



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Guidelines on section 95ZN claims in price inquiries

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Australian Competition and Consumer Commission
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Purpose of these guidelines

These guidelines provide information about the approach taken by the Australian Competition and Consumer Commission (ACCC) in assessing whether to disclose information under section 95ZN of the Competition and Consumer Act 2010 (Cth) (CCA) where that information has been:

- provided to the ACCC under section 95ZK of the CCA
- made available to the ACCC in submissions to a price inquiry, or
- given in private at a formal price inquiry hearing.

These guidelines are for the general guidance of legal practitioners and business advisors and are not a substitute for legal advice.

These guidelines are not intended to replace or amend any other ACCC guidance about the ACCC's handling of confidential or commercially sensitive information under other sections of the CCA or other legislation.

The ACCC may amend these guidelines from time to time.

More guidance about the ACCC's handling of information can be found in the following publications:

- [ACCC & AER information policy: collection and disclosure of information](#), June 2014.
- [The ACCC's accountability framework for investigations](#), April 2019.

1. Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.
- 1.2 As mentioned, one of the ACCC's functions is to conduct price inquiries under Part VIIA of the CCA.¹ When conducting price inquiries, the ACCC Chair may require a person to give relevant information or produce documents under section 95ZK of the CCA. The ACCC may also receive information through submissions, or at a formally convened hearing of the inquiry.
- 1.3 These guidelines set out how the ACCC assesses, under section 95ZN of the CCA, whether information given or documents produced to the ACCC under section 95ZK of the CCA, or through submissions, or in private at a formal hearing of the inquiry, may be disclosed.

2. Price inquiry legislative framework

Price inquiries

- 2.1 Under section 95H of the CCA, the responsible Minister may, by notice in writing, direct or approve the ACCC holding a price inquiry into certain specified matters.
- 2.2 Under section 95J of the CCA, this notice must specify the goods or services in relation to which the price inquiry is to be held.

Information-gathering powers

- 2.3 The ACCC is able to use a range of information-gathering powers once the Minister has directed or approved the holding of a price inquiry. These include issuing compulsory notices under section 95ZK of the CCA, and conducting formal inquiry hearings under section 95R of the CCA.
- 2.4 Under section 95ZK of the CCA, the ACCC Chair may, by notice in writing, require a person to give the ACCC relevant information or documents. The Chair may require this if they have reason to believe that the person is capable of giving information or producing documents relevant to a supply of goods or services by the person that is of a kind in relation to which the ACCC is carrying out the price inquiry. Refusing or failing to comply with such a notice is a criminal offence, which exposes an individual to a fine of 20 penalty units and a corporation to a fine of 100 penalty units.²
- 2.5 Under sections 95R and 95S of the CCA, the ACCC may require or permit written submissions, take written or oral evidence at a formal hearing of the inquiry, and issue summonses to witnesses to give evidence or produce documents at a formal hearing of the inquiry. Failing to comply with a summons is a criminal offence, which exposes an individual to a fine of 10 penalty units.
- 2.6 Under section 95R(2) of the CCA, a person may request that their evidence be given in private at a formal hearing of the inquiry. Where evidence is given in private at a formal hearing, section 95ZN of the CCA still applies to the ACCC's decision about whether to disclose that evidence.

¹ The ACCC also has other functions under Part VIIA of the CCA, including price monitoring and price notification.

² One Commonwealth penalty unit is currently \$222. This amount will be indexed again on 1 July 2023.

Disclosure of information

- 2.7 Under section 95ZN of the CCA, where information (including information contained in a document) has been given to the ACCC under section 95ZK of the CCA, or through a submission, or in private at a formal hearing of the inquiry, and the information provider has made a claim that disclosure of that information would damage its competitive position, the ACCC must take all reasonable steps to ensure that the information is not disclosed without the consent of the information provider, if:
- the ACCC is satisfied that the information provider's claim that disclosure would damage its competitive position is justified, and
 - the ACCC is not of the opinion that disclosure of the information is necessary in the public interest.
- 2.8 However, the ACCC can disclose the information if:
- the ACCC is not satisfied that the claim that disclosure would damage the information provider's competitive position is justified, or
 - the ACCC is of the opinion that disclosure of the information is necessary in the public interest.

Scope of section 95ZN of the CCA

- 2.9 Section 95ZN of the CCA does not apply where information has been aggregated, such that the proposed disclosure will not reveal information about an individual information provider (e.g., where a disclosure relates to multiple providers, but cross-referencing the aggregated information against information held by another provider or against publicly available information will not in effect disclose an individual provider's information).
- 2.10 Therefore, the ACCC will not consult on such aggregated information, even if the original individual information was obtained under the ACCC's information-gathering powers.

▶ **Example:** Treatment of aggregated information

A statement that "the two suppliers of product X supplied a combined volume of 1000 units of product X in 2018" would disclose the individual information of each supplier, as each supplier could identify the information provided by the other supplier by subtracting its own information from the aggregated information. Individual information would therefore be disclosed, and section 95ZN applies to that individual information.

However, a statement that "while the ten largest suppliers of product X differed in size significantly, the average quantity of product X supplied per supplier in 2018 was Y" may not disclose any information of an individual supplier. Where a proposed disclosure does not disclose the information of an individual information provider, then the ACCC's obligations under section 95ZN of the CCA do not apply and the information may be disclosed without a decision under section 95ZN of the CCA.

- 2.11 Section 95ZN of the CCA also does not apply to information that is publicly available. Therefore the ACCC will not consult on such information, even if it was also obtained under the ACCC's information gathering powers.
- 2.12 In addition, the ACCC will discontinue its assessment under section 95ZN of the CCA in respect of proposed disclosures where:
- the information provider does not make a claim that the proposed disclosure would damage their competitive position, or
 - the ACCC decides not to proceed with the proposed disclosure for other reasons.

3. Consultation under section 95ZN of the CCA

The process for consulting information providers

- 3.1 The ACCC will:
- inform an information provider that the ACCC is proposing to disclose particular items of information that have been provided by that information provider
 - describe to the information provider in general terms how the ACCC proposes to disclose those items of information (e.g., whether or how the information provider will be identified in the disclosure, or describe the general context of the disclosure), and
 - ask the information provider whether it wishes to make any claims under section 95ZN of the CCA.
- 3.2 The ACCC may decide not to consult with an information provider about a proposed disclosure where the ACCC considers that the information provider is not identifiable by disclosure of the information. However, the ACCC will still make a decision under section 95ZN of the CCA in relation to these proposed disclosures.

Particularising claims under section 95ZN of the CCA

- 3.3 Section 95ZN of the CCA contemplates that any claim that disclosure would damage the information provider's competitive position must be made in respect of specific items of information.
- 3.4 To enable information providers to make valid claims, the ACCC will inform information providers of the specific items of information provided by that information provider that the ACCC is proposing to disclose.
- 3.5 When making a claim under section 95ZN of the CCA, the information provider must identify the particular information or documents to which the claim relates and set out how the disclosure of the specific items of information would damage its competitive position (see section 4 below).
- 3.6 The ACCC may decide not to assess claims made under a blanket claim, that is, a generally expressed claim over the entirety of the information or documents provided under section 95ZN of the CCA.

4. Assessing damage to a person's competitive position

- 4.1 The first element in the ACCC's consideration of whether to disclose information is an assessment of an information provider's claim that disclosure of the information would damage its competitive position.
- 4.2 This element is not satisfied merely by establishing that the information is confidential (commercially or otherwise), is of a confidential nature, or was provided to the ACCC in confidence. The fact that the information is not publicly known and relates to the commercial affairs of the information provider, or the fact that it is included in a document that has been marked "confidential", or "commercial-in-confidence", or similar, or the fact that disclosure may damage the information provider's reputation, is not sufficient.

- 4.3 In addition, damage to a third party's competitive position will generally be insufficient to justify a claim under section 95ZN of the CCA. Section 95ZN of the CCA requires that an information provider identify the damage that would occur to its own competitive position, should a particular item of information be disclosed. However, where relevant, the ACCC will take damage to a third party's competitive position into account when deciding whether to disclose information under section 95ZN of the CCA.
- 4.4 In assessing whether a claim is justified, the ACCC will assess the impact that disclosing the information would have on the information provider's future ability or capacity to compete in the supply or acquisition of the relevant goods or services. As part of this assessment, the ACCC will consider whether:
- the disclosure would have any impact on the nature or intensity of the competition that the information provider would otherwise face or provide in the future in the absence of the disclosure, or
 - the disclosure would provide any other advantage to competitors seeking to compete against the information provider.
- 4.5 Accordingly, the ACCC expects that the information provider will direct its claims at these types of issues.
- 4.6 The ACCC will inform an information provider where it is proposing to disclose particular items of information obtained from that provider. If that information provider wishes to make a claim that the disclosure of one or more of those items of information would damage its competitive position, supporting material must be provided on an item-by-item basis. That is, for each individual proposed disclosure, the claim must be accompanied by:
- reasoning specific to that proposed disclosure as to the damage to the information provider's competitive position that would be caused by disclosure, and
 - where reasonably possible, relevant evidence supporting the claim for that item.
- 4.7 Each claim should reflect the content of each individual proposed disclosure, rather than:
- being part of a blanket claim, or
 - relying on reasoning or evidence presented in a different claim, unless the relevant reasoning and evidence is identical for each claim.
- 4.8 As a guide, the ACCC is unlikely to consider that a claim is justified in the following cases:
- the information can be inferred from an analysis of other information that is already publicly available
 - the disclosure would not reveal any information about:
 - the identifiable information provider's current or future competitive strategies, such as its approach to pricing or the non-price features of its product offering,
 - the identifiable information provider's own assessment of the strengths and weaknesses of its own current or future competitive position,
 - the identifiable information provider's financial position, or the identity of their customers or suppliers.
- 4.9 The ACCC will also take into account whether the disclosure would damage existing or future commercial relationships between the information provider and its suppliers or customers in a way that would result in damage to the information provider's competitive position.

5. Assessing public interest factors

- 5.1 The second element in the ACCC's assessment is whether disclosure is necessary in the public interest. As noted above, the ACCC may assess disclosure to be necessary in the public interest even where to do so would damage the information provider's competitive position.
- 5.2 The ACCC will inform an information provider where it is proposing to disclose particular items of information obtained from that provider. If that information provider wishes to object to the disclosure of one or more items of information on the basis the disclosure is not necessary in the public interest, supporting material must be provided on an item-by-item basis. That is, for each individual proposed disclosure, the objection must be accompanied by:
- reasoning specific to that proposed disclosure as to why the disclosure is not necessary in the public interest, and
 - where reasonably possible, relevant evidence supporting the objection for that item.
- 5.3 Again, each claim should reflect the content of each individual proposed disclosure, rather than being part of a blanket claim, or relying on information and evidence that supports another claim unless the relevant reasoning and evidence is identical for each claim.
- 5.4 The ACCC's assessment involves forming an opinion about whether the disclosure is reasonably required to achieve the purpose of this disclosure – namely, the advancement of the public interest. This is a discretionary and evaluative judgement for the ACCC in light of the subject, matter, scope and purpose of Part VIIA of the CCA. It will often require the consideration and balancing of a number of competing factors, and of various facets of the public interest.³
- 5.5 As a guide, the ACCC would be likely to form the opinion that the disclosure is necessary in the public interest where:
- the disclosure would be likely to provide increased transparency about matters that are within the scope of the inquiry as directed or approved by the Minister, such as the competitive dynamics or consumer experience of relevant markets in light of the commercial and operational features of those markets,
 - the disclosure would be likely to improve the ability of consumers (or other customers) to make informed decisions about acquiring relevant goods or services, such as about which supplier to choose, or
 - the disclosure would otherwise be likely to reduce information asymmetries in relevant markets, and therefore improve the ability of consumers (or other customers) to make informed decisions.

6. Informing information providers of section 95ZN decisions

- 6.1 Where the ACCC makes a decision to disclose information that is the subject of a claim as to competitive damage, the ACCC will communicate that outcome to the information provider.
- 6.2 The information provider may then seek details of the reasons for the ACCC's decision.

³ See, e.g., *A v Corruption & Crime Commissioner* [2013] WASCA 288.



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