



# COMPETITION & REGULATION UPDATE

## *What to do if the ACCC come knocking: Practical tips for responding to section 155(1)(a) and (b) notices*

The Australian Competition & Consumer Commission (ACCC) has broad powers to investigate suspected breaches of the competition and consumer provisions of the *Competition and Consumer Act (CCA)*, including the use of coercive statutory powers to issue section 155 notices and to obtain search and seizure warrants. These powers may be used by the ACCC in investigations into conduct such as cartel conduct, misuse of market power, anti-competitive agreements, mergers, misleading and deceptive conduct and breaches of consumer warranties.

Receiving a section 155 notice from the ACCC or being the subject of a “dawn raid” by the ACCC can be a stressful and intimidating event and can result in the company expending significant amounts of unrecoverable time and money. It is critical to understand in advance the correct way to respond to such approaches by the ACCC, so as to ensure the company’s response is done cost effectively and in a manner that will minimise the risks for the company in any on-going investigation by the ACCC (and perhaps by other overseas competition regulators too).

In a series of three updates, we will examine the different types of coercive information-gathering powers of the ACCC and suggest some practical “do’s and don’ts” for companies. In the first update of the series, we examine section 155(1) (a) and (b) notices.

### **SECTION 155 NOTICES: MANDATORY PRODUCTION OF INFORMATION AND DOCUMENTS**

Section 155(1)(a) and (b) notices require the recipient to produce information or documents respectively. It is common for a company to receive both a section 155(1)(a) and (b) notice at the same time. These notices are the primary methods by which the ACCC exercises its coercive information gathering powers.

### **PRACTICAL TIPS FOR RESPONDING TO SECTION 155(1)(A) AND (B) NOTICES**

**Do ensure that it is a compulsory section 155 notice.** A section 155 notice will be clearly labelled as one. A company may alternatively receive a document or information request in the form of a letter from the ACCC. This request will be a voluntary one and gives the company greater flexibility in responding.

**Do not ignore a section 155 notice.** Section 155 notices are mandatory. Failure to comply with a section 155 notice, or knowingly providing information that is false or misleading, is a criminal offence. Individuals face fines of up to \$3,600 or up to 12 months’ imprisonment.

**Do consider the scope of the notice and whether you need to approach the ACCC to seek clarifications or variations to the notice.** Carefully consider the types of information and/or documents being requested and the time frame for the response.



Consider:

- Are any of the information or document requests in the notice ambiguous or unclear? The ACCC must particularise the information and/or documents sought in the notice in sufficient detail. However, it is possible that the categories of information or documents sought are unclear. It is advisable in such circumstances to seek clarification from the ACCC.
- Do any of the requests require production of an unreasonable volume of material? If so, consider requesting a variation to the notice. It is possible that the ACCC may not have appreciated the volume of information covered by the notice and the ACCC may be prepared to vary the notice in response to concerns raised with it.
- Is there a sufficient link between the alleged contravention set out in the notice and the information or documents sought? If not, raise these concerns with the ACCC. The ACCC may be prepared to detail how they think the matters and information or documents are related.
- Is it practicable to respond by the time specified in the notice? If not, explain to the ACCC the issues with responding in the time allocated and seek an extension.

If any clarifications or variations are to be requested, it is prudent to raise them with the ACCC as soon as possible after receiving the notice (and certainly well in advance of the time initially listed in the notice for the company's response).

**Do put in place a project plan to locate and review the information or documents.** This plan should consider a range of issues, including:

- Is it necessary to issue document retention notices, which instruct staff to immediately cease routine destruction of documents, including IT backup tapes?
- What level of resources will the company need in order to respond to the notice by the specified deadline?
- Which staff are likely to have the documents or information and on what forums (emails, hard or soft copy documents, diaries, etc)? Also consider whether

the company needs to request documents from its agents or third party representatives (e.g. accountants) where those documents are still within the company's control and need to be produced in response to the notice.

- What instructions and guidelines will be given to employees who are assisting to identify responsive documents and information? It is prudent to record all such instructions and guidelines, including decisions made about key search terms and sources to be searched. It is important that these instructions and guidelines are neither too narrow nor too broad.

Once the information and documents have been collated, it is important to leave sufficient time so that each document can be reviewed by internal or external lawyers, who will check for relevance, consider how to deal with any confidential information of the company and third parties and ensure no document or information that is subject to legal professional privilege is produced.

**Do consider the information in the notice and whether an internal investigation is necessary.** The section 155(1)(a) or (b) notice must set out certain basic information which is very useful for understanding the scope of the ACCC's investigation and the company's role in it. In particular, consider from this information:

- What is the nature of the alleged breach of the CCA? The ACCC are required to set out in the section 155 notice the relevant section of the CCA that has been alleged or suspected to be breached, the conduct that is alleged or suspected to be in breach of that section and the relevant period of the conduct.
- Is your company the focus of the ACCC's investigation or is it providing assistance in an ACCC investigation focused on another company? To issue a section 155(1)(a) or (b) notice, the Chairman of the ACCC must have a reasonable belief that a person is capable of providing information or documents that relate to a matter which constitutes or may constitute a contravention of the CCA. However, the ACCC is not restricted to issuing notices only to those persons who are suspected to have contravened the CCA. It may be that your company has received a notice because it possesses information relating to an alleged or suspected breach by another person.



- If your company is the focus of the ACCC's investigation, consider immediately conducting an internal investigation. It is desirable to complete the internal investigation before responding to the section 155 notice, if at all possible. The findings from the internal investigation may help determine the company's strategy moving forward in the investigation.
- At what stage of the ACCC's investigation has the notice been issued and what may this indicate about the ACCC's future actions? The ACCC often commences investigations with voluntary requests for information rather than section 155 notices. Accordingly, your company may have been the subject of an ACCC investigation for some time and may have provided some information voluntarily. Given the escalation from voluntary to compulsory requests and the scope of information or documents outlined in the section 155 notice, it may be possible to surmise that the ACCC is seriously contemplating litigation and is seeking specific evidence in admissible form to use in court. Alternatively, the ACCC may be using a compulsory notice to break a standstill in its investigation. On the other hand, if an investigation into your company is being commenced with a section 155 notice, it may indicate a more serious breach, a belief by the ACCC that the company is unlikely to be cooperative and/or that the ACCC has already obtained detailed information from another source, such as a whistleblower.

**Do consider implications for your company in other jurisdictions.** The company should consider whether the conduct is alleged to have occurred only in Australia or also in other countries? If the latter, consider whether action, including internal investigations and immunity or leniency applications in those countries, needs to occur before the deadline for producing the information and documents to the ACCC.

## CONCLUSION

A company's response to a section 155 notice can be critical in determining the investigation's eventual outcome. It is best to engage internal or external lawyers as soon as possible in an ACCC investigation and, certainly, upon receiving a section 155 notice. If we can assist your company in responding to a section 155 notice received from the ACCC, please contact us.

For further information, please refer to DLA Piper's Rapid Response [website](#) and [app](#).



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