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| Guidelines on section 95ZN claims in price inquiries |
| **[DRAFT]** |
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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, or
* 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.

More general guidance about the ACCC’s handing of information can be found in the following publications:

* [*ACCC & AER information policy: collection and disclosure of information*](https://www.accc.gov.au/system/files/ACCC-AER%20Information%20Policy.pdf), June 2014
* [*The ACCC's accountability framework for investigations*](https://www.accc.gov.au/system/files/1553_Accountability%20Framework%20for%20Investigations_FA.pdf), April 2019.

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.

1. Introduction
   1. The ACCC is an independent Commonwealth statutory authority. The ACCC’s role is to enforce the CCA and a range of additional legislation, promoting competition and fair trading, and regulating national infrastructure, for the benefit of all Australians.
   2. One of the ACCC’s functions is to conduct price inquiries under Part VIIA of the CCA.[[1]](#footnote-1) When conducting price inquiries, the ACCC Chairperson may require a person to provide relevant information or documents under section 95ZK of the CCA. Information may also be provided via submissions, or at a formally convened hearing of the inquiry.
   3. These Guidelines set out how the ACCC assesses, under section 95ZN of the CCA, whether information given or made available to the ACCC under section 95ZK of the CCA, or via submissions, or in private at a formal hearing of the inquiry, will be disclosed.
2. Price inquiry legislative framework

**Price inquiries**

* 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. 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.
  2. Price inquiries enable the ACCC to develop an in-depth understanding of particular industries, including what competition or consumer problems may be occurring in that industry.
  3. Price inquiries, in combination with market studies that are self-initiated by the ACCC under section 28 of the CCA, also assist the ACCC in achieving its compliance objectives.[[2]](#footnote-2)

### Information gathering powers

* 1. The ACCC has a range of information gathering powers available to it 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. Under section 95ZK of the CCA, the Chairperson of the ACCC may, by notice in writing, require a person to give the ACCC specified information or documents. The Chairperson may do so if they have reason to believe that the person is capable of giving information or 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.[[3]](#footnote-3)
  3. Under sections 95R and 95S of the CCA, the ACCC may obtain 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.
  4. 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. However, section 95ZN still applies to the ACCC’s decision about whether to disclose that information.

### Disclosure of information

* 1. 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 via 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 their 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 person’s claim that disclosure would damage their competitive position is justified, and
* The ACCC is not of the opinion that disclosure of the information is necessary in the public interest.
  1. However, the ACCC can disclose the information in either of these circumstances:
* The ACCC is not satisfied that the claim is justified, or
* The ACCC is of the opinion that disclosure of the information is necessary in the public interest, whether or not it is satisfied that the claim is justified.
  1. The ACCC is not required to assess a proposed disclosure under section 95ZN if it decides (for other reasons) not to proceed with the disclosure.
  2. Where information is publicly available, the ACCC will base its disclosure on public sources and will not assess any claims under section 95ZN in relation to that information.
  3. Section 95ZN of the CCA does not apply in the following situations:
* Where a person has not made a claim that disclosure would damage their competitive position.
* Where information has been aggregated such that the disclosure will not reveal information about an individual party (for example, by cross-referencing with information held by another party or with other publicly available information).

**Example: Treatment of aggregated information**

The ACCC will consider, on a case-by-case basis, whether the disclosure of aggregated information involves the disclosure of individual information.

For example, a statement that “the two suppliers of product X supplied a combined volume of 1000 units of product X in 2018” would disclose information of each individual supplier, as each supplier could identify the information provided by the other supplier by subtracting its own information from the aggregated information.

However, a statement that “the three suppliers of product X supplied a combined volume of 1000 units of product X in 2018” would not disclose any information of an individual supplier, unless the volume of product X supplied by one or more of those three suppliers was otherwise publicly known, in which case this statement would also involve a disclosure of individual supplier information for the same reason as the statement in the paragraph above.

1. Assessing damage to a person’s competitive position
   1. The first element in the ACCC’s consideration of whether to disclose information is an assessment of a person’s claim that disclosure of the information would damage that person’s competitive position.
   2. This element of section 95ZN of the CCA establishes a targeted and specific test for making and assessing a claim. It is not satisfied merely by establishing that the information is confidential (commercially or otherwise), or 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 person, 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 person’s reputation, is not sufficient. Rather, this element of section 95ZN of the CCA is specifically directed at whether disclosure of the information would damage that person’s competitive position. Damage to a third party’s competitive position does not provide a basis for making a claim.
   3. In assessing whether a claim is justified, the ACCC will assess the impact that disclosing the information would have on the person’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 person would otherwise face or provide in the future in the absence of the disclosure, and
      * The disclosure would provide any other advantage to competitors seeking to compete against the person.
   4. Accordingly, the ACCC expects that the person who provided the information will direct their claims at these types of issues.
   5. The ACCC will inform a person where it is proposing to disclose particular items of information about that person. If that person wishes to make a claim that the disclosure of one or more of those items of information would damage their 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 person’s competitive position that would be caused by disclosure, and
      * Where reasonably possible, by relevant evidence supporting the claim for that item.
   6. Each claim is to 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.
   7. As a guide, the ACCC would be unlikely to consider that a claim is justified in the following cases:
      * The information is already publicly available, or can be inferred from an analysis of other information that is already publicly available,
      * The disclosure will not name the person, and the person will not otherwise be able to be identified by anyone else as the person to whom the information relates,
      * The disclosure would not reveal any information about:
        + - the person’s current or future competitive strategies, such as their approach to pricing or designing the non-price features of their product offering,
          - the person’s own assessment of the strengths and weaknesses of their own current or future competitive position,
          - the person’s financial position, or the identity of their customers or suppliers.
   8. Where the proposed disclosure would disclose information about each identifiable member of a class (for example, “the four largest suppliers of product X priced that product below $Y”), the ACCC is unlikely to consider that the disclosure would damage the competitive position of the individual members of that class.
   9. The ACCC will also take into account whether the disclosure would damage existing or future commercial relationships between the person and their suppliers or customers, in a way that would result in damage to the person’s competitive position.
2. Assessing public interest factors
   1. The second element in the ACCC’s consideration of whether to disclose the information is an assessment of whether disclosure is necessary in the public interest. As noted above, the ACCC may decide to disclose information where it is of the opinion that disclosure is necessary in the public interest, even if it accepts that the disclosure would damage the person’s competitive position.
   2. The ACCC will inform a person where it is proposing to disclose particular items of information about that person. If that person 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 why the disclosure is not necessary in the public interest, and
      * Where reasonably possible, by relevant evidence supporting the objection for that item.
   3. Again, each claim is to 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.
   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 judgment 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.[[4]](#footnote-4)
   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,
      * The disclosure would otherwise be likely to reduce information asymmetries in relevant markets, or
      * The relevant information explains the basis for the findings or recommendations made by the ACCC in its inquiry report.

1. The ACCC also has other functions under Part VIIA of the CCA, including price monitoring and price notification. [↑](#footnote-ref-1)
2. *Enforcement and Compliance Policy and Priorities*, ACCC, 2019. [↑](#footnote-ref-2)
3. One penalty unit is currently $210, and will increase on 1 July 2020. [↑](#footnote-ref-3)
4. See, for example, *A v Corruption & Crime Commissioner* [2013] WASCA 288. [↑](#footnote-ref-4)