

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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**INVESTIGATIVE POWER IN PRACTICE – Breakout session 2: Requests for
Information – Limits and Effectiveness**

Contribution from Australia

- Session IV -

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This contribution is submitted by Australia under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout session 2 - Requests for Information Limits and Effectiveness -

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1. The ACCC uses both voluntary and compulsory requests to obtain information from complainants, traders, and third parties. Generally, the ACCC obtains most of its information through cooperation and voluntary means. This paper examines the ACCC's approach when obtaining information for investigations and market inquiries and focuses on three case studies, *Coles Supermarkets Australia Pty Ltd [2014] FCA 1405*, the ACCC Dairy Inquiry, and *ACCC v Informed Sources Pty Ltd & Ors [2015]*.

1. Overview of voluntary and compulsory information requests by the ACCC

2. Voluntary requests for information (**RFIs**) can occur informally, such as through phone discussions, informal interviews or written requests for information addressed to any party who can provide relevant information¹. The ACCC also conducts voluntary formal interviews, where a potential defendant/respondent agrees to be interviewed by the ACCC in relation to alleged contraventions.

3. Consideration is given to whether the relevant information, documents or evidence is likely to be otherwise available, including whether the target of the request is likely, and able to provide the information voluntarily. Any documents that are provided to the ACCC on either a voluntary or compulsory basis may be used in other investigations by the ACCC. If the documents are provided voluntarily, which is the preferred practice, the ACCC may be asked to comply with conditions which the user puts on the use of the information. If the ACCC is unable or unwilling to meet these conditions, then it will generally seek to negotiate acceptable conditions or not accept the information and consider alternative investigative options.

4. In some situations, it is more appropriate for the ACCC to obtain information, documents and evidence with its compulsory information gathering tools.² The ACCC may use its compulsory powers to request information, documents or evidence from a third party who may have relevant material, even if that party is not the subject of the investigation.

¹ While parties are not obligated to respond to voluntary RFIs, it is an offence to provide false or misleading information to a Commonwealth officer or to obstruct a Commonwealth officer in the course of their duties.

² The ACCC is able to compel parties to provide information under sections 155(1)(a), (b) and (c), and 95ZK of the Competition and Consumer Act 2010 (Cth) (CCA). The ACCC also has other more limited information gathering powers that, in general, do not apply to its competition functions (for example, s51ADD of the CCA).

5. The Chair of the ACCC can compel parties to provide investigative assistance. It does this by issuing Notices under section 155 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**s155 Notices**) that require parties to provide information, documents, or appear before the ACCC to give evidence. The ACCC Chair typically issues s155 Notices in competition and consumer protection investigations, as well as merger reviews. The ACCC does not need to establish that a party has engaged in a contravention of legislation to issue a s155 Notice. However, s155 notices can only be used to assist the ACCC in the exercise of its functions and cannot be used when proceedings have commenced in relation to the same matter.

6. In order to issue a s155 Notice, the ACCC's Chair must have sufficient 'reason to believe' that the person or corporation is capable of providing relevant information, documents, or evidence that relates to the subject matter of the notice. The 'reason to believe' must take into account the ability of the addressee to provide the information, documents or to give evidence.

7. The ACCC can use any information or documents with which it is provided, including material provided in response to s155 Notices, to commence or assist in an investigation, even if that information was provided in relation to a separate or unrelated investigation. The ACCC may also use information from previous investigations to establish a 'reason to believe' to issue s155 Notices.

8. Anyone that receives a s155 Notice is required to comply. Refusal to do so is a criminal offence that can attract financial penalties and/or imprisonment, determined by the Courts. Giving evidence that is false or misleading in response to a s155 Notice is also a criminal offence.

9. In addition to s155 Notices, the ACCC has other compulsory information gathering powers related to market inquiries that are more confined in scope. These powers also require the Chair to have a 'reason to believe', however are limited in who the notices can be issued to by the terms of reference of the inquiry.

2. Challenges of third party cooperation – A case study - Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 unconscionable conduct against suppliers

10. The ACCC can issue notices to compel individuals information from persons involved in the alleged conduct, but also individuals such complainants who may be a third party, to assist in ACCC investigations.

11. In May 2014, the ACCC took court action against Coles Supermarkets Australia Pty Ltd (**Coles**) alleging it took advantage of its superior bargaining position by demanding money from suppliers that it was not lawfully entitled to, and was, in all the circumstances, unconscionable. The ACCC alleged Coles made threats of commercial consequences to suppliers if they did not agree to certain rebates resulting from changes to Coles' supply chain. The ACCC also alleged Coles, outside of its trading terms with its suppliers, pursued agreements to pay Coles for 'profit gaps' on supplier's goods, being the difference between the amount of profit it had wanted to make on those goods, and the amount it had actually achieved, as well as requiring retrospective payments for waste and payment for short or late deliveries where this was not provided for in Coles' agreements with Suppliers.

12. Although this was a case brought under the unfair trade practices provisions of the Australian Consumer Law and not the competition provisions of the CCA, it demonstrates

the challenges the ACCC faces in making RFIs, which are also present in competition cases.

13. One of the challenges in investigating the Coles case was obtaining supporting evidence from those affected by the conduct – Coles’ suppliers. Coles is the second largest supermarket chain in Australia. Many of the suppliers sold a significant proportion of their products through Coles. Suppliers were hesitant to come forward because they were concerned that if they complained to the ACCC, they would might lose their contracts with Coles and other major supermarkets, or receive less favourable trading terms with them.

14. To help overcome this challenge, the ACCC’s Chair put out a public call through the media to encourage suppliers to come forward voluntarily on a confidential basis through a single contact point. The information was collected, de-identified and formed the basis of the ACCC’s ‘reason to believe’ test to issue s155 Notices to Coles. This compelled Coles to produce information and documents. The notices were specifically drafted to ensure the most relevant conduct was identified, and to protect the identity of the suppliers who had come forward.

15. After receiving and analysing Coles’ response, the ACCC issued further s155 Notices to other suppliers, who were not part of the initial engagement strategy. These notices requested information and documents to verify the information that had been provided by Coles. In some cases suppliers also appeared before the ACCC to give evidence by answering the ACCC’s questions.

16. By issuing s155 Notices to suppliers that sought to corroborate the information already provided by Coles, the perception that the suppliers were actively or voluntarily working to damage Coles was reduced and subsequently so was the risk of retribution perceived by suppliers.

17. In December 2014, the Federal Court found, by consent, that Coles had engaged in unconscionable conduct, and was ordered to pay \$10 million in penalties, and refund more than \$12 million to Coles’ suppliers. Without issuing s155 Notices to third party suppliers, many of which were reluctant, we were unlikely to have achieved such a successful outcome.

3. Confidentiality in third party information – A case study - ACCC Dairy Inquiry

18. From time to time, the Treasurer, pursuant to section 95H of the CCA, may issue a notice directing the ACCC to hold an inquiry into a specified matter. When conducting such an inquiry, the ACCC can compel individuals to provide information and documents relevant to the inquiry by issuing a Notice under 95ZK of the CCA (**s95 Notice**).

19. Section 95 Notices provide a difference scope to s155 Notices and can only be issued to parties directly involved in the inquiry or a supplier of goods or services in relation to the inquiry, as defined by the inquiry’s terms of reference. In addition, the ACCC’s Chair must have a ‘reason to believe’ that a person is capable of giving information or producing documents relevant to the inquiry.

20. In 2016, the ACCC was directed to conduct an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry (**Dairy Inquiry**).

21. A challenge for the ACCC in the Dairy Inquiry was that it could not compel information from some third parties, such as industry research organisations, who did not directly participate in the dairy industry supply chain but held relevant information and data. The ACCC was unable to use s155 notices to overcome this challenge, as these can only be used where there is an allegation of a contravention of the CCA.

22. Under s95 Notices, an individual may refuse or fail to give information or produce a document on the grounds that the information or production of documents might tend to incriminate the individual or expose the individual to a penalty, which is in contrast to s155 Notices.

23. Each respondent to the s95 Notices that were issued for the Dairy Inquiry made confidentiality claims over specific aspects of their submissions. The ACCC can accept a claim of confidentiality from a party if it is satisfied that the disclosure of information would damage their competitive position, and the ACCC is not of the view that disclosure of the information is necessary in the public interest. In contrast to s155 Notices, where a party provides information to the ACCC in response to a notice, it is unable to place conditions on that information. Respondents are able to draw the ACCC's attention to information that they would like to claim confidentiality over. The ACCC treats confidential information in accordance with the law, and if required to disclose, notifies the party who provided that information.

4. The challenges of data in RFIs – Case study - ACCC v Informed Sources Pty Ltd & Ors [2015].

24. Competition investigations are invariably complex and often require the analysis of large quantities of data. This poses a challenge to competition regulators as large amounts of data can be very costly to deal with, both in the staffing costs associated with processing and analysing the data, and the costs associated with physically handling and storing the data. For example, large data sets may require specialist software or external advisers to assist in its interpretation.

25. In August 2014, the ACCC took court action against Informed Sources Australia Pty Ltd (IS) and several petrol retailers in Australia. IS offered a service whereby fuel retailers would provide pricing data to IS at frequent, regular intervals on a site-by-site basis. In return, those retailers could see the prices charged by other retailers at hundreds of sites around Australia together with various reports containing pricing information across particular regions.

26. The ACCC alleged that through the service operated by IS, petrol retailers were able to communicate with each other about their prices, and that these arrangements had the effect or likely effect of substantially lessening competition in markets for the retail supply of petrol in Melbourne.

27. During the investigation, the ACCC collected very large volumes of pricing data through s155 notices including the price of petrol at each site in Melbourne every 15 or 30 minutes over several years. This presented a significant challenge because the data set was so large that it could not be opened using standard office software, such as Excel. Therefore, the ACCC needed to utilise specialised software which meant that the analysis process was more time consuming and expensive.

28. Due to the size of the data files, a secure file transfer service was used to provide the data to external legal and economic advisers. However, data transfer could fail if there was not a stable enough internet connection. If the file transfer method was unsuccessful, encrypted USB drives were sent to the external domestic parties as required.

29. Transferring the data was especially challenging when dealing with international parties due to the increased possibility of unstable Internet connections. Posting USB drives was also less practical. These issues contributed to the higher cost in preparing the matter for litigation.

30. From the outset, the ACCC confined its analysis to one of Australia's cities (Melbourne), instead of multiple geographic locations. This significantly reduced the amount of data that needed to be analysed, while still being sufficient to demonstrate the ACCC case theory.

31. The ACCC also focused heavily on synthesising and explaining the data through graphs, charts and diagrams. This was essential for third parties associated with the matter, such as judges and economic experts, as they would otherwise be unable to draw conclusions from the data in its raw form.

32. In December 2015, the ACCC, IS and the petrol retailers resolved the proceedings. Each subscribing retailer agreed not to enter into or give effect to any price information exchange service unless the same information each receives is made available to consumers and third party organisations at the same time. IS agreed that it would not supply the information exchange service unless the pricing information it provides to the petrol retailers is made available to consumers for free and to third parties on reasonable commercial terms at the same time.

33. It may have been difficult for the ACCC to achieve this positive result without employing strategies to manage the large amounts of data, and to present that data in a way that allowed the competitive effects of the conduct to be more easily understood and interpreted.

34. As evidenced in the IS matter, in the age of big data, a challenge for regulators in analysing large datasets is sure to increase, and with that the risks of inadvertent disclosure of confidential information. Regulators need to remain mindful that company data is often sensitive, and in such large volumes, regulators may need to work outside of normal processes, such as relying on third parties to manage data effectively.