



A policy document

ACCC/AER Information Policy

June 2014



This guideline sets out the general policy of the Australian Competition and Consumer Commission and the Australian Energy Regulator on the collection, use and disclosure of information.

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Summary

This guideline sets out the general policy of the Australian Competition and Consumer Commission and the Australian Energy Regulator on the collection, use and disclosure of information.

General policy

- (a) The ACCC/AER will use its statutory powers to obtain information where appropriate. Depending on the circumstances, the ACCC/AER may prefer to obtain information on a voluntary basis.
- (b) The ACCC/AER holds a significant amount of in-house information and collects a wide range of data on various industries. Where practical, the ACCC/AER will endeavour to draw upon existing information sources to avoid unnecessary duplication of effort and to minimise the burden placed on those from whom information is requested.
- (c) Information (including confidential information) collected by the ACCC/AER may be viewed by ACCC/AER members, staff and consultants (for example, when the ACCC/AER obtains an opinion or analysis by an internal or external economic, legal or industry adviser).
- (d) If the ACCC/AER has obtained information in the course of one matter which is relevant to another matter, the ACCC/AER will, in general, use that information in the context of the other matter subject to any specific legal requirement to the contrary. For example, information (including confidential information) collected by the ACCC may be used by the AER and vice versa. In general, the ACCC/AER will not accept conditions that seek to limit the use of information to a particular matter.
- (e) In general, a party that provides information to the ACCC/AER should clearly identify the part of the information that it regards as confidential. Unless otherwise indicated, reasons should also be provided in support of that claim. The identified information must be genuinely of a confidential nature and not otherwise publicly available.
- (f) The ACCC/AER is committed to treating confidential information responsibly and in accordance with the law. In some circumstances, the ACCC/AER may be legally required to produce confidential information. In most cases, the ACCC/AER will endeavour to notify and consult the person who provided confidential information about the proposed release of that information.
- (g) The ACCC/AER recognises that in some cases release of information provided by complainants and informants (such as their identity) may have a substantial adverse effect on that party. This may also affect the willingness of other information providers to assist the ACCC/AER in its functions. Where requested to do so, the ACCC/AER will, to the extent reasonably possible, seek to protect that information.
- (h) The ACCC/AER recognises that the disclosure of confidential commercial information in respect of a business may have a substantial adverse effect on the interests of that business. However, the ACCC/AER function may also substantially affect other parties (such as access seekers or competitors) and some disclosure of information may be necessary for open and transparent decision-making. In these circumstances, options available to the ACCC/AER may include:
 - releasing aggregated data
 - disclosing the substance of submissions rather than releasing individual submissions or disclosing the identity of the information provider
 - restricting disclosure to limited internal personnel and external lawyers and consultants either by agreement or by order (such as in the context of arbitrations).

Exceptions include a confidential review of a merger.

The application of this general policy will depend on the particular situation. The ACCC/AER will depart from the general policy where appropriate.

The ACCC/AER has also issued guidelines that cover information issues in particular areas.

Introduction

The ACCC is an independent Commonwealth statutory authority. Its role is to enforce the *Competition and Consumer Act 2010* (the Competition and Consumer Act) and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians.

The AER is Australia's national energy market regulator. The AER's functions are set out in national energy market legislation and rules.

While specific functions vary according to the legislated responsibilities that underpin the ACCC and the AER, the two bodies share common objectives, both working to protect, strengthen and supplement competitive market processes.

The purpose of this guideline is to provide clarity to stakeholders as to how the ACCC/AER:

- obtains information (including the use of its statutory powers to require the provision of information)
- uses that information (including the use of information obtained for one matter, for another matter)
- discloses that information outside the ACCC/AER.

The application of this guideline will depend on the particular situation. The ACCC/AER will depart from the general policy where appropriate.

The ACCC/AER has also issued guidelines that cover information issues in particular areas. Energy network business should also refer to the AER's [Better Regulation: Confidentiality guideline](#) released in November 2013.

This document supersedes earlier guidelines on the collection, use and disclosure of information, although there may be pre-existing matters where the earlier guidelines continue to be relevant.

1. Collection of information

The ACCC/AER needs reliable and timely information to perform its functions. This section:

- describes how the ACCC/AER collects information
- sets out the ACCC/AER's general approach to the collection of information
- provides guidance for parties on how to provide information to the ACCC/AER.

1.1 How the ACCC/AER collects information

The ACCC/AER obtains information from many sources (including complainants, informants, industry participants, experts and other government agencies). The information may be publicly available or may be provided voluntarily or under compulsion.

The compulsory information gathering powers include:

(a) Compulsory notices

Under s. 155 of the Competition and Consumer Act, the ACCC may, in certain cases (usually related to a possible contravention of that Act) issue a notice requiring the provision of information or documents, or the giving of sworn evidence at a formal examination.

Under s. 95ZK of the Competition and Consumer Act, the Chairperson of the ACCC may require a person to provide information or documents relevant to a price notification, inquiry or monitoring under Part VIIA of that Act.

Under s. 28 of the National Electricity Law (NEL) and section 42 of the National Gas Law (NGL), the AER may require a person to provide information or documents relevant to the AER's performance or exercise of its functions or powers.

(b) Search and seizure

Under Part XIX of the Competition and Consumer Act, the ACCC may, in certain cases (usually related to a possible contravention of that Act) obtain information by entering premises under a search warrant.

Under s. 21 of the NEL and s. 35 of the NGL, the AER may in certain cases (usually related to a possible contravention of the relevant regime) obtain information by entering premises under a search warrant.

(c) Ongoing record keeping and information provision

In several industries where the ACCC/AER has regulatory functions, parties can be required to undertake ongoing record-keeping and to provide the ACCC/AER with this information on a regular basis.

This includes:

- the telecommunications regime in Part XIB of the Competition and Consumer Act
- airport financial reporting and quality of service monitoring under parts 7 and 8 of the *Airports Act 1996* (Cth)
- monitoring Australia Post under Part 4A of the *Australian Postal Corporation Act 1989* (Cth)
- regulatory information notices and general regulatory information orders under the NEL and NGL.

(d) Summonses

For certain functions (including arbitrations under part IIIA of the Competition and Consumer Act and price inquiries under Part VIIA of that Act), the ACCC/AER may summon a witness to give evidence and provide documents.¹

(e) Litigation

Where the ACCC/AER is a party to a matter before a court or tribunal, it may obtain information through court or tribunal powers such as orders for discovery, notices to produce and subpoenas.

¹ For example, under ss. 44ZH(2) and 95S(3) of the Competition and Consumer Act, s. 142(2) of the NEL and s. 201(2) of the NGL.

1.2 ACCC/AER general approach

Depending on the circumstances, the ACCC/AER may prefer to obtain information on a voluntary basis, without recourse to its statutory powers. Obtaining information voluntarily can be less intrusive, faster and more flexible.

However, the ACCC/AER will use its statutory powers to obtain information where appropriate. For example, where:

- there is a risk of destruction, removal or alteration of information sought by the ACCC/AER
- a party may not provide all or part of the information voluntarily
- a party may seek to attach conditions that could constrain the ACCC/AER in the exercise of its functions
- the information is required within a certain timeframe
- it protects the information provider (for example, from being identified, breaching any duties of confidence or any retribution that might flow from appearing to cooperate with the ACCC/AER)
- businesses in a regulated industry are required to provide information at regular intervals and in a consistent format.

The ACCC/AER recognises that the provision of information to the ACCC/AER may involve the provider in considerable work and expense. The ACCC/AER is committed to collecting information responsibly. In particular:

- (a) The ACCC/AER holds a significant amount of in-house information and collects a wide range of data on various industries. Where practical, the ACCC/AER will endeavour to draw upon existing information sources to avoid unnecessary duplication of effort and to minimise the burden placed on those from whom information is requested.
- (b) The ACCC/AER will act in accordance with the law, including the *Privacy Act 1988* (Cth), which sets out privacy principles that guide the collection, use and disclosure of personal information.

1.3 Providing information to the ACCC/AER

The following guidelines are intended to assist parties providing information to the ACCC/AER.

(a) Submissions

The ACCC/AER prefers all written submissions to be in an electronic format (MS Word or PDF format) that is text-searchable and allows a 'copy and paste' function.

It is in the submitter's interest that the submission be lodged within the time specified by the ACCC/AER. In some cases, the ACCC/AER may not consider a late submission², or may give less weight to that submission (for example, where the timeframe precludes a full and timely analysis of the submission).

(b) Confidential information

Submissions will generally be treated as public documents and posted on the ACCC/AER website.

In general, a party that provides information to the ACCC/AER should:

- (i) For all information, clearly identify the part of the information that it regards as confidential—a blanket claim for confidentiality over the entirety of the information provided should not be made unless all such information is truly regarded as confidential. The identified information must be genuinely of a confidential nature and not otherwise publicly available.
- (ii) In the case of a submission (and, where appropriate, other documents), submit both a public and confidential version of the document. The public version of the document should clearly identify the confidential material by replacing the material with the word 'Confidential'. Deleted text should be left blank to retain the same formatting and page numbers as the confidential version.

² For example, under s. 28ZC of the NEL and s. 65 of the NGL.

(iii) In the case of all documents, clearly mark 'Confidential' on the relevant part(s) of the document (to reduce the risk of inadvertent disclosure).

(iv) Unless otherwise indicated, provide reasons in support of the confidentiality claim.

In the case of submissions, the ACCC/AER may give less weight to confidential information (for example, where the ACCC/AER has not been able to test the information).

If confidential materials are posted to the ACCC/AER, registered post should be used. The ACCC/AER is not responsible for the loss of documents for which it has not signed.

The above process does not apply to all ACCC/AER functions (for example, informal merger reviews, and the exclusion of information from certain adjudication, merger and notification registers³).

(c) Redactions

At times, parties have, in documents provided in response to ACCC/AER compulsory information-gathering powers, sought to redact or 'black-out' information they do not consider relevant.

The ACCC/AER position is that in general its compulsory information-gathering powers provide for the production of entire documents, not parts of documents. As a result, it is generally inappropriate to provide responses that redact or black-out information.

The ACCC/AER expects that parties will not provide redacted information without first discussing the matter with the ACCC/AER.

³ See [Informal Merger Review Process Guidelines 2013 \(September 2013\)](#), Competition and Consumer Regulations 2010 (Cth) regulation no. 24, [Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes \(May 2011\)](#).

2. Use of information

This section:

- explains the structure of the ACCC and AER
- sets out the ACCC/AER's general approach to the use of information.

2.1 ACCC/AER structure

The ACCC consists of a Chairperson and such other members as are appointed (known as 'Commissioners'). A person may also be appointed as an 'associate member' of the ACCC. The Competition and Consumer Act provides for staff and consultants to be engaged to assist the ACCC.

The AER is a part of the ACCC, with a separate legal personality. It consists of a Commonwealth AER member and two state/territory AER members. The Commonwealth AER member must also be an ACCC member. The state/territory AER members are taken to be ACCC associate members. ACCC staff and consultants assist the AER to perform its functions.

The Competition and Consumer Act provides for information-sharing between the ACCC and AER.⁴

2.2 ACCC/AER general approach

The ACCC/AER has multiple functions and may hold information produced in the course of one matter that is relevant to another matter. Ignoring such information may prevent the ACCC/AER from properly performing its functions, lead to inappropriate outcomes or the duplication of information collection, or be administratively impractical.

The ACCC/AER's general approach is as follows:

- (a) Information (including confidential information) collected by the ACCC/AER may be viewed by ACCC/AER members, staff and consultants (for example, when the ACCC/AER obtains an opinion or analysis by an internal or external economic, legal or industry adviser).
- (b) If the ACCC/AER has obtained information in the course of one matter which is relevant to another matter, the ACCC/AER will, in general, use that information in the context of the other matter. For example, information (including confidential information) collected by the ACCC may be used by the AER and vice versa. This is subject to specific legal requirements (for example, the privacy principles on the use of personal information).
- (c) Where information is provided voluntarily, the ACCC/AER will generally not accept conditions that seek to limit the use of that information to a particular matter (unless there is a specific legal requirement to the contrary).
- (d) Where information is provided under a compulsory power, the provider is unable to place conditions on the information. The purposes for which the ACCC/AER may use the information will be determined by the relevant legal context.
- (e) Where the ACCC/AER obtains information as the result of litigation, it is subject to the obligations regarding use of such information that apply to any litigant.

⁴ Under ss. 44AAF and 157A of the Competition and Consumer Act.

3. Disclosure of information

This section:

- describes when the ACCC/AER may or must disclose information
- sets out the ACCC/AER's general policy on the disclosure of confidential information.

3.1 Circumstances in which the ACCC/AER may or must disclose information

The ACCC/AER (including its staff and internal and external consultants) are subject to a number of general prohibitions on making an unauthorised disclosure of information.⁵ The circumstances in which the ACCC/AER may or must disclose information include:

(a) Disclosure required by a third party

The ACCC/AER can be required to produce material in certain circumstances including:

- as part of the ACCC/AER's performance of its duties or functions where there is a legislative obligation or a duty to provide procedural fairness. For example, the legislation may require the ACCC/AER to make applications and submissions publicly available, publish its decision and reasons, and place material on a public register
- in response to a request under the *Freedom of Information Act 1982* (Cth) (the Freedom of Information Act)
- as part of its duty to provide discovery or comply with a notice to produce in proceedings it initiated or in proceedings against it
- in response to a subpoena or summons issued in proceedings between third parties
- in response to a statutory discovery obligation to disclose documents⁶
- in response to a minister, house of parliament or another government agency's power to obtain information, and
- under the *Archives Act 1983* (Cth) (which is concerned with the preservation and use of archival resources).

(b) Disclosure of confidential information

The Competition and Consumer Act and other legislation provide for the ACCC/AER to disclose confidential information in certain circumstances. For example:

- Under s. 155AAA of the Competition and Consumer Act, the ACCC is permitted to disclose confidential information relating to certain ACCC functions under the Act (enforcement, mergers, authorisations and telecommunications) to certain ministers, government departments, royal commissions and other government agencies (including international competition and consumer agencies).⁷
- Under s. 44AAF and 157A of the Competition and Consumer Act, the ACCC and AER are permitted to disclose confidential information to certain government agencies.⁸

5 For example, s. 70 of the *Crimes Act 1914* (Cth); s. 13 of the *Public Service Act 1999* (Cth); regulation no. 2.1, of the *Public Service Regulations 1999* (Cth); *Privacy Act 1988* (Cth); and ss. 44AAF, 95ZP, 10.89, 155AAA and 155AA of the Competition and Consumer Act.

6 For example, under s. 157 of the Competition and Consumer Act.

7 The agencies are the Australian Bureau of Statistics, Australian Communications and Media Authority, Australian Prudential Regulation Authority, Australian Securities and Investments Commission, National Competition Council, Productivity Commission, Australian Statistician, Commissioner of Taxation, Australian Competition Tribunal, Director of Public Prosecutions, Reserve Bank of Australia, a state/territory government body, a foreign government body and any other agency within the meaning of the Freedom of Information Act (Cth). The ACCC has cooperation agreements with a number of agencies, including the New Zealand Commerce Commission, United States Federal Trade Commission and the European Commission.

8 In addition to the ACCC and AER, the agencies are the Australian Energy Market Commission, and (in the case of the AER) the National Electricity Market Management Company Limited and other bodies prescribed by regulation.

- The Competition and Consumer Act and other legislation govern claims for confidentiality, including in respect of price notifications, inquiries and monitoring under Part VIIA⁹; arbitrations under part IIIA¹⁰; authorisations, notifications and merger clearances under Part VII¹¹; and shipping investigations under Part X of the Competition and Consumer Act.¹²

(c) Disclosure of personal information

The Privacy Act prohibits the ACCC/AER from disclosing personal information for a purpose other than the purpose for which it was collected unless, for example¹³:

- the information provider has given their consent
- the information provider would reasonably expect the information to be used for the other purpose and it is related to the purpose for which it was collected
- disclosure is necessary to prevent or lessen a serious and imminent threat to life or health
- the law or a court/tribunal order requires or authorises the disclosure
- the disclosure is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of public revenue.

3.2 Disclosure of confidential information

The ACCC/AER's general approach to the disclosure of confidential information (to a party other than ACCC or AER members, staff or consultants) is as follows:

- (a) The ACCC/AER is committed to treating confidential information responsibly and in accordance with the law. In some circumstances, the ACCC/AER may be legally required to produce confidential information.
- (b) In most cases, the ACCC/AER will endeavour to notify and consult the person who provided confidential information about the proposed release of that information. For example:
 - Where the ACCC/AER is required to produce documents in response to a subpoena or discovery order, it will endeavour to advise that person, thereby allowing that person an opportunity to seek confidentiality orders.
 - The Freedom of Information Act requires the ACCC/AER to consult, as far as practicable, any person whose business or professional affairs or personal information is contained in a document before disclosure and gives such a person rights of review in relation to any decision to release such information.¹⁴

However, in some cases, prior notification and consultation may not occur (for example, where the ACCC/AER is required to produce material to another government agency, and notification would compromise the other agency's performance of its functions).

- (c) The ACCC/AER recognises that in some cases release of information provided by complainants and informants (such as their identity) may have a substantial adverse effect on that party. This may also affect the willingness of other information providers to assist the ACCC/AER in its functions. Where requested to do so, the ACCC/AER will, to the extent reasonably possible, seek to protect that information.
- (d) The ACCC/AER will, if requested and where appropriate, take steps to protect informants from being the subject of legal proceedings solely because they provide assistance. The ACCC/AER may, for example, assist an informant in responding to an action for defamation or breach of confidence arising from cooperation with the ACCC/AER.

⁹ Sections 95R, 95ZC, 95ZE, 95ZF and 95ZN of the Competition and Consumer Act.

¹⁰ Sections 44ZL and 44ZNB of the Competition and Consumer Act. See also competitive tender processes under Part IIIA (ss. 44PE and 44PF) of that Act, and undertakings/access codes under Part IIIA (ss. 44ZZBD and 44ZZBE) of that Act.

¹¹ Sections 89, 95 and 95AI of the Competition and Consumer Act. For example, where requested, the ACCC is required to exclude, from the register, particulars of secret formulas or processes, cash considerations offered for acquisition of the shares or assets, and the current costs of manufacturing, producing or marketing goods or services.

¹² Section 10.88 of the Competition and Consumer Act.

¹³ See Australian Privacy Principle 6 set out in Schedule 1 of the Privacy Act.

¹⁴ Sections 27 and 27A of the Freedom of Information Act.

(e) The ACCC/AER recognises that the disclosure of confidential commercial information in respect of a business may have a substantial adverse effect on the interests of that business. However, the ACCC/AER function may also substantially affect other parties (such as access seekers or competitors) and some disclosure of information may be necessary for open and transparent decision-making. In these circumstances, options available to the ACCC/AER may include:

- releasing aggregated data
- disclosing the substance of submissions rather than releasing individual submissions or disclosing the identity of the information provider
- restricting disclosure to limited internal personnel and external lawyers and consultants either by agreement or by order (such as in the context of arbitrations).

Exceptions include a confidential review of a merger.

4. Other references

The ACCC and AER have published a range of guidelines covering the relevant legal rules and practices in particular areas. These documents should be referred to for guidance on the ACCC/AER's information policies in those areas.

Further information on the ACCC and the AER's functions can be found on the ACCC and the AER's websites.

Contacts

Australian Competition and Consumer Commission

Infocentre: 1300 302 502

Website: www.accc.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service by calling:
13 3677 for TTY users, or
1300 555 727 for Speak and Listen
and state that you want to contact the ACCC on 1300 302 502

Australian Energy Regulator

Tel: (03) 9290 1444

Email: AERInquiry@aer.gov.au

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Important notice

Please note that this guideline is a summary designed to give you the basic information you need. It does not cover all relevant legislation and general law principles, nor is it a substitute for professional advice.

Moreover, because this guideline avoids legal language wherever possible, it contains generalisations about the application of legislation. Some provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining the application of the law to that conduct.

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