravenes the CCA and whether enforcement or other action is required to address any harm to competition and/or consumers. Under s. 155, the ACCC can require a person to provide information, documents and/or give evidence under oath or affirmation.

Parliament has recognised the significance of the ACCC's s. 155 powers by making it a legal requirement for a recipient to comply with a s. 155 notice and by setting serious penalties that can apply for non-compliance.

The ACCC must follow certain procedures when exercising its s. 155 powers, which include taking into consideration the value of the information to the ACCC's investigation and the burden of the notice on the recipient.

This publication provides guidance to the business community, their advisers and the public about the ACCC's procedures and approach in exercising its s. 155 powers. The ACCC has also published [Section 155 Information Gathering Powers: A Basic Guide for Individuals and Small Business](#).

These guidelines relate to the exercise of these powers in connection with the ACCC's functions, with a particular focus on the use of s. 155 powers in the ACCC's enforcement and merger activities. As the circumstances of an informal merger review process can vary from a typical enforcement investigation, these guidelines refer to the use of s. 155 powers in the course of a merger review where relevant.

The *Competition and Consumer Amendment (Competition Policy Review) Act 2017* came into effect on 6 November 2017 and made several changes to s. 155. These changes have been incorporated into this guidance where relevant, particularly in relation to the ACCC's approach to the reasonable search defence.

## Overview of s. 155

Section 155 confers powers on the ACCC to obtain information, documents and evidence in relation to:

- matters that constitute or may constitute a contravention of the CCA
- matters relevant to the ACCC investigating or inquiring into possible unfair terms of consumer or small business contracts<sup>1</sup>
- certain provisions of the *Radiocommunications Act 1992*
- matters that constitute or may constitute a contravention of any of the terms of an undertaking under section 87B of this Act or under section 218 of the ACL
- designated water and communications matters
- the making of a decision by the ACCC in relation to the application for a merger authorisation or certain notification functions.

The matters that constitute or may constitute a contravention of the CCA and/or ACL include the possibility that the conduct would contravene the CCA or where the conduct has contravened or could in the future contravene the CCA.

An extract of s. 155 is provided at **Attachment A** to these guidelines.

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<sup>1</sup> See s.155(2B)(v)) as amended by the Treasury Laws Amendment (Australian Consumer Law) Bill 2018.

Specifically, a s. 155 notice may be issued by the ACCC to require the recipient to:

- furnish information in writing signed by the recipient or competent officer of the recipient within the time and in the manner specified, s. 155(1)(a), and/or
- produce documents to the ACCC, or to a person specified in the notice, s. 155(1)(b), and/or
- appear before a member of the ACCC or a specified ACCC Senior Executive Service employee at a time and place specified in the notice to give evidence, orally or in writing, and produce documents, s. 155(1)(c).

The power is investigative, not judicial. It does not involve the ACCC making a determination as to the facts or applying the law to them in any way that is binding or authoritative.<sup>2</sup> Similarly, it does not involve the ACCC making a finding that a party has engaged in a contravention of the CCA, ACL or other relevant legislation.

## The scope and use of s. 155

Generally, the ACCC obtains most of its information through cooperation and voluntary means. However, there are often circumstances where the ACCC considers it appropriate to obtain information, documents and evidence through the use of its s. 155 powers, as outlined in these guidelines.

The decision to issue a s. 155 notice is not taken lightly. The ACCC uses the power to properly investigate potential contraventions of the CCA and/or ACL resulting in harm to competition and/or consumers.

The ACCC may issue a s. 155 notice to a party that is the subject of an ACCC investigation or merger review or to other third parties who may have relevant information, documents or evidence.

There is a careful process of internal consideration and review prior to the Chair or Deputy Chair issuing a s. 155 notice.

ACCC officers will consider whether the information, documents or evidence are necessary and relevant to the ACCC's investigation. Consideration is also given to whether the relevant information, documents or evidence is likely to be otherwise available, including whether it is likely to be provided voluntarily. In many cases, including the vast majority of informal merger reviews, the ACCC will request that information be provided voluntarily prior to relying upon its s. 155 powers.

However, the voluntary production of information, documents and evidence is not always appropriate. For example, it may not be appropriate in circumstances where:

- it is important for the ACCC's decision making on investigations to have confidence that it has full and complete information on key issues in circumstances where voluntary requests will not deliver the same confidence
- a party may have previously failed to respond or respond fully to a voluntary request
- a party is unable to cooperate because of legal or confidentiality restrictions on disclosure
- a third party requests that the information or documents be compulsorily required to avoid being seen to be cooperating freely with the ACCC and to be protected from possible retaliation from the party that is the subject of an ACCC investigation
- the ACCC has obtained information from other sources (including market enquiries) that is inconsistent with the information voluntarily provided by the party under investigation or subject to an informal merger review
- the ACCC has concerns that a voluntary request will be met with delays or protracted negotiations impacting on the ACCC's ability to carry out its functions and appropriately act to address any competitive or consumer harm
- a party does not want to cooperate with the ACCC

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<sup>2</sup> *Pioneer Concrete Pty Ltd v TPC & Anor* (1982) 152 CLR 460 (at 467).

- critical information required by the ACCC will be most efficiently sought through the use of a s. 155 notice
- the ACCC has a particular forensic reason to issue a s. 155 notice.

Prior to issuing a s. 155 notice, the ACCC will also consider:

- whether there is a risk that the information, documents or evidence may otherwise be destroyed, not provided or provided only on terms unacceptable to the ACCC
- whether it may be appropriate to use s. 155 powers to obtain such information, documents from a potential respondent for evidentiary purposes, including obtaining oral evidence under oath or by way of affirmation
- whether it is appropriate to use other ACCC powers to obtain the information, documents or evidence (e.g. search warrant powers or a substantiation notice or wait for any future discovery process)
- the burden of the s. 155 notice on the recipient, including time and cost considerations.

The ACCC endeavours to target the s. 155 notice appropriately to ensure that only material that is necessary and relevant is sought for the purposes of the ACCC's investigation into the matters, taking into account burden considerations as discussed below.

The ACCC does not use its powers under s. 155 to conduct a 'fishing expedition' for information, documents or evidence. It does not, and cannot, issue a s. 155 notice unless the ACCC, its Chair or Deputy Chair has a 'reason to believe' that a person is capable of furnishing relevant information, producing relevant documents or giving relevant evidence that relates to the subject matter of the notice. This is distinct from a belief that a person is capable of providing information, documents or evidence that will establish or is likely to establish a contravention.<sup>3</sup> The formal requirements of a s. 155 notice are outlined in further detail below.

The courts have upheld the use of s. 155 powers for a range of investigative purposes, including:

- providing the ACCC with admissible evidence intended to be tendered in anticipated proceedings<sup>4</sup>
- obtaining evidence to be used in penalty proceedings on the question of quantum of any penalty<sup>5</sup>
- ascertaining whether there is a possible defence under s. 85(1) of the CCA or information indicating that there hasn't been a contravention<sup>6</sup>
- obtaining evidence to inform the exercise of the administrative function of determining whether or not to commence proceedings.<sup>7</sup>

## Burden on the recipient

The ACCC is required to and will have regard to the burden of the s. 155 notice on the recipient before exercising its s. 155 powers, in particular, the time and cost burden it imposes on the recipient including having regard to digital technology.<sup>8</sup>

The Chair or Deputy Chair balances the likely time and cost burden of the s. 155 notice on the recipient (to the extent known) with the value to the ACCC of the information, documents or evidence being sought. This includes assessing whether the notice provides the recipient with a reasonable time to comply.

3 *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559 at 561.

4 *Kotan Holdings Pty Ltd & Ors v Trade Practices Commission* (1991) ATPR 41-134.

5 *idem*.

6 *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129.

7 *Korean Airlines v ACCC [2008] FCA 701*.

8 Digital technology can increase the number of documents generated and stored within an organisation. This can mean that the recipient of a notice must conduct extensive searches to ensure that all relevant documents are produced. On the other hand, digital technology allows for searching to be partly automated and therefore conducted more efficiently than manual searches.

Sufficient time must be allowed for the recipient to undertake the necessary searches (including electronic searches) for documents sought, to make appropriate enquiries and to seek any legal advice or representation. The ACCC determines what it believes to constitute a reasonable time to comply with a s. 155 notice or to attend an examination on a case by case basis, taking into account a range of factors that determine whether shorter or longer periods of time may be given.

The prescribed timeframe for a recipient to comply with a notice will vary based on the scope of the s. 155 notice.

Where possible, the ACCC limits the scope of a s. 155 notice and takes steps to minimise the compliance and cost burden on a recipient. In particular, the ACCC endeavours to target the s. 155 notice appropriately and takes into account the following factors:

- the urgency of the investigation and significance of the information, documents and evidence to facilitate enforcement action to stop any contravening conduct and minimise consumer and competitive harm
- the volume of information and documents sought including the extent to which documents are likely to be stored electronically, the relevant time period that applies to the documents, the number of categories of documents and the number and location of potential custodians of documents
- the nature of the documents sought (for example, economic data may take more time to retrieve and produce from databases compared to business records kept in the ordinary course that are likely to be easier and faster for a recipient to retrieve and produce)
- whether a sample of a category or type of document will suffice or a more limited data set or time series
- whether certain information and documents sought are of more critical importance to its investigation and therefore required sooner with other documents to be produced over a longer timeframe
- the identity of the proposed recipient, i.e., whether the recipient is a party to the investigation or a third party
- the organisational structure of the proposed recipient
- any other information or knowledge that the ACCC possesses about the way in which the proposed recipient of the notice conducts its document management system, including its digital environment.

In appropriate circumstances, the ACCC may consult with a proposed recipient prior to a s. 155 notice being issued to it in order to better understand its document management system and digital environment. This may also assist in understanding the structure of the organisation and the identity of the most relevant people within the organisation who are likely to hold responsive documents. This can result in efficiencies for both the recipient of the notice and the ACCC's investigative process.

For example, this may occur when the ACCC is dealing with a third party that is not the subject of investigation or in certain merger reviews. This includes merger reviews where the time available for the ACCC to issue and the recipient to comply with the s. 155 notice may be relatively short, there may be many custodians holding potentially responsive (and possibly duplicative) documents, and the nature of the investigation and the documents sought may mean that there is little risk of the investigation being compromised by consulting the recipient prior to issuing the notice.

Recipients of a s. 155 notice can also raise any questions they may have in relation to the notice, including the scope and terms of a notice, with the ACCC as soon as possible for ACCC consideration. This includes any issues in relation to the burden of responding to the s. 155 notice as well as any clarifying questions.

For example, where a party must undertake extensive enquiries to locate potentially responsive documents or assess the volume of such documents, they should advise the ACCC of this early on and provide a date as soon as possible thereafter by which they will be in a position to update the ACCC on whether they have any questions in relation to the notice.

In appropriate circumstances, the ACCC may engage with recipients on any proposals they make or tools used to search electronic and other documents in response to a s. 155 notice. Given compliance is a matter for recipients who are best placed to know the information they hold, it is not appropriate for the ACCC to agree on search approaches but engagement with the ACCC in suitable circumstances may assist recipients in making those decisions.

However, the mere fact that a s. 155 notice may pose a substantial burden does not invalidate it as long as the ACCC has given consideration to the burden and the benefit to be derived from obtaining the information or documents sought pursuant to the notice, and provided it is reasonable in the circumstances to seek the information requested.<sup>9</sup>

## Limits on the use of s. 155 powers

The ACCC's power to issue a notice must be used in good faith, not for a collateral purpose, but to perform ACCC functions under the CCA, ACL and other relevant legislation.<sup>10</sup> For example, it would not be appropriate for the ACCC to:

- require the recipient of a s. 155(1)(a) notice to give an interpretation of a document, except where explanations of symbols, codes, etc. may be necessary<sup>11</sup>, or
- seek out information or documents that are not in its possession, custody or control.

A s. 155 notice may be directed to a body corporate, but where information about awareness, knowledge or belief is required, the question should refer to particular persons (e.g. company officers, directors or employees).<sup>12</sup>

The power under s. 155 is a power used for the purposes of investigations, including to gather evidence that may be used in court proceedings. However, issuing s. 155 notices to respondents in proceedings instituted by the ACCC in relation to the subject matter of the proceedings may interfere with the court's inherent power to conduct its own proceedings.

In most circumstances, the ACCC's power to issue a s. 155 notice expires on the ACCC commencing proceedings in relation to the matters the subject of the notice.

Section 155(4) provides that a member of the ACCC may exercise, or continue to exercise s. 155 powers in relation to a matter until the ACCC commences proceedings in the matter (other than proceedings for an injunction, whether interim or final) or until the close of pleadings in relation to an application by the ACCC for a final injunction in relation to the matter.

The power to issue a s. 155 notice for the purposes of an ACCC investigation is not affected by another party instituting proceedings against the proposed recipient of the notice.<sup>13</sup> A decision by the ACCC to institute proceedings, as distinct from actually instituting proceedings, does not necessarily preclude it from issuing a s. 155 notice.<sup>14</sup>

## Formal requirements for a valid s. 155 notice

It is the ACCC's practice that a s. 155 notice requiring the recipient to furnish information or produce documents will:

- identify the matter that constitutes or may constitute a contravention of the CCA
- specify the information or documents sought in enough detail to enable the recipient to know what is required

9 *Kotan Holdings Pty Ltd*, loc. cit.; *Pyneboard Pty Ltd v Trade Practices Commission* (1982) ATPR 40-272 at 43, 448-9.

10 *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129; and *Kotan Holdings Pty Ltd & Ors v Trade Practices Commission* (1991) ATPR 41-134.

11 *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129.

12 *idem*.

13 *Trade Practices Commission v Pioneer Concrete (Vic) Pty Ltd* (1981) ATPR 40-229.

14 *Kotan Holdings Pty Ltd & Ors v Trade Practices Commission* (1991) ATPR 41-134; see also *TPC v Ampol Petroleum (Vic) Pty Ltd* (1994) ATPR 41-344.

- request information or documents that relate to the matter.

Where a s. 155 notice requires a person to give evidence on a certain date (i.e. attend an oral examination), the description of the matter in the notice determines the scope of the questions that the ACCC can ask at the examination.

Given the investigative nature of the s. 155 notice, there is no requirement that it will set out all the facts necessary to constitute a contravention or possible contravention. Nor is it necessary to set out the relevant evidence or information on which the ACCC based its decision to issue the notice.

The matter that constitutes, or may constitute, a contravention of the CCA is to be described simply but in enough detail for it to be evident on the face of the s. 155 notice that the recipient is capable of furnishing information, producing documents or giving evidence relating to the matter.

## Service of the s. 155 notice

Service of s. 155 notices is governed by regulation 12(3) of the *Competition and Consumer Regulations 2010*. The regulation provides that a notice may be served on a person:

- where the person has, in a document or notice lodged with the ACCC, stated an address for service **that is not an electronic address**:
  - by delivering the notice to that address—by way of personal delivery or by registered post
- where the person has, in a document or notice lodged with the ACCC, stated an address for service **that is an electronic address**:
  - by sending the notice to that address
- in any other case:
  - where the person is a body corporate, by delivering the document personally to the manager or secretary of a body corporate, or leaving the document at, or sending it by registered post to its registered office in Australia, or if the body corporate does not have a registered office in Australia, by sending it by registered post addressed to the body corporate at its principal place of business in Australia, or
  - where the person is not a body corporate, by delivering the document to the person or by sending the document by registered post addressed to the person at the last known address of the person.

While regulation 12(3) permits service by registered post, it is ACCC practice to serve s. 155 notices personally in most circumstances. The ACCC encourages service by email and, in appropriate cases, will contact the recipient or recipient's legal adviser to obtain a written notice of the email address in order to effect service by those means. Even where no written notice of an email address has been lodged, the ACCC often provides the recipient with a copy of the s. 155 notice by email ahead of formal service.

The ACCC may serve the s. 155 notice on the recipient's legal adviser where the adviser has instructions from the recipient to accept service on the recipient's behalf and has given written notice, by email or otherwise, to the ACCC of the legal adviser's instructions and an address for service. This includes, where possible, an email address for service.

## Variation

In appropriate circumstances, the ACCC can make a variation to a s. 155 notice which may involve changing the timeframe for compliance to allow for an extension, changing the date of an oral examination or narrowing the scope and terms of a notice where there are unintended consequences.

The ACCC's usual practice to vary a s. 155 notice, where possible, is to have the person who signed the original notice consider the variation. This is the approach whether the variation relates to the core 'reason to believe' requirements for a valid s. 155 notice or if it relates to other changes to the notice. Where the variation would be lengthy and/or complex, the ACCC may decide to revoke the original s. 155 notice and issue a new one.



Where a recipient considers that there are genuine reasons why it may not be able to comply with the s. 155 notice on or before the due date, or considers there to be issues raised by the scope and terms of the notice, it should make contact (e.g. by phone or email) with the ACCC as soon as possible after receipt of the notice. A written application should then be made setting out the reasons for the proposed variation and a date by which it considers that it can comply. This may involve proposing a staged response to the ACCC where some information is still able to be provided by the due date.

ACCC officers will then consider whether to recommend to issue a variation to the notice. Where approaches are made shortly before the due date, it is likely to be difficult for the ACCC to consider the application prior to the due date.

## Compliance with the s. 155 notice

The s. 155 notice will state the requirement of the recipient to furnish information, produce documents or give oral evidence on specified day(s), at a specified place and a specified time.

The information and documents required will be detailed in schedules to the s. 155 notice. Reasonable time will be allowed to comply with a notice. It is the responsibility of the recipient of a s. 155 notice to comply with the notice to the extent it is capable of doing so within the relevant timeframe. This does not involve providing any documents created after the date of the s. 155 notice.

Usually, the ACCC office in the state or territory where the response to the s. 155 notice is to be lodged is specified in the notice. Where the recipient is remote from an ACCC office, the s. 155 notice usually specifies response by registered mail to the nearest ACCC office.

A recipient is obliged to comply with a s. 155 notice. The obligations of the recipient are set out in ss. 155(5) and (5A) of the CCA.

In particular, a recipient of a s. 155 notice must not:

- refuse or fail to comply with a s. 155 notice to the extent that the person is capable of complying with it, or
- in purported compliance with a s. 155 notice, knowingly furnish information or give evidence that is false or misleading.

Refusal or failure to comply with the s. 155 notice by the due date, unless a variation is granted, is a criminal offence which may attract fines under the CCA not exceeding \$22 200 or 2 years imprisonment for individuals, or fines not exceeding \$111 000 for companies (ss. 155(5) and 155(6A) of the CCA and s. 4B(3) of the *Crimes Act 1914* (Cth)).

The ACCC may refer any non-compliance to the Commonwealth Director of Public Prosecutions for consideration of whether the recipient should be prosecuted for an offence under s. 155(5). This includes where the recipient of a s. 155 notice refuses or fails to comply with that notice (including refusing to answer questions in an examination) or knowingly furnishes information, produces documents, or gives evidence that is false or misleading. If a person refuses or fails to comply with a s.155 notice, the ACCC may also apply for a court order directing the person to comply with the notice (s. 155(8A)).

## Reasonable search defence

On 6 November 2017 a new reasonable search defence to a failure or refusal to comply with a s. 155 notice became available to a s. 155 notice recipient. This is one of several s.155 changes introduced under the *Competition and Consumer (Competition Policy Review) Act 2017*. Under s. 155(5B), the reasonable search defence will be established where:

- the s 155 notice relates to producing documents
- the s 155 notice recipient proves that, after a reasonable search, they are not aware of the documents

- the s. 155 notice recipient provides a written response to the notice, including a description of the scope and limitations of the search.

Ultimately, whether a person has established the reasonable search defence will be a question for the court. To date, s. 155(5B) has not been the subject of judicial consideration. However, the ACCC provides the following guidance about its current approach to assessing the s. 155(5B) elements.

### **Notice relates to producing documents**

The reasonable search defence is available only in relation to a failure or refusal to comply with a notice requiring the production of documents issued under s. 155(1)(b) or s. 155(1)(c) of the CCA.

It will not be available in relation to an alleged failure or refusal to comply with:

- a notice to furnish information to the Commission issued under s. 155(1)(a), or
- a notice to appear before the Commission to give evidence issued under s. 155(1)(c), except to the extent that the refusal or failure in question is in respect of the production of documents specified in the notice.

### **Recipient proves that, after a reasonable search, they are not aware of the documents**

A recipient seeking to rely on the reasonable search defence bears the legal burden of establishing the defence. Accordingly, a recipient seeking to rely on the defence must prove that, on the balance of probabilities, they undertook a reasonable search and, after that reasonable search, they were not aware of the requested documents.

In addition, the defence is only available where a person is not aware of documents responsive to a s. 155 notice. It will not be established where the recipient of a s. 155 notice chooses not to search for a document the person is aware exists, or chooses not to produce a document that the person is aware exists.<sup>15</sup>

Whether a search undertaken by a person is a 'reasonable search', for the purposes of s. 155(5B)(b), will be assessed objectively. In other words, a recipient's subjective view that their searches were reasonable will not be decisive or sufficient. Regardless of the person's own view of the appropriateness of the search they undertook, the question will be whether the ACCC (or ultimately a court) considers that the search undertaken could objectively be considered to be reasonable.<sup>16</sup>

Section 155(6) provides a non-exhaustive list of factors that may be taken into account when determining whether a search is reasonable:

- the nature and complexity of the matter to which the notice relates
- the number of documents involved
- the ease and cost of retrieving a document relative to the resources of the person who was given the notice
- any other relevant matter.

The ACCC will apply these factors on a case by case basis in forming its view as to whether the searches made by a person seeking to rely on s. 155(5B) were reasonable. The reasonableness of a search may often turn on the nature of the methodology used to conduct the search, which the ACCC will assess against the factors set out in s. 155(6).

The factors in s. 155(6) include the number of documents involved and the ease and cost of retrieving the documents. When considering the ease and cost of retrieving documents the matters considered by the ACCC will include the search capabilities and limitations of the notice recipient's electronic filing

<sup>15</sup> See paragraph 11.30 in the *Explanatory Memorandum to the Competition and Consumer (Competition Policy Review) Bill 2017* at <https://www.legislation.gov.au/Details/C2017B00072/Explanatory%20Memorandum/Text>.

<sup>16</sup> See paragraph 11.28 in the *Explanatory Memorandum to the Competition and Consumer (Competition Policy Review) Bill 2017* at <https://www.legislation.gov.au/Details/C2017B00072/Explanatory%20Memorandum/Text>.

system, how rigorously the defendant stored documents in the correct places and where the computer servers containing electronic documents were located.<sup>17</sup>

As noted above, the list of factors in s. 155(6) is not exhaustive and does not limit the matters that may be taken into account by the ACCC when forming a view as to whether a search is reasonable. For example, 'other relevant matters' may include the costs of document review relative to the person who was given the notice.<sup>18</sup> The ACCC will also take the time period for compliance into consideration when assessing whether a search is reasonable.

Consistent with its broader approach to s. 155 notices, the ACCC encourages recipients to raise any questions in relation to the notice, including in relation to the scope and terms of the s. 155 notice with the ACCC as early in the process as possible. In appropriate circumstances, the ACCC may engage with recipients on any proposals they make or tools used to search electronic and other documents in response to a s. 155 notice. Given compliance is a matter for recipients who are best placed to know the documents they hold, it is not appropriate for the ACCC to agree on search approaches, but engagement with the ACCC in suitable circumstances may assist recipients in making those decisions.

### **Written response to the notice, including description of scope and limitations of search**

A person may only rely on the reasonable search defence in s. 155(5B) if they have provided the ACCC with a written response to the s. 155 notice which includes a description of the scope and limitations of the search undertaken by the person.<sup>19</sup>

In other words, a person who seeks to rely on s. 155(5B) must, at the time of complying with the notice:

- provide a written response to the notice (i.e., they cannot simply fail to respond to the notice or provide only a documentary response to the notice), and
- include in that written response to the notice a description of the scope and limitations of the search undertaken.

The purpose of this requirement is to ensure that the ACCC has sufficient information to make an assessment of documentary responses to s. 155 notices, including whether it considers the notice recipient has conducted a reasonable search.<sup>20</sup>

Accordingly, it would be prudent for a written response to address all matters that may be relevant to the ACCC's (and, ultimately, a court's) assessment of whether the search undertaken in response to a s. 155(1)(b) notice was reasonable. This will include matters going to the scope and limitations of the search (s. 155(5B)(3)) as well as the factors set out in s. 155(6) (as set out above).

In this context, the ACCC suggests that a person who seeks to rely on the s. 155(5B) defence consider addressing the following matters in their written response to the notice:

- (i) key steps taken to undertake the document search, and by whom, to identify documents that may fall within the scope of the notice
- (ii) the sources of documents identified as potentially responsive to the notice (e.g. computer hard-drives, email inboxes, document management systems, diaries, notebooks etc.) and the location of relevant servers
- (iii) details of the software and search tools used to search electronic sources for documents that may be responsive to the notice (e.g. Microsoft Outlook search)
- (iv) the search terms used to identify documents that may be responsive to the notice (for both hard copy material and electronic material, if different search terms were used for different sources)

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<sup>17</sup> See paragraph 4 in the Addendum Explanatory Memorandum to the *Competition and Consumer (Competition Policy Review) Bill 2017* at [http://classic.austlii.edu.au/au/legis/cth/bill\\_em/cacapr2017633/memo\\_1.html](http://classic.austlii.edu.au/au/legis/cth/bill_em/cacapr2017633/memo_1.html).

<sup>18</sup> See paragraph 11.27 in the Explanatory Memorandum to the *Competition and Consumer (Competition Policy Review) Bill 2017* at <https://www.legislation.gov.au/Details/C2017B00072/Explanatory%20Memorandum/Text>.

<sup>19</sup> See paragraph 11.31 in the Explanatory Memorandum to the *Competition and Consumer (Competition Policy Review) Bill 2017* at <https://www.legislation.gov.au/Details/C2017B00072/Explanatory%20Memorandum/Text>.

<sup>20</sup> See paragraph 11.32 in the Explanatory Memorandum to the *Competition and Consumer (Competition Policy Review) Bill 2017* at <https://www.legislation.gov.au/Details/C2017B00072/Explanatory%20Memorandum/Text>.

- (v) the approximate number of electronic and hard copy documents identified that may be responsive to the notice after conducting the searches undertaken
- (vi) where searches have been conducted by reference to individuals (including former employees) rather than a general company-wide search, the name and title of the individual/s and brief explanation of why the search was limited to the documents in the possession, power or control of the individual/s
- (vii) details of any searches of electronic documents that were identified as having been deleted and not recovered including whether any attempts were made to recover them and a brief explanation of why or why not
- (viii) details of any searches of archived documents conducted in order to identify documents that may be responsive to the notice including, if these searches were not undertaken, a brief explanation of why not
- (ix) details of any document retention or deletion policy or practice that may have limited the searches undertaken for documents that may be responsive to the notice
- (x) any other details relevant to the assessment of the scope and limitations of searches conducted to identify documents that may be responsive to the notice (e.g. any associated costs).

The ACCC may further engage with a recipient to clarify or better understand their written response and the searches undertaken.

## Declaration of search processes conducted

The ACCC prefers that a notice recipient provide a declaration in its responsive cover letter to a s. 155(1)(b) notice that is signed by a person authorised by the notice recipient (including, if appropriate, its legal representative) who had primary responsibility for preparing the response to the notice.

The form of this declaration is for an authorised person to certify, on behalf of the notice recipient, that to the best of their knowledge, a careful and thorough search for all documents responsive to the notice has been undertaken and all documents responsive to the notice have been produced, subject to the description of the scope and limitations of the search provided in any written response.

The ACCC encourages the signing of the declaration to help ensure the representative has considered whether all appropriate steps have been taken before providing the response to the ACCC.

Like the written response, the declaration will also be taken into account by the ACCC when assessing whether a recipient has undertaken a reasonable search and any compliance issues.

## Guidance on production of electronic documents

The ACCC will sometimes attach to a s. 155 notice cover letter guidance on the production of electronic documents, which sets out the ACCC's preferred formats for receiving material in response to a s. 155 notice. There is no obligation to comply with the guidance, however compliance will assist the ACCC in assessing the matters that may contravene the CCA as quickly as possible.

The ACCC may contact a notice recipient prior to or shortly following the issuance of the s. 155 notice to discuss production methodologies, and will be available for ongoing consultation regarding the production of documents. Early and regular communication between the ACCC, notice recipients and their legal advisors regarding production methodologies and formats is encouraged.

## Privilege against self-incrimination

Under s. 155(7) of the CCA, a person is not excused from furnishing information under s. 155(1)(a) or producing a document under s. 155(1)(b) on the ground that the information or document may tend to incriminate the person or expose the person to a penalty. However, that section also provides that where information is furnished by an individual, it is not admissible in evidence against the individual in any criminal proceedings (e.g. for criminal cartel conduct or other offences under the ACL), other than

criminal proceedings for non-compliance with the s. 155 notice. Similar provisions apply to the evidence given and documents produced at an examination under s. 155(1)(c)—see s. 159.

Two further matters relating to the privilege against self-incrimination or exposure to penalty in the context of s. 155 should be noted. First, the privilege is not available to a corporation. Therefore, information and documents produced under s. 155 by corporations are able to be used in civil penalty proceedings or criminal proceedings against corporations and individuals. Secondly, the privilege only applies to information furnished by an individual under s. 155(1)(a) or evidence given by an individual in a s. 155(1)(c) examination. By contrast, any documents already in existence at the time the s. 155 notice is issued and produced in response to that notice by an individual are admissible against the individual in any criminal proceedings.

## Legal professional privilege

Section 155 does not require a person to produce a document that would disclose information that is the subject of legal professional privilege—s. 155(7B). However, the ACCC may seek particulars of the ground on which a claim of legal professional privilege is made.

# Conduct of an oral examination

## General

An oral examination may be conducted before the full Commission but is invariably conducted before a member of the ACCC delegated to hear the evidence under s. 25 of the CCA<sup>21</sup> or before an ACCC Senior Executive Service employee who is specified in the notice. Such examinations are private hearings.<sup>22</sup>

## Practical arrangements

The ACCC will often seek to engage with a proposed examinee prior to issuing the s. 155 notice so that it can take into account the examinee's availability when fixing the date of the examination. Such an approach reduces the burden on the examinee, provides certainty and enhances the efficiency of the ACCC's investigative process.

Examinations are normally conducted within standard business hours. Where an examinee explains in writing that exceptional circumstances prevent or unreasonably impede attendance within business hours, the ACCC may, at its discretion, reschedule an examination outside business hours and vary the notice accordingly. Examinations will, wherever possible, be held in the ACCC office in the state or territory where the examinee resides.

An examinee will not normally be examined for more than one and a half hours at a time before being given a 15 minute adjournment. In most circumstances, an examination will not exceed five hours in any one day, except following consultation with the examinee. For example, if a short extension allows the examination to be concluded that day which avoids the need to extend the examination into a further day. ACCC officers will arrange suitable stationery, telephone and photocopier access and refreshments (but not meals) for all participants at the examination.

## Use of oath or affirmation

Section 155(3) provides that the ACCC may require evidence to be given under oath or by way of affirmation. For that purpose, any member of the ACCC may administer an oath or affirmation. If the notice requires a person to appear before an ACCC Senior Executive Service employee to give evidence, the ACCC Senior Executive Service employee may administer an oath or affirmation—s. 155(3A). It is the ACCC's policy to administer an oath or affirmation as a matter of course in s. 155(1)(c) examinations.

<sup>21</sup> Under s. 8A(4) of the CCA, the ACCC Chair may direct that, to exercise the powers of the ACCC on a specified matter (including a specified s. 155(1)(c) matter), designated associate members be regarded as members in relation to that matter.

<sup>22</sup> *Constantine v Trade Practices Commission* (1994) ATPR 41-291.

## The ACCC's use of counsel

Counsel and/or an instructing solicitor may assist the member of the ACCC or Senior Executive Service employee hearing the evidence. Counsel representing the ACCC usually assists by asking questions during the examination. ACCC officers will also be present and may ask questions of the examinee.

## Examinee's legal representation

As a matter of procedural fairness, the ACCC will permit an examinee the assistance of a legal adviser.<sup>23</sup>

The s. 155 notice will be issued with a covering letter outlining that the examinee may have their legal adviser present, subject to such reasonable conditions as the ACCC may wish to impose (e.g. the provision of a confidentiality undertaking by the legal adviser). While an examinee is generally permitted to be legally represented, there may be objections to a particular legal adviser if that legal adviser's presence would prejudice or has the potential to prejudice the investigation—for example, where:

- the legal adviser is being instructed by more than one examinee in the same matter<sup>24</sup>
- the legal adviser also acts for the subject of the investigation, not being the examinee
- the legal adviser declines to give an undertaking not to disclose the content of the examination to any person other than the examinee until such time as the ACCC has concluded its inquiry or otherwise consents<sup>25</sup>
- the legal adviser may themselves be at a real risk of investigation by the ACCC in relation to the matter.<sup>26</sup>

An examinee is entitled to a legal adviser in an examination and it will not usually be appropriate for in-house lawyers and other representatives of an examinee's employer to attend an examination due to the likelihood of there being a conflict of interest. The examinee's legal adviser will normally only be permitted to:

- object to questions asked as being unclear, unfair, likely to reveal information over which a claim of legal professional privilege could properly be made, or irrelevant to the subject matter of the examination
- re-examine the examinee to clarify any response to an earlier question
- make submissions on any relevant matter at the completion of the examination.

A legal adviser who prejudices the examination—for example, by continually objecting on minor issues to the extent of being obstructive—may be excluded.

## Direction to examinee not to disclose

The ACCC has the power to direct an examinee not to disclose the content of the examination to any person other than a legal adviser (for the purpose of obtaining legal advice) until such time as the ACCC has concluded its inquiry or otherwise consents.<sup>27</sup>

This direction to the examinee protects the private nature of the s. 155(1)(c) process as far as is reasonably practicable.

The direction prevents examinees from disclosing to third parties (such as the company employing the examinee) what was said in the examination or the fact that certain kinds of information were disclosed in the examination. As a general rule, the ACCC will send a letter to the examinee withdrawing the direction for non-disclosure at an appropriate time. This will usually be when the investigation has been completed. The period of non-disclosure would not extend beyond the institution of proceedings in respect of matters the subject of the investigation.

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<sup>23</sup> *idem*.

<sup>24</sup> See *National Crime Authority v A, B and D* (1988) 78 ALR 707.

<sup>25</sup> *Constantine*, loc. cit.

<sup>26</sup> See *Australian Securities Commission v Bell* (1991) 32 FCR 517 at 521 per Lockhart J.

<sup>27</sup> *Constantine*, loc. cit.

However, a party can make contact with the ACCC and request that the direction for non-disclosure be withdrawn at an earlier stage in circumstances where it considers there are sound reasons for such a withdrawal. For example, it may enhance the efficiency of an investigation including through potential resolution of the matter or better clarification of the facts.

## Exclusion of third parties

Third parties are excluded from s. 155(1)(c) examinations notwithstanding that they may have a direct interest in the evidence to be given. For example, an employer whose company is under investigation has no right of attendance at the examination of an employee.

The exclusion of third parties is supported on the basis that s. 155 examinations are investigative and private rather than judicial proceedings, so that no right of attendance arises.

Attendance by the ACCC will include members of the ACCC, legal or other expert advisers and ACCC officers directly involved in the investigation plus transcription employees.

## Adjournment

An examination may be adjourned to a date advised to the examinee when the examination is not concluded in one day or where the ACCC considers there may be further questions to be put to the examinee at a later date. The ACCC will not adjourn an examination as a matter of course. However, where further examination is reasonably foreseeable in light of the evidence given or due to other examinations that are yet to be conducted, it is likely that the ACCC will adjourn an examination.

## Transcript

Where appropriate, a full transcript of the evidence given by an examinee will be made available to the examinee as soon as reasonably practicable after the conclusion of the examination, including any resumption of adjourned examinations. Where an examination has been adjourned and not yet concluded, the transcript will not normally be made available during the intervening period.

There may be circumstances where, to maintain the integrity of its investigation, the ACCC does not make the transcript of evidence available until the conclusion of the whole investigation, of which the examination is only a part.

Transcripts made available to examinees will be accompanied by a letter inviting them to identify any errors in the transcript by a specified date and advising them that the transcripts are confidential.

# Use of information, documents and evidence obtained under s. 155

## Use for investigative purposes

The ACCC is under an implied legal obligation to use information, documents or evidence provided in response to a s. 155 notice for the purposes for which the notice was issued, that purpose normally being to assist the ACCC in investigating a possible contravention of the CCA and to reach a view as to whether such a contravention has occurred. This obligation reflects the legal requirement that statutory powers are to be used for proper purposes. The obligation is modified to some extent by s. 155AAA of the CCA.

While s. 155AAA provides some limits on the disclosure of s. 155 material, it also enables the ACCC to disclose the material obtained under s. 155 in other specified circumstances.

For example, when an ACCC official is performing duties or functions as an ACCC official. The ACCC takes the view that this provision enables the ACCC, where it has obtained material in the course of one matter, to use that material, where relevant, in another matter. Further information on this is provided below.

## Disclosure and confidentiality

The confidentiality of material provided by a recipient of a notice, including information that may be commercially sensitive, is protected by the provisions of s. 155AAA. The ACCC may use and disclose such material only in accordance with those provisions.

### Protection of certain information (s. 155AAA)

Section 155AAA prohibits ACCC officers from disclosing protected information, which includes information obtained by the ACCC under s. 155 that relates to a matter arising under a core statutory provision, except:

- a. when the ACCC official is performing duties or functions as an ACCC official, or
- b. when the ACCC official or the ACCC is required or permitted by:
  - (i) the Act or any other law of the Commonwealth, or
  - (ii) a prescribed law of a state or internal territory to disclose the information.

The ACCC is not precluded from disclosing protected information to counsel, external law firms or experts for the purpose of advising the ACCC.

### Disclosure of protected information as specifically permitted by s. 155AAA

#### Disclosure to certain agencies

Specific limitations apply if the intended disclosure of information obtained under s. 155 is to assist a third party (such as the Australian Securities and Investments Commission, the Australian Communications and Media Authority, the Australian Prudential Regulation Authority, or a state, territory or foreign government body) in the performance of their duties or functions. Any decision of this type must be made by the Chair. The Chair may also impose conditions upon the disclosure.

#### Disclosure to ministers, departments and Royal Commissions

An ACCC official may disclose s. 155 information to the relevant minister, government department and to a Royal Commission.

#### Disclosure of statistics and summaries

ACCC officials may disclose summaries or statistics derived from protected information, (that are not likely to enable the identification of a person), information with consent, or information that has become publicly available.



# Attachment A—extract of s. 155

## Competition and Consumer Act 2010—s. 155

### Power to obtain information, documents and evidence

- (1) Subject to [subsection](#) (2A), if the Commission, the [Chairperson](#) or a Deputy [Chairperson](#) has reason to believe that a [person](#) is capable of furnishing information, producing documents or giving evidence relating to a matter referred to in [subsection](#) (2), a [member of the Commission](#) may, by notice in writing served on that [person](#), require that [person](#):
  - (a) to furnish to the Commission, by writing signed by that [person](#) or, in the case of a body corporate, by a competent [officer](#) of the body corporate, within the time and in the manner specified in the notice, any such information;
  - (b) to produce to the Commission, or to a [person](#) specified in the notice acting on its behalf, in accordance with the notice, any such documents; or
  - (c) to appear before the Commission, or before a member of the staff assisting the Commission who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.
- (2) For the purposes of [subsection](#) (1), the matter must be a matter that:
  - (a) constitutes, or may constitute, a [contravention](#) of:
    - (i) this Act; or
    - (ii) Division 4A or 4B of Part 3.3 of the [Radiocommunications Act 1992](#); or
    - (iii) any of the terms of an undertaking under section 87B of this Act or under section 218 of the [Australian Consumer Law](#); or
  - (b) is relevant to:
    - (i) a designated communications matter (as defined by [subsection](#) (9) of this section); or
    - (ii) a designated water matter (as defined by [subsection](#) (9A) of this section); or
    - (iii) the making of a [decision](#) by the Commission under [subsection](#) 90(1) in relation to an application for a merger authorisation; or
    - (iv) the making of a [decision](#) by the Commission under [subsection](#) 91B(4), 91C(4), 93(3), (3A) or (3B) or 93AC(1), (2) or (2A); or
    - (v) the Commission investigating or inquiring into the terms of a consumer contract or small business contract for the purposes of determining whether or not to make an application to the court under section 250 of the [Australian Consumer Law](#).
- (2AA) A [member of the Commission](#) may [vary](#) the time specified in a notice under [subsection](#) (1) within which the information must be furnished, or the documents produced, or at which the [person](#) is required to appear before the Commission or the member of the staff assisting the Commission who is specified in the notice.
- (2AB) [Subsection](#) (2AA) does not affect any operation that [subsection](#) 33(3) of the *Acts Interpretation Act 1901* has in relation to a notice under [subsection](#) (1).
- (2A) A [member of the Commission](#) may not give a notice under [subsection](#) (1) merely because:
  - (a) a [person](#) has refused or failed to comply with a notice under [subsection](#) 95ZK(1) or (2) on the ground that complying with the notice would tend to incriminate the [person](#), or to expose the [person](#) to a [penalty](#); or
  - (b) a [person](#) has refused or failed to answer a question that the [person](#) was required to answer by the [person](#) presiding at an inquiry under Part VIIA, on the ground that the answer would tend to incriminate the [person](#), or to expose the [person](#) to a [penalty](#); or

- (c) a [person](#) has refused or failed to produce a document referred to in a summons under [subsection](#) 95S(3), on the ground that production of the document would tend to incriminate the [person](#), or to expose the [person](#) to a [penalty](#).
- (3) If a notice under [subsection](#) (1) requires a [person](#) to appear before the Commission to give evidence, the Commission may require the evidence to be given on oath or affirmation. For that purpose, any [member of the Commission](#) may administer an oath or affirmation.
- (3A) If a notice under [subsection](#) (1) requires a [person](#) to appear before a member of the staff assisting the Commission to give evidence, the staff member may require the evidence to be given on oath or affirmation and may administer an oath or affirmation.
- (4) A [member of the Commission](#) may exercise, or continue to exercise, a power under [subsection](#) (1) in relation to a matter referred to in that [subsection](#) until:
- (a) the Commission commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or
  - (b) the close of pleadings in relation to an application by the Commission for a final injunction in relation to the matter.
- (5) A [person](#) shall not:
- (a) refuse or fail to comply with a notice under this section;
  - (b) in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading.
- (5A) [Paragraph](#) (5)(a) does not [apply](#) to the extent that the [person](#) is not capable of complying with the notice.
- Note: A defendant bears an evidential burden in relation to the matters in [subsection](#) (5A), see [subsection](#) 13.3(3) of the *Criminal Code*.
- (5B) [Paragraph](#) (5)(a) does not [apply](#) to the extent that:
- (a) the notice relates to producing documents; and
  - (b) the [person](#) proves that, after a reasonable search, the [person](#) is not aware of the documents; and
  - (c) the [person](#) provides a written response to the notice, including a description of the scope and limitations of the search.
- Note: A defendant bears a legal burden in relation to the matter in [paragraph](#) (5B)(b) (see section 13.4 of the *Criminal Code*).
- (6) For the purposes of (but without limiting) [paragraph](#) (5B)(b), a determination of whether a search is reasonable may take into account the following:
- (a) the nature and complexity of the matter to which the notice relates;
  - (b) the number of documents involved;
  - (c) the ease and cost of retrieving a document relative to the resources of the [person](#) who was given the notice;
  - (d) any other relevant matter.
- (6A) A [person](#) who contravenes [subsection](#) (5) is guilty of an offence punishable on conviction by imprisonment for 2 years or a fine not exceeding 100 [penalty](#) units.
- Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.
- Note 2: Part IA of the [Crimes Act 1914](#) contains provisions dealing with penalties.
- (7) A [person](#) is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the [person](#) or expose the [person](#) to a [penalty](#), but the answer by an individual to any question asked in a notice under this section or the furnishing by an individual of any information in pursuance of such a notice is not admissible in evidence against the individual in any criminal proceedings, other than:
- (a) proceedings for an offence against this section; or

- (b) proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this section.
- (7A) This section does not require a [person](#):
- (a) to give information or evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet of a State or [Territory](#); or
  - (b) to produce a document prepared for the purposes of a meeting of the Cabinet of a State or [Territory](#); or
  - (c) to give information or evidence, or to produce a document, that would disclose the deliberations of the Cabinet of a State or [Territory](#).
- Note: A defendant bears an evidential burden in relation to the matters in [subsection](#) (7A), see [subsection](#) 13.3(3) of the *Criminal Code*.
- (7B) This section does not require a [person](#) to produce a document that would disclose information that is the subject of [legal professional privilege](#).
- Note: A defendant bears an evidential burden in relation to the matter in this [subsection](#) (see [subsection](#) 13.3(3) of the *Criminal Code*).
- (8) Nothing in this section implies that notices may not be served under this section and section 155A in relation to the same conduct.
- (8A) If a [person](#) refuses or fails to comply with a notice under this section, a court may, on application by the Commission, make an order directing the [person](#) to comply with the notice.
- (8B) A [member of the Commission](#) may, in writing, delegate the member's powers under [subsection](#) (2AA) to a member of the staff of the Commission who is an SES employee or an acting SES employee.
- Note 1: Section 2B of the *Acts Interpretation Act 1901* contains the [definitions](#) of **SES employee** and **acting SES employee**.
- Note 2: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.
- (8C) In performing a function, or exercising a power, under a delegation, the delegate must comply with any directions of the member.
- (9) A reference in this section to a **designated communications matter** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:
- (a) the [Telecommunications Act 1997](#); or
  - (b) the [Telecommunications \(Consumer Protection and Service Standards\) Act 1999](#); or
  - (ba) the [National Broadband Network Companies Act 2011](#); or
  - (c) Part XIB or XIC of this Act; or
  - (d) Division 4A or 4B of Part 3.3 of the [Radiocommunications Act 1992](#).
- (9A) A reference in this section to a **designated water matter** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:
- (a) Part 4 or 4A of the [Water Act 2007](#); or
  - (b) regulations made under that Act for the purposes of Part 4 of that Act; or
  - (c) water charge rules, or water market rules, made under Part 4 of that Act.
- (10) In this section:
- “legal professional privilege”** includes privilege under Division 1 of Part 3.10 of the [Evidence Act 1995](#).



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

