



# ACCC INVESTIGATIONS

**A SHORT GUIDE ON WHAT TO DO  
AND HOW TO PREPARE**

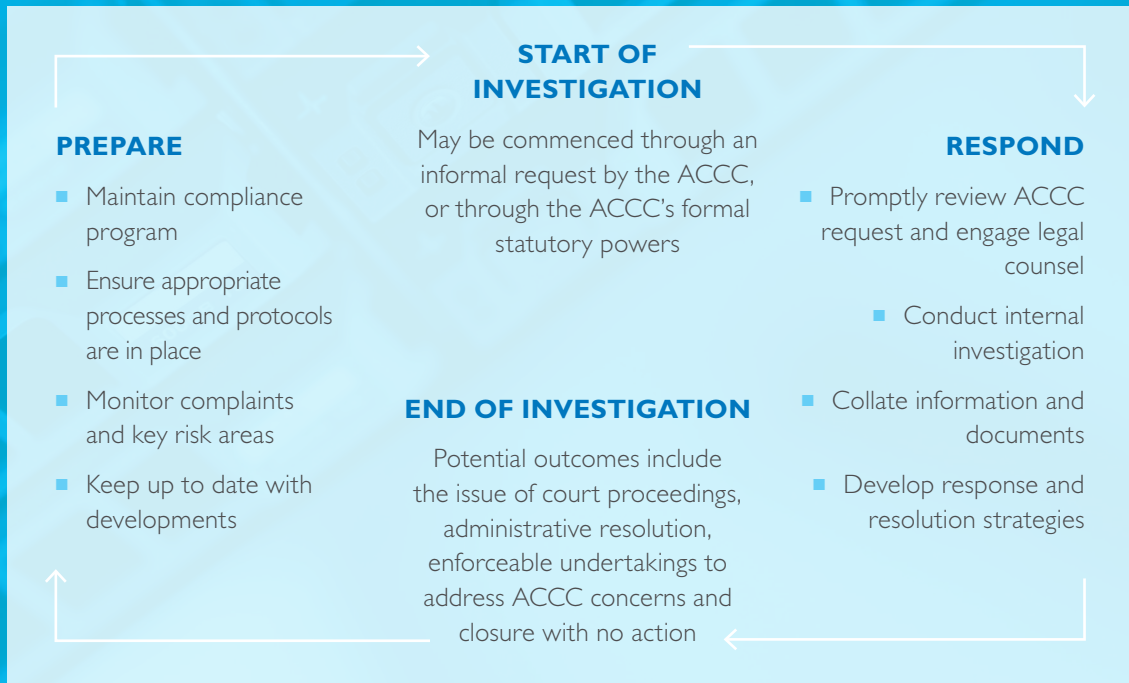
August 2016

The Australian Competition and Consumer Commission (ACCC) has powers to investigate potential breaches of competition and consumer law in Australia – including cartel conduct, anti-competitive arrangements, misuse of market power, false or misleading representations and unconscionable conduct.

The consequences of an ACCC investigation can be severe. Responding to investigations can also be costly, disruptive and time consuming. It is therefore important that businesses:

- know what to do in the event of an ACCC investigation and about common issues that arise during an investigation; and
- take steps to prepare for an ACCC investigation.

We have extensive experience in assisting businesses subject to ACCC investigations and can provide help at each step of the process.



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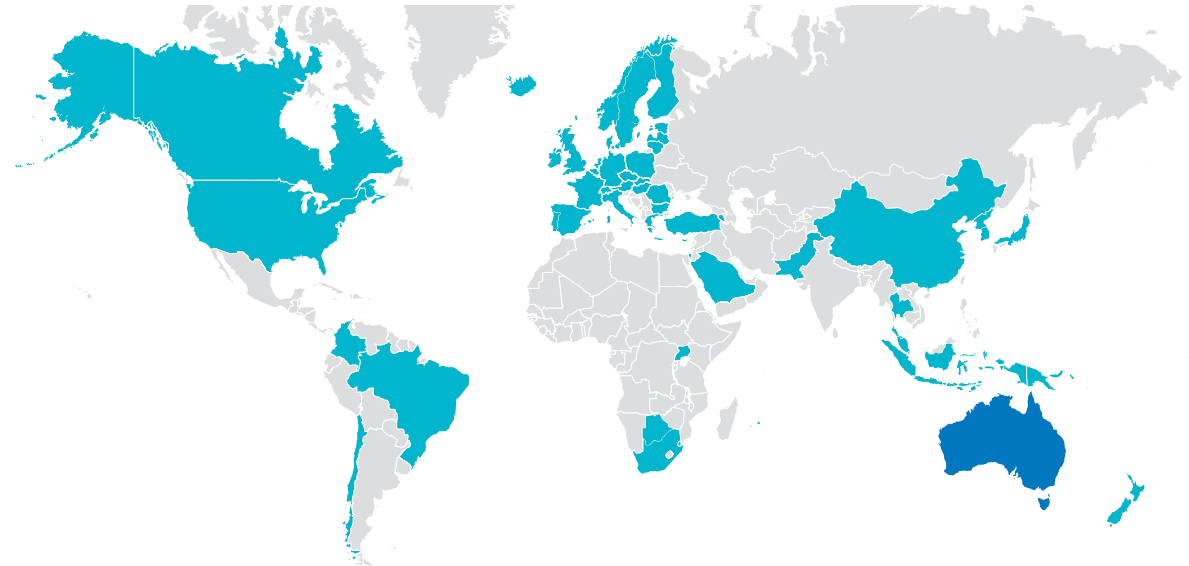
## WHAT PROMPTS AN ACCC INVESTIGATION?

The ACCC may become aware of potential breaches of competition and consumer law as a result of:

- complaints (for example, by your customers or competitors)
- media coverage
- the ACCC's own monitoring and intelligence
- in the case of cartels, applications for immunity
- information from other agencies
- the ACCC's cooperation with international regulators.

The ACCC has reported that, in the first three months of 2016, it:

- Received over **88,000** contacts (phone calls, emails and letters) through its contact centre, which is the ACCC's initial contact point for enquires and complaints on competition and consumer issues
- Commenced:
  - **112** initial investigations (the first stage of its detailed complaint assessment)
  - **52** in-depth investigations



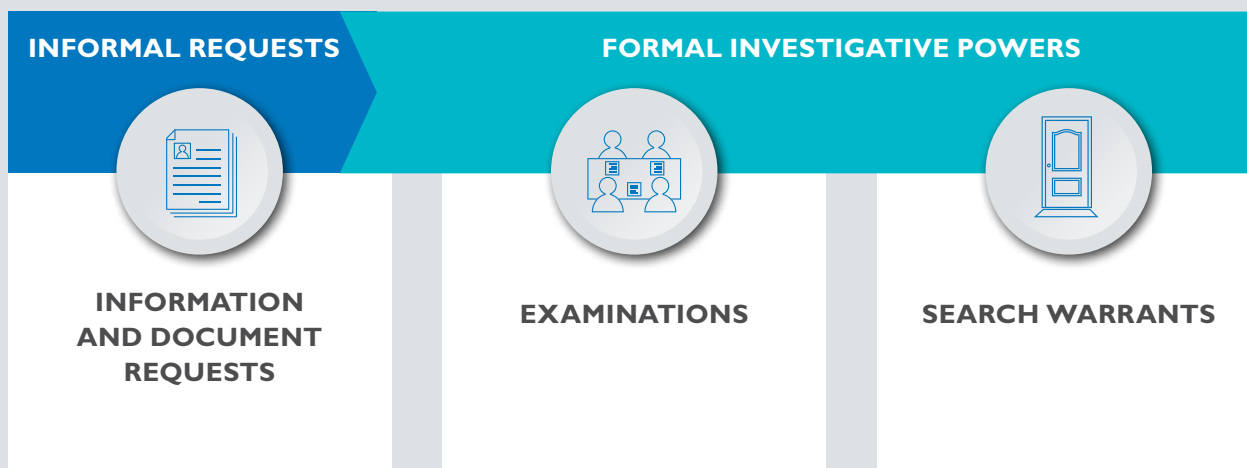
**In 2014-15 the ACCC engaged with over 150 agencies in the countries and areas highlighted above.**

*(Source: ACCC and AER Annual Report 2014-15)*

An ACCC investigation may be commenced:

- informally – through a letter, email or phone call requesting that you provide information or documents to the ACCC voluntarily
- formally – through the issue of a notice under the ACCC's coercive section 155 powers, which require you to provide information/documents or attend an ACCC examination, or (in rare cases) through the execution of a search warrant – a 'dawn raid'.

Frequently an informal request can turn into a formal investigation.



**THE ACCC HAS REPORTED THAT IN 2014-15 IT COMPLETED:**

- **40** in-depth investigations of **competition** matters
- **80** in-depth investigations of **consumer law** matters



ACCC  
INVESTIGATIVE  
TOOLS



## KEY STEPS IN RESPONDING TO AN INVESTIGATION



### ACCC REQUESTS FOR INFORMATION AND DOCUMENTS

If a company receives a request to provide information or documents to the ACCC, the request should be reviewed promptly and appropriate people in the company should be alerted. For example, this may be the Chief Compliance Officer or General Counsel. Promptly reviewing an ACCC request is important so that the company can start an internal investigation into the issues raised by the ACCC. Timing is particularly important if the ACCC's investigation relates to an alleged cartel, as the ACCC has an immunity policy for cartel conduct that only applies to the first person to apply and satisfy conditions for immunity.

An internal investigation may determine whether there has been a breach or possible breach, or may find that there is no evidence of a breach. This will help to inform the strategy for responding to the ACCC investigation – such as whether to apply for immunity (in the case of a cartel investigation) and how the company responds to, and co-operates with, the ACCC. It will also assist in ensuring the accuracy of the response to the ACCC.

A critical issue to consider early in the investigation process is the strategy for claiming privilege with respect to the internal investigation and process for responding to the ACCC's request, and whether in-house counsel are in a position to make such a claim.

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 12 months' imprisonment.

## TIPS FOR RESPONDING TO A REQUEST FOR INFORMATION OR DOCUMENTS FROM THE ACCC

### FIRST 48 HOURS AFTER RECEIVING REQUEST

Review the ACCC's request and engage legal counsel

- Check that the request is from the ACCC. The ACCC has recently issued a **warning** for businesses to watch out for scam emails that claim to be from the ACCC.
- Seek legal advice.
- Consider what the request relates to. Is it an alleged breach of competition or consumer law by the company, or does it relate to an investigation being conducted by the ACCC in which the company is not alleged to have breached the law? If the request relates to a possible cartel, immediate consideration will need to be given to the ACCC's immunity policy.
- Consider whether the request is formal (referring to the ACCC's section 155 powers) or informal. In many cases, an informal request should be treated with similar seriousness to a formal request. However, an assessment of whether a request is formal or informal can impact on the strategy for responding to a request and the degree of flexibility in terms of matters such as time.
- Consider what is being requested, and whether any clarification of what is requested is required. For example, is any aspect of the request unclear or will it require the production of an unreasonable amount of material?
- Check what timeframe the ACCC has provided for a response and whether the timeframe will be practicable. If not, a request for extension of time should be lodged.

Commence internal investigation

- The nature and extent of an internal investigation will depend on the details of the ACCC's request. However, in general, it may involve:
  - Identifying the staff who will need to be involved and resources that will be needed.
  - Determining who will conduct the investigation (in-house or external legal advisers).
  - Issuing document retention notices to relevant staff to ensure that relevant documents are not destroyed.
- Consider strategy for claiming privilege over internal investigation.
- If the company operates in multiple jurisdictions, consider whether the investigation may have implications beyond Australia.

Conduct internal investigation

- Interview relevant staff. In some cases, such as cartel investigations, it may also be necessary to consider whether any individuals involved will require separate legal representation. This should be monitored throughout an investigation.
- Collect, search and review electronic and hard copy documents. Ensure that a record of search terms and sources used is kept.

Develop response and resolution strategies

- Prepare a response to the ACCC and develop strategy for engaging with the ACCC and resolving the matter.

Respond to ACCC

- Check that documents containing information subject to legal professional privilege are not inadvertently being provided to the ACCC.
- Identify commercially sensitive or confidential information. Note that confidentiality is not a valid reason to refuse to provide information to the ACCC.



## ACCC EXAMINATIONS

The ACCC can also conduct compulsory examinations of any person who it reasonably believes is capable of providing evidence in relation to a suspected breach of competition or consumer law. A person who receives such a notice (called a 'section 155(1)(c) notice') will be required to attend a specified location, usually an ACCC office, on a particular day to answer questions on oath or affirmation.

### TIPS FOR INDIVIDUALS REQUIRED TO ATTEND AN EXAMINATION

Prepare for examination	This may include preparing a detailed chronology of events relevant to the matter set out in the ACCC's notice (including the examinee's role in those events) and reviewing relevant documents produced to the ACCC by the company that the examinee wrote or had access to.
Have a legal adviser attend the examination	The lawyer may object to irrelevant questions, assist to protect information subject to legal professional privilege, request short adjournments, and re-examine the examinee at the end of the examination to clarify answers provided earlier in the examination.
Take time to read documents and consider questions	An examinee is entitled to review documents relevant to questions in the examination and to carefully consider answers before providing them.
Ask for clarification and qualify answers	<p>If an examinee does not understand a question, the examiner may be asked for more detail or clarification. If a question is still confusing, the answer should be qualified by what the examinee understands the question to mean.</p> <p>If an examinee does not have knowledge of matters asked about, this should be made clear in the response. An examinee should not guess answers or offer opinions or conclusions and should limit answers to the information required to answer the specific question asked.</p>
Ask for, and review, a copy of the transcript of the examination	Check the transcript of the examination taken by the ACCC against the examinee's own recollection and for transcription errors, and consider whether there is any supplementary information or corrections that should be put to the ACCC.

The ACCC has reported that in 2014-15 it issued **303** notices under section 155, including **95** notices requiring the recipient to attend an examination.



## ACCC SEARCH WARRANTS – ‘DAWN RAIDS’

A ‘dawn raid’ is an unannounced visit by the ACCC (and sometimes the Australian Federal Police), usually to a company’s head office or other premises but possibly also to employees’ homes. The ACCC has powers to enter and search premises and seize materials where it has reasonable grounds to believe that there is evidentiary material on the premises that is relevant to a breach or possible breach of the Competition and Consumer Act. The ACCC must obtain a search warrant prior to entering premises (or obtain consent from the company).

We recommend that companies have guidelines in place so that staff know what to do and what not to do if the ACCC arrives at the company’s premises.

Failure to comply with a warrant is a serious offence. Refusing to answer questions or to provide reasonable facilities and assistance in relation to the warrant is punishable by a fine of \$5,400.

## START OF SEARCH

TIPS FOR FRONT-OFFICE STAFF IF THE ACCC EXECUTES A SEARCH WARRANT	
Check (and take a copy of) the ACCC’s search warrant and ACCC inspector’s identity card	<ul style="list-style-type: none"> <li>■ Ask to see the search warrant and take a copy.</li> <li>■ Ask to see the ACCC inspector’s identity card and take a copy of that identification. If the inspector fails to produce an identity card upon request, you may refuse entry. You should also ask to see the identification of all persons assisting the inspector.</li> </ul>
Do not obstruct ACCC entry onto the premises or impede the search	<ul style="list-style-type: none"> <li>■ Ask the ACCC officers to wait in a meeting room until a senior manager or lawyer of the company arrives. If the ACCC officers refuse to wait, permit them to enter, but make a note of why they refused to wait.</li> <li>■ Remain calm and courteous.</li> </ul>
Immediately call allocated senior managers and lawyers	<ul style="list-style-type: none"> <li>■ Inform senior managers and lawyers of:               <ul style="list-style-type: none"> <li>– the ACCC’s presence;</li> <li>– the contents of the search warrant – A copy of the search warrant should also be provided to the lawyers so that they can determine whether the search warrant is valid and advise on the scope of the permitted search and how the company should comply with the warrant; and</li> <li>– the number of ACCC officers present, so that they can arrange for sufficient company representatives to be present to monitor each ACCC officer’s search.</li> </ul> </li> </ul>





## TIPS FOR MONITORING A SEARCH

<p>Monitor the ACCC's search</p>	<p>As long as it does not impede the search:</p> <ul style="list-style-type: none"> <li>■ Accompany each ACCC officer at all times while they are on the company's premises and take notes. Carefully observe their activities and what they are saying to company personnel and each other. Note the locations searched and the time spent in each location, details of what was searched in each location, search criteria used for electronic searches, any material of particular interest to officers and the questions asked of staff and answers given. These observations may be helpful later in attempting to determine the scope of the ACCC's investigation.</li> <li>■ Prepare a list of all documents viewed, copied or seized by each ACCC officer.</li> <li>■ Try to ensure that only material covered by the warrant is taken in the search, and obtain receipts and copies of all hard copy and electronic documents seized by the ACCC.</li> </ul>
<p>Assist the ACCC</p>	<ul style="list-style-type: none"> <li>■ Provide the ACCC officers with all reasonable facilities and assistance. This might include unlocking cupboards, providing photocopying and printing facilities, making meeting rooms available to ACCC officers and providing IT support (including providing administrator access rights or passwords and/or temporarily blocking individual email accounts).</li> <li>■ Answer questions asked by the officers, but keep answers short, factual and accurate. Only answer the question if it relates to the search warrant and do not volunteer extra information that has not been requested. Make a note of any questions asked by the officers and the answers given.</li> <li>■ Upon request, produce evidential material to which the warrant relates. However, do not volunteer documents and do not provide any material that is outside the scope of the warrant. Further, do not consent to the search of an area or documents that are not identified in the search warrant.</li> <li>■ If offices, workstations, desks or filing cabinets are sealed by inspectors overnight, all personnel (including security and cleaning staff) must be instructed not to breach the seal.</li> </ul>
<p>Issue an internal communication about document retention, and do not destroy or hide documents or files</p>	<ul style="list-style-type: none"> <li>■ The company should issue an internal communication advising all personnel involved in the investigation that no documents relating to the investigation should be destroyed. It may also be necessary to place holds on routine destruction of documents or files and/or have IT put an immediate block on the deletion of electronic records, including emails.</li> </ul>

## TIPS FOR MONITORING A SEARCH

<p>Do not give ACCC officers documents subject to legal professional privilege</p>	<ul style="list-style-type: none"> <li>■ The company is not required to produce documents that are subject to legal professional privilege. Documents that are privileged should be put in a secure container and given to the company's lawyer.</li> <li>■ If it is not possible to verify whether documents are privileged but the company considers that they may be:             <ul style="list-style-type: none"> <li>– expressly reserve the company's right to continue to claim privilege; and</li> <li>– take a copy or make a note of such documents and request that the documents be stored separately and not reviewed by the ACCC until the issue of privilege is resolved.</li> </ul> </li> </ul>
<p>Consider potential for searches at other offices</p>	<ul style="list-style-type: none"> <li>■ If the company has other offices in Australia or operates in multiple jurisdictions, consider whether the raid may have implications elsewhere. The ACCC's investigation may involve co-ordinated dawn raids on multiple sites across Australia so consider checking on or sending staff to other locations that the ACCC is likely to simultaneously search (for example, the CEO's home, a factory or warehouse or retail stores). Also consider the likelihood of raids by competition regulators in other jurisdictions in which the company has offices or operations.</li> </ul>

## AFTER SEARCH



<p>Conduct a review meeting immediately after search</p>	<ul style="list-style-type: none"> <li>■ Consider the nature of the investigation, the materials the ACCC copied or seized, methods for dealing with confidential or privileged materials and the company's next steps in relation to the ACCC's investigation. These next steps may include conducting an immediate internal investigation (see tips under 'ACCC requests for information and documents' regarding internal investigations), so that the company is best placed to decide how to approach the remainder of the ACCC's investigation and develop a strategy to resolve the matter.</li> </ul>
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## SUMMARY OF KEY STEPS IN RESPONDING TO AN INVESTIGATION





# POTENTIAL OUTCOMES OF AN INVESTIGATION

If an ACCC investigation finds a breach or potential breach of competition and consumer law, the ACCC has a range of potential enforcement options. These include:

**Administrative resolutions**, which may involve the company agreeing to stop certain conduct and provide compensation to people who have suffered detriment.

**Enforceable undertakings** – The ACCC has the power to accept formal administrative undertakings, which may be enforced in court if a person fails to comply with the undertaking. Such undertakings are published by the ACCC, and often include an acknowledgement of breach, and a commitment to stop the conduct and remedy the harm caused.

**Infringement notices** – In some cases, the ACCC may issue an infringement notice (specifying the penalty payable for a breach) as an alternative to taking proceedings if it has grounds to believe that a person has breached particular provisions of the Australian Consumer Law.

**Court proceedings**, which could lead to:

- pecuniary penalties (and prison sentences in the case of cartel conduct)
- orders for damages and compensation
- orders disqualifying individuals from managing corporations for a specified period
- an order to implement a compliance program
- injunctions to stop certain conduct or require a person to take certain actions
- declarations of a breach of the relevant law
- findings of fact that may be used as prima facie evidence in follow-on proceedings for damages (e.g. class actions)
- community service orders
- adverse publicity and corrective advertising orders
- in the case of anti-competitive mergers, divestiture orders.

POTENTIAL PENALTIES FOR:	
A cartel or other anti-competitive conduct	
An individual	\$500,000  For serious cartel conduct – 10 years in jail
A company	The greater of: <ul style="list-style-type: none"> <li>■ \$10 million</li> <li>■ three times the value of the benefit obtained</li> <li>■ 10% of annual turnover of the body corporate (and any related body corporate)</li> </ul>
A false or misleading representation or unconscionable conduct	
An individual	\$220,000
A company	\$1.1 million



## HOW WE CAN HELP YOU PREPARE

Although ACCC investigations are often unexpected, there are steps that we can help businesses take to prepare for an investigation. They include:

- ✓ **Maintain an internal compliance program** – An effective compliance program can help to pick up potential issues and therefore reduce the risk of an ACCC investigation. Compliance training (which is tailored to the business and relevant staff) should be provided regularly, and compliance materials kept up to date. Part of the program may also include regular reminders to staff of competition and consumer law risks, and a requirement for certification by individuals that they have received compliance training and complied with relevant competition and consumer law policies and procedures.
- ✓ **Review internal processes, protocols and record keeping** – Ensuring that the company is in a position to quickly and efficiently produce relevant information and documents in response to an ACCC investigation can help to reduce the cost and disruptiveness of an investigation. Examples of areas that can be considered include:
  - *IT and document retention* – how easy will it be to access necessary records (such as archived material and back up electronic files) if there is an investigation?
  - *Employment agreements and policies* – what rights does the company have to access employee emails and phone records in the event of an investigation?
  - *Reporting lines and process* – does the company have a clear process and response strategy so it can respond quickly and effectively to an investigation?
  - *Legal privilege* – will it be easy to identify and separate documents subject to legal privilege in the event of an investigation?
  - *Dawn raids* – are there guidelines in place so that employees know what to do and who to call if the ACCC conducts a dawn raid?
- ✓ **Monitor complaints** – In the area of consumer law, frequent complaints about a particular issue could signal potential issues under the Australian Consumer Law. Similarly, complaints about particular business practices or agreements could indicate competition law risk.
- ✓ **Identify and monitor risk areas** – It is important to have processes in place to ensure that risks are identified and legal advice is sought when appropriate. Examples of what could be put in place to monitor risk areas include:
  - Protocols for attendance at trade association events or other functions at which competitors may be present.
  - Processes for legal review of proposed agreements (including JV, distribution and reseller agreements), and proposed advertisements and other marketing collateral before publication.
  - Compliance committees and 'hotlines' for employees to raise questions and concerns.
  - Regular audits of high risk areas to identify potential issues.
- ✓ **Keep up with developments** – Understanding ACCC focus areas, and relevant developments in the law through cases or legislative change, can help to focus compliance efforts.



## OTHER DLA PIPER RESOURCES



DLA Piper has a **Rapid Response** hotline and app, giving you immediate access to our crisis management lawyers and communications specialists across the globe. Visit [www.dlapiperrapidresponse.com](http://www.dlapiperrapidresponse.com) for more information on our Rapid Response service.

DLA Piper's [Legal Professional Privilege Global Guide](#) provides guidance on the application and protection of legal professional privilege.



DLA Piper's [Whistleblowing Guide](#) provides an overview of whistleblower protection regimes across the globe.

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