



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Section 155 notices

A basic guide for individuals and small businesses

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Australian Competition and Consumer Commission
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The Australian Competition and Consumer Commission (ACCC) has legal powers it uses to gather information in carrying out its functions. These are often referred to as section 155 powers to reflect the provision of the *Competition and Consumer Act 2010* under which these powers can be exercised.

This guide has been prepared by the ACCC to assist individuals and small businesses to understand the ACCC's information gathering powers under section 155 of the *Competition and Consumer Act 2010*. It aims to assist you in understanding the ACCC's section 155 process and what you should do if you receive a section 155 (s. 155) notice.

Introduction

The ACCC is a Commonwealth agency with responsibility for protecting consumers and competition by enforcing the *Competition and Consumer Act 2010* (the CCA), which includes the Australian Consumer Law and the Horticulture and Franchising Codes of Conduct.

In many cases, when requesting information, documents and evidence from parties, the ACCC will do so voluntarily. However, there are circumstances where this is not appropriate and where the ACCC will rely on its s. 155 powers. For example, 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.

There are typically three categories of material the ACCC will require under s. 155. The ACCC can require a party to provide information, produce documents or attend an ACCC examination if it has 'reason to believe' that the party is capable of doing so in relation to an ACCC investigation into a potential contravention of the law or other specific ACCC decisions.

If you receive a s. 155 notice (a notice), this does not necessarily mean that you are under investigation or that you have broken the law. It means that the ACCC considers that you are a person who is capable of assisting it by providing material relevant to the issues described in the notice. You may be a third party that can assist the ACCC with its investigation.

Before deciding to issue a notice, the ACCC will take into account the burden of the notice on you and where applicable, your business. The ACCC will allow a reasonable time for you to respond to the notice and will try to minimise the cost to you or your business by targeting the notice as much as possible and only requesting material that is necessary and relevant.

A hypothetical example of the type of matters to which a s. 155 notice may relate is included in this guide for your information along with an example request for information and documents.

Notices are used by the ACCC to gather information, documents and evidence about potential contraventions of the law and specific ACCC decisions.

Receiving a notice

Upon receiving a notice, you should consider whether to engage a lawyer to assist you in responding.

ACCC officers will typically issue a notice on you and/or your business in person at the relevant address, which is often a registered office or principal place of business. This is typically referred to as service of the notice. A notice can also be served on your lawyer if you have given your lawyer instructions to accept service on your behalf and this has been communicated to the ACCC.

You may also receive a notice by registered post or, if you have agreed to it, by email at your email address or your lawyer's email address (if provided to the ACCC).

If you receive a notice from the ACCC, you should check that the individual named on the notice is correctly identified or that you are authorised to accept the notice for your company, which should be named on the notice.

It is important to read the covering letter and the entire notice very carefully, as they contain information about your legal obligations. They will also set out:

- the matter or decision to which the notice relates
- the information or documents you are required to provide
- the ACCC office where the response must be delivered
- ACCC contact details if you have any questions in relation to the notice, and
- the time and date that the response is due.

Notices requiring you to attend an oral examination will set out:

- the place (typically an ACCC office), date, and time you are required to appear to give evidence, and
- the documents you are required to produce at the examination (if any).

When you receive a notice and cover letter you should read these documents carefully. They set out your legal obligations as well as details for the relevant ACCC contact person. If you have any questions, contact the ACCC and your lawyer immediately.

Your obligations

By law, if you receive a notice, you are obligated to comply with it. This will usually include doing all necessary searches and reviewing and producing materials in your possession or control. You may engage a lawyer to assist with this process. You are responsible for any legal costs or other costs associated with your response to the notice.

You must:

- provide a response to requests for information and documents to the ACCC by the due date
- answer all questions in your response fully and honestly
- (if applicable) attend any oral examination at the place, date, and time stated in the notice.

Written responses from business addressees must be signed by officers with the necessary authority to do so. For example, a company secretary, CEO or board chairman.

For an oral examination, you may choose to engage a lawyer to represent you and attend the examination with you. The ACCC may give you a direction not to disclose what was said in an examination to third parties (other than your lawyer) until the ACCC advises you, which is usually after the investigation has concluded.

There are serious consequences for a refusal or failure to properly comply with a notice by the due date which can include fines or imprisonment.

You must not provide information or documents to the ACCC which you know to be untrue or misleading. If you provide false or misleading information, documents or evidence to the ACCC this may be referred to the Commonwealth Director of Public Prosecutions to be pursued as a criminal offence.

You can find more information about these obligations in the covering letter to the notice.

You must by law comply with a notice. There are serious consequences for refusal or failure to comply and for giving false or misleading information, documents and evidence in response to a notice.

Responding to a notice

After you have carefully considered the notice, you should, as soon as possible, plan the steps you will take to fulfil your obligations and comply with the s. 155 notice. If you have any questions in relation to the notice or need any clarification about what the notice requires (including the potential volume of documents in response) you should immediately contact the ACCC officer named in the cover letter and notice by phone.

A notice that requests information and documents may require you to search different sources such as hard copy and electronic documents. The ACCC may provide you with guidance in the s.155 notice cover letter on how it prefers to receive electronic material.

You will need to allow adequate time to put your response together. If you engage a lawyer to assist with this process, make sure you allow enough time for this process to be completed before the due date on the notice.

If there are genuine reasons why you will not be able to respond to the notice in full by the due date or attend an oral examination, you should phone the relevant ACCC officer as soon as possible to explain. You will then be asked to make a written application to the ACCC and a decision will be made whether to grant the extension by varying the notice.

This same process applies if you request any other changes to the terms or scope of the notice.

Extensions and any changes to the notice are not granted automatically and it will be very difficult for the ACCC to consider granting an extension or making any changes to the notice if the request is made very close to the due date.

If you need to apply for an extension to respond to the notice, your written application should:

- clearly set out your reasons for this
- advise if there is any part of the response that you can provide by the original due date, and
- propose a date by which you believe you can comply.

Contact the ACCC immediately if you have genuine reasons why you cannot respond to a notice in full by the due date. Extensions and any changes to the notice are not automatic. It will be very difficult for the ACCC to consider granting an extension or making any changes to the notice if your request is made very close to the due date.

Reasonable search defence-production of documents

You will not breach the CCA for refusing or failing to comply with a s. 155 notice to produce documents, if you:

- can prove that, after a reasonable search, you were not aware of the documents
- provide a written response to the notice to the ACCC, and
- describe in that written response the scope and limitations of the searches you made.

This is known as the 'reasonable search defence'. More information about the reasonable search defence, including what is meant by a 'reasonable search' and the kinds of matters you may want to include in your written response is available in the *ACCC Guidelines—Use of s. 155 powers*.

The ACCC also prefers you or your lawyer provide a signed written declaration with your s.155 cover letter and documents to verify that you have taken all appropriate steps in your document search.

Further information about this written declaration can be found in the *ACCC Guidelines—Use of s. 155 powers*.

What happens after you have responded to the notice?

The ACCC will confirm it has received your response to the notice and may contact you if any additional information is required.

A transcript of an oral examination will usually be sent to you in the weeks following your examination and you will ordinarily be required to keep it confidential while the investigation continues (other than to your legal adviser who represented you at the examination and who is also under an obligation to keep the transcript confidential). You will be asked to identify any errors in the transcript and advise the ACCC. Sometimes, where the possible disclosure of a transcript might negatively impact upon an ACCC investigation, a transcript will not be provided until after the ACCC has completed its investigation.

The information, documents and responses you provided will be considered in the ACCC's broader investigation or decision making process.

The ACCC is also likely to contact you if it has any concerns with your response, including if it has any questions about your written response and the scope and limits of the search carried out to produce documents.

The ACCC will confirm it has received your response. You will usually be sent a transcript of any oral examination. The ACCC is likely to contact you if it has any concerns with your response.

Making a claim of legal professional privilege

When responding to the notice, you are not required to produce material that attracts legal professional privilege.

Legal professional privilege applies to confidential communications made in connection with:

- the giving or obtaining of legal advice
- the provision of legal services for use in, or in relation to, litigation.

Before responding to the notice, it is your responsibility to assess whether legal professional privilege applies and whether a document, or part of a document, should be withheld from your response to the ACCC or redacted so that the privileged part is not visible.

For more information about the ACCC's approach to legal professional privilege claims, see <https://www.accc.gov.au/business/business-rights-responsibilities/claims-of-legal-professional-privilege>.

We will usually ask you in the cover letter accompanying the notice to voluntarily provide certain information about any legal professional claims you wish to make.

You will usually be asked to provide this information at the same time as you respond to the compulsory notice.

If you think you may need longer to provide the legal professional privilege information, you should contact the case team. The case team may agree to another date for you to provide the information.

You should not delay responding to the compulsory notice to finalise legal professional privilege information.

Where to go for further information

Remember if you have any questions in relation to the notice, you should contact the ACCC officer named in the notice.

Further information about the ACCC's section 155 powers is contained in the publication *ACCC Guidelines—Use of s. 155 powers* on the ACCC website.

For general information about the ACCC see: www.accc.gov.au.

Frequently asked questions—s. 155 notices

Should I expect the ACCC to have made contact with me prior to issuing a s. 155 notice?

In some circumstances the ACCC will contact you beforehand, in particular if you are not a direct party under investigation and the ACCC is confident that there are no reasons for precluding early engagement with you. However, it will depend on the circumstances of the ACCC's investigation and it is not always appropriate to advise a party to expect a notice, for example, in covert matters involving cartel conduct and where the ACCC's investigation may be compromised.

Do I have to engage a lawyer if I receive a notice? Who pays for this?

You do not have to engage a lawyer however it may assist you in preparing your response and making sure you have taken the necessary steps to comply with the notice. You will be responsible for the costs of using a lawyer and any of the costs associated with responding to the notice (e.g. photocopying, postage or courier costs, employee wages). You may consider contacting your accountant in relation to any associated costs to see whether they can be claimed as a business expense.

Can I appeal the issuing of a notice?

The exercise of s. 155 powers by the ACCC is subject to judicial review by the Federal Court of Australia and there are limits on the ACCC's s. 155 powers and requirements that the ACCC must follow in order for a s. 155 notice to be valid. For further information see the publication *ACCC Guidelines—Use of s. 155 powers*.

However, the ACCC takes great care in drafting and issuing notices and seeks to avoid providing parties with a basis for judicial review of a notice. If you have any concerns about the burden, scope and/or terms of a notice, the ACCC encourages you to make contact with the relevant ACCC officer named in the notice and cover letter as soon as possible after receipt of the notice.

What if I don't understand a question in the notice and need to discuss it further?

You can contact the ACCC officer named in the notice and cover letter if you have any questions about the notice, if you require assistance in understanding the terms of the notice or if you think that you do not have some of the information or documents requested. You should contact the ACCC officer as soon as possible, to ensure you allow enough time to prepare your response and comply with the notice by the due date.

What if I can't meet the timeframe for compliance with the notice?

You should contact the ACCC officer named in the notice and cover letter as soon as possible and set out in writing the reasons why you do not think you can comply. The ACCC will then consider whether to grant an extension to the due date. It will be very difficult for the ACCC to consider granting an extension or making any changes to the notice if your request is made very close to the due date.

What happens at a s. 155 oral examination?

A s. 155 oral examination is a formal process where you give evidence under oath. You may also be required to bring documents to the examination. You will be asked questions by an ACCC Commissioner, ACCC Senior Manager or the ACCC's legal representative in relation to the issues set out in the notice.

Most examinations can be done in one day and you will be offered regular breaks from the examination. For further information see the publication *ACCC Guidelines—Use of s. 155 powers*.

Can I provide documents in my s. 155 response to the ACCC in electronic form?

The notice will define the form of the 'documents' requested and in most cases you will be required to reproduce electronic documents such as electronic records stored on back-up tapes, computer hard-drive and other electronic storage devices that are capable of being reproduced.

You can provide your s. 155 response in electronic form including on a disc or other storage device and the ACCC may ask you in the cover letter to the notice to provide your electronic files in a preferred form/s. For example, in searchable PDF format. While you do not have to provide electronic materials in this form, doing so will assist the ACCC in assessing the matters as quickly as possible.

How do I make a claim for legal professional privilege over information responsive to a s. 155 notice?

If you are claiming legal professional privilege over documents or parts of documents when responding to a s.155 notice, you will generally be asked in the cover letter to voluntarily provide information about the documents over which you are claiming legal professional privilege.

The details requested are not intended to interfere with privilege but rather, the information you provide will enable us to consider whether to accept or challenge any legal professional claims and assess your compliance with the notice.

Can I provide parts of documents to the ACCC and include redactions?

In general, a s. 155 response requires the production of entire documents, not parts of documents, unless a claim is being made for legal professional privilege. Generally, it is inappropriate to provide responses that redact or black-out information.

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

What is a reasonable search for documents?

Whether a search carried out to produce documents is a 'reasonable search' is a question for a court to determine. However, factors that may be taken into account to determine whether a search is reasonable include:

- 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.

For more about the ACCC's approach to assessing a reasonable search, see the *ACCC Guidelines—Use of section 155 powers*.

In addition to providing documents requested under a s. 155 (1)(b) notice, what other information do I have to provide to the ACCC about the searches conducted?

If you wish to rely on the reasonable search defence you must give the ACCC a written response to the s.155 notice with your cover letter and document response. This written response must include a description of the scope and limitations of the document searches you made.

While the ACCC provides guidance on what to include in your written response in the *ACCC Guidelines—Use of s. 155 powers*, you do not have to follow this. However, the guidance aims to address all matters that may be relevant to the ACCC's and a court's assessment of whether the searches you made were reasonable.

The ACCC also prefers that you provide a written declaration in your cover letter along with the documents produced. This declaration should be signed by a person who had primary responsibility for preparing the response to the notice. While this declaration is not a requirement, it will be taken into account by the ACCC when assessing whether you have carried out a reasonable search and any compliance issues. For further information see the *ACCC Guidelines—Use of s. 155 powers*.

How does the ACCC use the information and documents that I produce in response to the notice?

The ACCC reviews and uses the information and documents you produce in its investigation into a potential contravention of the CCA (including the Australian Consumer Law). The ACCC may also use your information and documents in any legal proceedings that may arise from its investigation.

The ACCC can also use your s. 155 response if it is relevant to other ACCC decisions or investigations, pursuant to s. 155AAA of the CCA.

A person providing information or documents to the ACCC in response to a notice is unable to place conditions on the ACCC's internal use of this information. However, material provided in response to a s. 155 notice is protected information under s. 155AAA which means that it can only be disclosed in certain circumstances. The ACCC will treat your information and documents in accordance with the law. If the ACCC is required by law to disclose this material, the ACCC will try to notify and consult with you about the proposed release of that information.

Can I get my documents and information back from the ACCC after the investigation?

Yes. The documents and information you provide to the ACCC will usually be copied again by the ACCC (including electronically) for further review. The ACCC will then retain these materials in accordance with its legal obligations under the *Archives Act 1983* and other Australian Public Service requirements. You are able to request that the information and documents produced to the ACCC be returned to you, however, in most cases, the ACCC will retain electronic copies of this material.

Example of matters to which a s. 155 notice may relate

Note: This is a hypothetical example for information purposes only and is not an actual ACCC s. 155 notice. The matters contained in this example relate to allegations that a company, [Company Example], is making misrepresentations in relation to consumer refund rights.

The matters that constitute or may constitute contraventions of ss. 18, 29(1)(m) and/or 29(1)(n) of the Australian Consumer Law (ACL):

1. Between 1 January 2015 to the date of this [Company Example] caused a statement to be published on the [Company Example] website (companyexample.com.au) under the heading 'Refunds and Remedies':
 - a. [Company Example] does not give refunds or any other remedies for any faulty goods purchased from it. Customers must contact the manufacturer of the goods in relation to faulty goods and obtaining any remedy.
2. In addition, between 1 January 2015 to the date of this Notice, sales representatives of [Company Example] made representations to consumers to the effect that the consumer was not entitled to a refund or any other remedy from [Company Example] for faulty goods purchased and that the consumer should contact the manufacturer to obtain a remedy for faulty goods.
3. The website statement set out in paragraph one above and the representations to consumers set out in paragraph two above were made in circumstances where:
 - a. the supply of products by [Company Example] was covered by a guarantee under s. 54 of the ACL that the products were of acceptable quality
 - b. consumers had rights to remedies from [Company Example] under Division 1 of Part 5-4 of the ACL in circumstances where the products supplied by [Company Example] were not of acceptable quality, and
 - c. in relation to the representations to consumers set out in paragraph two, certain products supplied to consumers by [Company Example] were not or may not have been of acceptable quality.
4. publishing the website statement set out in paragraph one above and making the representations to consumers in paragraph two above in the context referred to in paragraph three, [Company Example] made representations in trade or commerce in connection with the promotion, supply or possible supply of [Company Example] products that were false, misleading or deceptive, or likely to mislead or deceive, in contravention of ss. 18, 29(1)(m) and/or 29(1)(n) of the ACL, because consumers may have been entitled to a remedy, including a refund, from [Company Example] in relation to a faulty [Company Example] product, in addition to any remedies which may have been available to them from the manufacturer.

Example of a s. 155 request for information and documents

Note: This is a hypothetical example for information purposes only and is not an actual ACCC s. 155 notice. The information and documents requested in this example relate to allegations that a company, [Company Example], is making misrepresentations in relation to consumer refund rights. The ACCC is not limited to requesting this type of information and documents and the type of information and documents requested will vary based on the circumstances and complexity of the relevant matters or ACCC decision.

Schedule 1 to notice under s. 155(1)(a) and (b) of the Competition and Consumer Act 2010 issued to [Company Example]

Information to be furnished by 1 June 2016

Notes:

- a. All answers are to be in writing and signed by a competent officer of [Company Example].
- b. Unless otherwise stated, all information in the categories set out below is to be read as relating to the period from 1 January 2015 to the date of this notice.
- c. Unless otherwise stated, if the information specified in this Schedule is contained in a document provided in response to Schedule 2, the information may be furnished by referring to that document.

Organisational structure

1. Provide details of the organisational structure of the management and corporate governance of [Company Example] as at the date of this notice, including:
 - a. the full names, position titles and contact details of all directors and management staff
 - b. the core responsibilities of each director and manager.

[Company Example] Website

2. Provide the full name and position titles of the [Company Example] representative(s) who is/was primarily responsible for the following functions at any time for the period 1 January 2015 to the date of this notice:
 - c. the management and operation of the [Company Example] website (www.companyexample.com.au)
 - d. the development and/or approval of content published on the 'Refunds and Remedies' page of the [Company Example] website.

Complaints in relation to faulty [Company Example] products

3. For the period from 1 January 2015 to the date of this Notice, provide details of all complaints made to [Company Example] by consumers in the Australian Capital Territory regarding faulty [Company Example] products, including in relation to each complaint, to the extent known:
 - e. the name and contact details of the complainant
 - f. the date the complaint was received
 - g. the faulty [Company Example] product to which the complaint related
 - h. the date of purchase of the faulty [Company Example] product
 - i. the subject/nature of the complaint

whether or not the complainant was provided with a remedy, and the reason(s) for that decision.

Consumer Complaints Processes

4. Outline the processes undertaken by [Company Example] for dealing with complaints from consumers regarding faulty [Company Example] products, including:
 - j. the channels by which a consumer can make a complaint to [Company Example] (e.g. phone, email, online complaints form)
 - k. the position title(s) of the [Company Example] representative(s) responsible for assessing complaints
 - l. details of any processes for escalating complaints
 - m. options available to [Company Example] representatives for resolving complaints.

Schedule 2 to notice under s. 155(1)(a) and (b) of the Competition and Consumer Act 2010 issued to [Company Example]

Documents to be produced by 1 June 2016

Notes:

- a. Documents are defined in this Notice to include, but are not limited to emails, data or other information stored in electronic form which are capable of being reproduced.
- b. Unless otherwise stated, the documents required to be produced under this Notice are all documents in the possession, custody or power of [Company Example], falling within the categories set out below, that were brought into existence or acquired in the period from 1 January 2015 to the date of this Notice.

[Company Example] Website

1. Copies of all documents recording, constituting or evidencing the approval of content published on the 'Refund and Remedies' page of the [Company Example] website (www.companyexample.com.au).

Complaints in relation to faulty [Company Example] products

2. Copies of documents recording communications between [Company Example] and consumers in the Australian Capital Territory making complaints for faulty [Company Example] products from 1 January 2015 to the date of this notice.

Other Documents

3. Copies of all other documents referred to in response to Schedule 1 to the notice.

