

## CHAPTER 13: USE AND SCOPE OF SECTION 155

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### Background

Section 155 of the Act provides the ACCC with powers to obtain information, documents and evidence in the course of investigating possible contraventions of the Act and for use in proceedings under the Act. Section 155 has been included in the Act since its inception in 1974 and is consistent with the need for the enforcement of the Act to be supported by the availability of strong investigative powers.

Section 155(1) provides that where the ACCC, the chairperson or the deputy chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence in relation to a matter that may involve a contravention of the Act, that person may be required to provide such information, documents or evidence. A member of the ACCC may give notice in writing requiring the person:

- '(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time frame and in the manner specified in the notice, any such information;
- (b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or
- (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.'

Section 155(2) provides that if the ACCC, the chairperson or the deputy chairperson has reason to believe that a person has engaged in or is engaging in conduct that constitutes, or may constitute, a contravention of the Act, a commissioner of the ACCC may in writing authorise a member of the staff of the ACCC to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents. The power may only be exercised for the purpose of ascertaining by the examination of the documents in the possession or control of the person whether the person has engaged in or is engaging in such conduct.

Under section 155(3) the ACCC may require the evidence referred to in paragraph (1)(c) of the section to be given on oath or affirmation and under section 155(6) the member of staff entering the premises under subsection (2) must be provided by the occupier or person in charge of the premises with all reasonable facilities for the effective exercise of his or her powers under that subsection.

It is an offence for a person not to comply with a notice under section 155(1) to the extent that he or she is capable of complying with it. It is also an offence to obstruct or hinder a member of staff acting pursuant to subsection (2) or to fail to render assistance under subsection (6).

A person is not excused from furnishing information or producing or permitting inspection of a document on the ground that the information or document may tend to incriminate the person. The evidence is not admissible in criminal proceedings other than proceedings under section 155 or, in the case of a corporation, proceedings under the Act.

### Use of section 155

Figures produced by the ACCC (see Table 1) indicate that the use of section 155 notices has increased over the last four years. In 1998-99, there were 84 notices served under section 155(1) and no authorities were given under section 155(2). In 2001-02, there were 438 notices served under section 155(1) and eight authorities given under section 155(2). However, those figures treat each section 155(1)(a) and (1)(b) notice as a separate notice when in most cases only one notice was served which included a request for documents and information under both (1)(a) and (1)(b). Thus, although the total number of section 155(1)(a) and (1)(b) notices for 2001-02 was 343, in fact the actual number of notices issued (which in many cases contained a section 155(1)(a) and (1)(b) request) was 196.

The ACCC attributed the increased use of section 155 to an increased workload driven by increased complaints and the reluctance of parties to provide information voluntarily. The introduction of the new privacy legislation, in particular, has led some parties to believe that they cannot provide information requested unless section 155 is used.

The ACCC has used its powers under section 155(2) on 16 occasions only and, in determining whether to use those powers, considers whether it would be sufficient to use its section 155(1) powers. It says that it will generally only issue an authority to enter premises, inspect and copy material under section 155(2) where it believes that documents may be destroyed, where

documents are held over a number of sites and it is necessary to act simultaneously or where there has been a failure to comply with voluntary requests or a section 155(1) notice. The ACCC has also used its section 155(2) powers where it would be more disruptive to require the production of documents or objects.

Table 1: Use of section 155 notices

Year	Section 155(1)(a) & (b)	Section 155(1)(c)	Section 155(2)
1998-99	51	33	N/A
1999-00	129	47	N/A
2000-01	189	88	1
2001-02	343*	95	8

\* From 1998-99 to 2000-01 the number of notices were calculated on the basis of one notice per alleged conduct. In 2001-02 notices issued under more than one conduct are counted once.

Source: ACCC

## International context

The position regarding search powers overseas is varied.

### European Union

Consistently with its extensive administrative powers, the European Commission has power to demand written information, enter premises and demand company information ('dawn raids') and seek oral explanations, all without the need to obtain a warrant. The European Commission's decision to conduct inspections can be reviewed by the Court of Justice. Recently the European Commission's powers to enter have been extended to include non-business premises.

### United States

In the United States, the DoJ and the FTC may use court enforceable subpoenas to obtain the production of documents and the testimony of witnesses. Subpoenas are available for on-site access to documents. The DoJ, which

enforces the criminal provisions of the anti-trust law, only enters premises without notice in criminal investigations and pursuant to a search warrant.

## Canada

In Canada, the Competition Bureau generally obtains warrants from a court to search for, and seize, documents, but may do so without a warrant in circumstances where delay might result in the evidence being lost.

## United Kingdom

In the United Kingdom, the Office of Fair Trading has extensive powers both under the *Competition Act 1998* and the new *Enterprise Act 2002*. It may enter premises without a warrant (in most cases having given written notice, although notice is not required in all cases), require documents to be produced and take copies and ask for explanations of documents. It may also seek a warrant to enter (with force if necessary) and seize copies of the actual documents. The Office of Fair Trading has also been granted extensive surveillance powers under the *Regulation of Investigation Powers Act 2000*. Some surveillance is at the agency's own discretion, whereas more intrusive surveillance, for example, wire taps is only with a warrant.

The Canadian and United Kingdom laws expressly preserve legal professional privilege.

## Analysis

A common complaint in the submissions to the Committee relates to the cost of compliance with a section 155(1) notice where the information or documents sought are extensive. However, the purpose of such a notice is investigative and it is inevitable that compliance will, in many cases, involve cost. The cost, however, should ordinarily be regarded as an incident of carrying on business activities. The Committee does not favour a suggestion that costs be recoverable from the ACCC, even where the recipient of the notice is a person other than the person thought to be involved in a contravention of the Act. The ACCC needs broad investigative powers for the purpose of detecting and prosecuting contraventions of the Act and the powers that it is given under section 155(1) are, in the Committee's view, not excessive. They are admittedly extensive. The ACCC need not, for example, satisfy itself that the information which it seeks will demonstrate that the Act has been contravened, but the detection and prosecution of breaches of the Act is in the interests of both business and consumers. Consistently with the objectives of the Act and the

powers of other regulators, such as ASIC, it is important that the power given to the ACCC under section 155(1) to require the production of information, if necessary, on a forthwith basis, and the power to interview persons continue without further restriction.

That does not mean that the ACCC should be unconcerned about the effect upon the recipient of a notice under section 155(1). The ACCC has issued guidelines for the use of its section 155 powers. These guidelines point out that the power to issue a notice should be exercised in good faith and that the notice should not be unreasonably burdensome.<sup>1</sup> However, the mere fact that a notice may impose a substantial burden does not invalidate it, provided that it is reasonable to seek the information or documents sought.<sup>2</sup> In practice, the ACCC will entertain an application for an extension of time for compliance with a notice if the time allotted proves too short. The ACCC maintains that it adheres to its guidelines. The Committee is in no position to reach a contrary conclusion. However, adherence to the guidelines is not established by pointing out, as the ACCC does, that there have been few challenges to the use of its powers. A challenge would be expensive and time-consuming and, more importantly, might give the appearance that there was something to hide. The view was put to the Committee that a person with grounds for doing so will be reluctant to mount a challenge for these reasons. Complaints about the failure to observe the guidelines should be able to be dealt with by the Associate Commissioner of Complaints and the consultative committee as recommended in Chapter 11.

Section 25 of the Act allows the ACCC to delegate to a commissioner of the ACCC the function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice. The Committee considers it would be appropriate if this function were able to be delegated to senior staff of the ACCC. Commissioners would not then be directly involved in the detail of particular investigations once approval had been given to proceed under section 155(1)(c). The delegation of this function would be consistent with the delegation of similar functions by other agencies including ASIC.<sup>3</sup>

A search warrant is issued by a judicial officer if the officer is satisfied by information on oath, supplied by the person applying for the warrant, that there are reasonable grounds for its issue.<sup>4</sup> An authorisation under

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1 ACCC October 2000, *Section 155 of the Trade Practices Act*, p. 9.

2 *Pyneboard Pty Ltd v. Trade Practices Commission and Bannerman* (1982) Vol. 39 Australian Law Reports, p. 565.

3 Section 102 of the *ASIC Act 2001*.

4 See, for example, section 3E of the *Crimes Act 1914* (Commonwealth).

section 155(2) is given if the ACCC, the chairperson or the deputy chairperson has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of the Act. Whilst the ACCC has set up a procedure to ensure that the requirements of the Act are met before an authorisation is given, no assessment is made independently of the ACCC. This is not unique. The Commissioner of Taxation has power under section 263 of the *Income Tax Assessment Act 1936* to authorise an officer to enter premises and inspect documents and take extracts or copies. The Director of Australian Transaction Reports and Analysis Centre has similar powers to enter premises without a warrant.

Under the *ASIC Act 2001*, ASIC has powers similar to those under section 155 of the Act which may be exercised in the performance of its functions or to ensure compliance with the corporations legislation or in relation to a suspected contravention. ASIC can require production of specified books at a specified place and time (including forthwith if required) relating to a financial body or relating to the affairs of another such body. ASIC is also able to enter premises without a warrant to inspect those books required to be kept by the corporations legislation. If a party fails to comply with a notice to produce, ASIC may apply for a warrant to enter premises to search for such books. ASIC also uses search warrants pursuant to section 3E of the *Commonwealth Crimes Act 1914* if it has concerns about evidence being destroyed or for the purposes of criminal investigations.

It was submitted to the Committee that the power to enter and inspect under section 155(2) should be recast so that it is exercisable only under a warrant issued by a judicial officer, such as a Federal Court Judge or Magistrate. The Committee sees merit in this suggestion. Having regard to the present internal procedures of the ACCC for the granting of an authorisation, such a requirement should impose no more onerous a burden on the ACCC and would not inhibit its ability to gain access to documents speedily and effectively. It would ensure that there was no question of lack of impartiality or unreasonableness in relation to the process. This would, the Committee thinks, be of benefit generally and to the ACCC in particular.

The powers of the ACCC under section 155(2) of the Act are considerable but less extensive than the powers given by a search warrant issued under section 3E of the *Commonwealth Crimes Act 1914*. There is no power to effect a forcible entry as with a search warrant, but it appears that the practice is to seek entry in the presence of members of the Australian Federal Police so that in most cases there is no practical difference. There is no power to seize documents, but the power to inspect them and make copies or take extracts is little different in scope, particularly in the case of data which is electronically

stored. To clarify the position, the Committee proposes that the ACCC's powers be extended to allow it to search for and seize documents. The elements of these powers are generally well known. Providing the ACCC with a search and seizure power, which is subject to judicial approval, would be consistent with the search and seizure powers provided by the competition enforcement regimes of New Zealand, the United Kingdom, Canada and the United States. Although the regimes in the United Kingdom and Canada also allow their agencies to enter and take copies of documents without a warrant, the Committee considers, on balance, that it would be preferable if the ACCC only had power to enter premises with a warrant.

Whilst it is outside its terms of reference, the Committee would point out that it is desirable that there be some consistency in the powers of different regulatory agencies in this country to gather evidence by the use of invasive procedures such as entry without a warrant.

In addition to clarifying the powers available under section 155(2) notices, consideration might also be given to changing the application of the section. As is the case already with notifications under section 93, it may be appropriate to extend the availability of the ACCC's investigative powers to circumstances where the ACCC is considering the revocation of an authorisation under sections 91B and 91C. The now redundant section 155(4) should be repealed.

### **Legal professional privilege**

In *ACCC v. Daniels Corporation International*<sup>5</sup> the Full Court of the Federal Court held that the ACCC had power under section 155 to compel the production of documents and the provision of information covered by legal professional privilege. That decision was reversed on appeal to the High Court.<sup>6</sup> It was submitted to the Committee that, notwithstanding the High Court decision, the Act should specifically provide that the section does not override the privilege and so make explicit the intention of the legislature. The Committee agrees with this submission.

Legal professional privilege applies to confidential communications between a client and the client's legal adviser for the dominant purpose of giving or receiving legal advice or for use in existing or anticipated litigation. It does not

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<sup>5</sup> (2001) Vol. 182 Australian Law Reports, p. 114.

<sup>6</sup> *Daniels Corporation International v. ACCC* [2002] High Court of Australia, 49<sup>th</sup> decision.

attach to legal advice to facilitate the commission of a crime, fraud or civil offence, whether or not the legal adviser knows of that purpose.

The privilege is in the public interest because it facilitates the obtaining of legal advice and promotes the observance of the law. This is particularly desirable in the area of competition law, which is often complex. Corporations and individuals should not be discouraged from seeking legal advice for fear that their communications might subsequently be used against them by the ACCC. Nor should clients be inhibited in giving instructions to their lawyer in order to obtain legal advice or be confined to oral communications. The Committee believes that legal professional privilege should be preserved under the Act.

## Conclusions

- The ACCC's investigatory powers are essential for the proper administration of the Act. The powers provided to the ACCC under both section 155(1) and section 155(2) are integral to its enforcement function.
- The function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice should be delegable to senior staff of the ACCC. Commissioners would not then be directly involved in a particular investigation once approval had been given to proceed under section 155(1)(c).
- It is essential for the ACCC to keep in mind the potential for requests made for information, whether they are made informally or under section 155(1), to impose real financial and other costs on the businesses concerned. The need for such requests and the scope of the information sought should be carefully considered with this in mind.
- The future operation of section 155 would be improved by amendments to provide for the issuing of a warrant under section 155(2) by a Federal Court Judge or Magistrate.
- Other changes to the section should be considered to clarify the nature of the ACCC's powers under a section 155(2) notice.
- Taken together these changes to the operation of section 155(2) should help to remove the concerns of business about the use of section 155(2) powers whilst not inhibiting effective investigation by the ACCC.



- Legal professional privilege should be specifically preserved under the Act to ensure that corporations and individuals are not discouraged from seeking legal advice or are inhibited in giving instructions to their lawyers.

### ***Recommendations***

- 13.1 The ACCC should continue to give careful consideration to the financial implications of requests for information that are made to businesses consistent with the ACCC's guidelines on this matter.
- 13.2 The function of conducting an examination of a person who is in receipt of a section 155(1)(c) notice should be delegable to senior staff of the ACCC.
- 13.3 Section 155(2) of the Act, which provides for the ACCC to enter premises and inspect documents, should be amended to:
  - 13.3.1 require the ACCC to seek a warrant from a Federal Court Judge or Magistrate for the exercise of these powers; and
  - 13.3.2 provide the ACCC with the power to search for and seize information.
- 13.4 Section 155 should also be amended to:
  - 13.4.1 extend the availability of the ACCC's investigative powers to circumstances where the ACCC is considering the revocation of an authorisation under sections 91B and 91C; and
  - 13.4.2 repeal the redundant section 155(4).
- 13.5 It should be made explicit in the Act that section 155 does not require the production of documents to which legal professional privilege attaches.

