

29 November 2019

Mr Parnos Munyard
Advocacy and Law Reform
Australian Competition and Consumer Commission

By email: parnos.munyard@acc.gov.au

Dear Mr Munyard

Draft guidelines regarding claims in price inquiries under section 95ZN of the *Competition and Consumer Act 2010 (Cth)*

The Competition & Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) appreciates the opportunity to comment on the approach set out in the Australian Competition and Consumer Commission's (**ACCC**) draft guidelines regarding claims in price inquiries under section 95ZN of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) (**Draft Guidelines**).

The proffering of this guidance is particularly timely in circumstances where the proportion of the ACCC's work being conducted under Part VIIA of the CCA has been increasing, both in the number of inquiries being undertaken by the ACCC at any one time and the period over which some of these inquiries are being run. In 2018/19 alone, 10 price inquiries or market studies were commenced, continued or completed. As well as creating resourcing and operational challenges for the ACCC as it seeks to balance market study work with investigative work (as noted in its Annual Report), the prevalence of inquiries means that more entities than ever are becoming involved in price inquiries conducted by the ACCC. In these circumstances, we welcome the ACCC providing guidelines and additional transparency to legal practitioners and business advisors, as well as entities regularly engaged with the ACCC, regarding the ACCC's understanding and interpretation of the CCA.

We have set out some comments on the approach set out in the Draft Guidelines below, for the ACCC's consideration.

In summary, the Committee considers that the Draft Guidelines could be improved by clarifying:

- the circumstances in which section 95ZN applies;
- how the ACCC will assess competitive detriment; and
- how the ACCC will assess public interest.

In addition, the Committee recommends that the ACCC provide additional guidance regarding the timing and process of the confidentiality consultation and the timing and implications of the ACCC's decision on confidentiality.

1. Application of section 95ZN

As set out in section 95ZN(1), section 95ZN applies

...if a person claims that disclosure of the following information would damage the competitive position of the person:

1. (a) *information made available, or to be made available, by or on behalf of the person (whether in oral evidence or in a written statement, submission or other document) at the hearing of an inquiry by the Commission or another body;*
2. (b) *information given, or contained in a document produced, by the person under section 95ZK to the Commission or another body.*

In addition to the qualifying criteria set out in 95ZN(1), the Draft Guidelines specify that section 95ZN of the CCA does not apply 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 publicly available information).

In this case, the Draft Guidelines state that the ACCC will consider, on a case-by-case basis, whether the disclosure of aggregated information involves the disclosure of individual information.

In general, we agree that information which has been aggregated from multiple sources:

- may differ substantially from the original information provided to the ACCC; and/or
- may be less likely to damage the competitive position of the person claiming confidentiality.

However, we caution against limiting the application of section 95ZN beyond the circumstances specified in section 95ZN(1). Limiting the application of section 95ZN may:

- confuse market participants about the circumstances in which section 95ZN applies;
- limit the ability of market participants to provide submissions in support of a claim under section 95ZN because they may not be consulted by the ACCC about the proposed disclosure of their information; and
- limit the information available to the ACCC to determine whether the disclosure may damage the person's competitive position (for example, because the person providing the information remains identifiable to other market participants).

This is particularly significant as section 95ZN is fundamentally protective in nature and operates to protect market participants from suffering unnecessary competitive detriment as a result of the disclosure of their confidential and competitively sensitive information, in circumstances in which there is no requirement, before a market participant is subject to the issuance of a compulsory notice by the ACCC, that there be any potential contravention of the CCA either by that person or any other person.

We therefore recommend that the circumstances in which the ACCC does not propose to consult on the disclosure of information derived from information the subject of a section 95ZN claim should be clearly set out in the Draft Guidelines, and in any event limited to exceptional circumstances such as where:

- aggregated information has been derived by the ACCC; and
- the aggregated information differs substantially from the original information provided to the ACCC, so that it no longer conveys any information which is subject to a section 95ZN claim (i.e. it cannot be "back solved" using other information made available).

Importantly, the inquiries conducted under Part VIIA frequently relate to concentrated markets and focus on a subset of market participants. We consider that a person is more likely to be identifiable to other market participants in these circumstances.

In these circumstances, when considering whether information is aggregated "enough" (noting the suggestion in the Draft Guidelines that section 95ZN will not be satisfied in

respect of information derived from 3 or more people in the market), regard must be had to whether the form of disclosure would be of competitive advantage to competitors of those whose information is being aggregated because it renders identifiable the fact that it represents the position of significant market participants.

2. Assessing a claim that the disclosure of information would damage the competitive position of the person

Section 95ZN(2) provides that, if a person makes a claim under 95ZN(1), the ACCC must take all reasonable steps to ensure that the information is not disclosed, without the consent of the person, unless the ACCC:

is not satisfied that the claim is justified; or

is of the opinion that disclosure of the information is necessary in the public interest.

We support the general approach outlined in Section 3 of the Draft Guidelines regarding “Assessing damage to a person’s competitive position” and have set out specific comments on key issues below.

2.1 When is the ACCC is unlikely to be satisfied that a section 95ZN claim is justified?

We support the ACCC in illustrating its approach to section 95ZN by including examples in the Draft Guidelines.

However, as the ACCC will make each disclosure decision on a case-by-case basis, we consider that the Guidelines should provide an open list of examples, rather than including a proscriptive list. In addition, the Draft Guidelines would provide increased transparency if they included examples of both when the ACCC:

- is likely to be satisfied that a section 95ZN claim is justified; and
- is unlikely to be satisfied that a section 95ZN claim is justified.

Accordingly, we recommend that the third bullet in [3.7] become a new paragraph and be revised as follows:

As a guide, the ACCC may consider that a claim is justified if the disclosure would ~~not~~ reveal information about:

- a. the person’s current or future competitive strategies, such as their approach to pricing or designing the non-price features of their product offering,
- b. the person’s own assessment of the strengths and weaknesses of their own current or future competitive position,
- c. the person’s financial position, or the identity of their customers or suppliers.

2.2 Aggregated information about market participants

Paragraph [3.8] of the Draft Guidelines state that the ACCC is unlikely to consider that the disclosure of information about each member of a class would damage the competitive position of the individual members of that class.

We agree that the disclosure of information about a class, including aggregated information about a class, may not cause damage to a persons’ competitive position.

However, as noted above, we consider that information about a class of market participants should be considered on a case-by-case basis, including because the disclosure may reveal

information about one or more people who may be specifically identifiable to others in the market.

2.3 Information which is confidential to third parties

Paragraph [3.2] of the Draft Guidelines provides that “damage to a third party’s competitive position does not provide a basis for making a claim under section 95ZN.”

We agree with this statement in principle. However, if the ACCC receives confidential information in the course of conducting an investigation under Part VIIA about a person other than the person who provided the information (**Third Party Information**), we consider that the third party should be provided with the opportunity to be heard prior to the publication of their Third-Party Information. This would be consistent with principles of natural justice.

If the ACCC proposes to disclose Third Party Information, we consider that the ACCC should provide the Third Party with the same opportunity to be heard regarding the proposed disclosure of their confidential information, as the person who provided the information. For example, the ACCC should:

- inform the third party where it is proposing to disclose particular items of information about that person;
- provide the third party with a reasonable opportunity to make a claim that the disclosure of one or more of those items of information would damage their competitive position; and
- if the third party claims that the information should not be published and the ACCC nonetheless decides to disclose the information, the third party should be informed of this decision and given an opportunity to seek an injunction to protect their information.

We note that paragraph [3.9] of the Draft Guidelines indicates that the ACCC will consider whether the disclosure would damage existing or future commercial relationships between the person who provided the information and their suppliers or customers, in a way that would result in damage to the person’s competitive position. However, we do not consider that this is sufficient to protect the interests of third parties.

3. Assessing whether disclosure of the information is necessary in the public interest

As noted above, section 95ZN fundamentally protects market participants from damage to their competitive position as a result of the disclosure of their confidential information in circumstances where the ACCC has used its compulsive powers to obtain information and documents in the course of conducting an inquiry rather than investigating a possible contravention of the CCA. In comparison to the rest of section 95ZN, subsection 95ZN(2)(b) provides that the ACCC may disclose information if it is of the opinion that disclosure of the information is *necessary in the public interest*, notwithstanding that:

- a market participant may have made a valid claim that disclosure of the information would cause them competitive damage; and
- that the disclosure may in fact cause damage to that person.

Consequently, we consider that section 95ZN(2)(b) requires the ACCC to carefully and cautiously balance the factors which weigh for, and against, a decision to disclose information section 95ZN(2)(b).

This is consistent with the interpretation of the phrase “necessary in the public interest” in *A v Corruption and Crime Commissioner* [2013] WASCA 288, as cited in the Draft Guidelines, in which the Court considered that disclosure must be ‘required’ in the sense that the public interest would not be maintained or advanced unless the information is disclosed.

In principle, we support the ACCC illustrating its approach to section 95ZN by including the examples set out in paragraph [4.5] of the Draft Guidelines.

However, we consider that some of the examples of when disclosure is necessary in the public interest are too broad, having regard to the context of section 95ZN as a whole, and context of inquiries under Part VIIA more generally, in circumstances where damage may be caused to a person’s competitive position.

For example, we do not agree that it is necessary in the public interest to disclose confidential information which may cause competitive detriment to a market participant solely on the basis that “disclosure would be likely to provide increased transparency about matters that are within the scope of the inquiry”. This factor seems to go to no more than something being of interest to the public, by virtue of being the subject of an inquiry by the ACCC, rather than being in the public interest.

In addition, we consider that legal practitioners and other business advisors, as well as entities engaged by the ACCC in an inquiry under Part VIIA of the CCA, would benefit from the Draft Guidelines including examples of competing public interest factors which may weigh both for and against the disclosure of information.

For example, while Part 6 of the *Freedom of Information Guidelines*¹ (**FOI Guidelines**) provides a framework which identifies when the disclosure of information is in the public interest for the purposes of the *Freedom of Information Act 1982* (Cth),² the FOI Guidelines also include a non-exhaustive list of factors against disclosure including where the disclosure:

- could reasonably be expected to prejudice the protection of an individual’s right to privacy;
- could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct;
- could reasonably be expected to prejudice the competitive commercial activities of an agency;
- could reasonably be expected to harm the interests of an individual or group of individuals; and
- could reasonably be expected to prejudice an agency’s ability to obtain confidential information.

What this regime and others make clear is that, as Justice Tamberlin stated:

The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the

¹ <https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/foi-guidelines/foi-guidelines-combined-june-2019.pdf>, [6.17] to [6.27].

² We note that the factors for and against the disclosure of information which are set out in *Freedom of Information Guidelines* may not be directly applicable to a decision under section 95ZN(2)(b), including because the *Freedom of Information Act* was developed to facilitate open government and encourages the disclosure of information, in contrast to section 95ZN which restricts the disclosure of information to protect market participants from damage caused by the disclosure of their confidential information.

*relative weight of these facets before reaching a final conclusion as to where **the** public interest resides.*³

The more guidance the ACCC can provide, the better informed market participants will be as to the likelihood that they will be able to maintain confidentiality over information provided to the ACCC.

4. Procedure and notification of decision

4.1 Timeframe for the confidentiality consultation

We generally support the confidentiality consultation process set out in paragraphs [3.5] and [4.2] of the Draft Guidelines, under which a person wishing to object to the disclosure of information on the basis that it would damage their competitive position and/or is not necessary in the public interest, should provide supporting material on an item-by-item basis accompanied by:

reasoning specific to that proposed disclosure, and

where reasonably possible, by relevant evidence supporting the objection for that item.

However, we note that preparing reasoning specific to each proposed disclosure which is supported by relevant evidence, where reasonably possible, can involve significant time and resources, particularly where a significant number of disclosures are proposed to be made based on information supplied by an individual market participant.

Accordingly, we recommend that the Draft Guidelines be revised to clarify that the ACCC will provide each person who has made a claim under section 95ZN with a reasonable opportunity to consider and respond to the proposed disclosure of their confidential information.

In addition, we consider that the Draft Guidelines should expressly recognise that:

- as the preparation of reasoning specific to each proposed disclosure can involve significant time and resources, the ACCC will consider the adequacy of the submissions it receives on confidentiality in the context of the timeframe provided to a person to consider and respond to the proposed disclosure of their confidential information; and
- there may be circumstances in which it may not be reasonably possible for a market participant to provide evidence supporting an objection to the disclosure of information, having regard to the nature of the statement and the timeframe for that person to object to the disclosure of information before it is disclosed.

4.2 Timeframe for notifying the ACCC's decision

We consider it to be open to a Court to determine that a decision by the ACCC to disclose information under section 95ZN of the CCA is an administrative decision to which the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies. We also consider that if the ACCC decides to disclose a person's confidential information, then the person is likely to have the right to:

- be informed of the ACCC's decision to disclose their information;
- seek reasons for the ACCC's decision to disclose their information; and

³ *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, [12].

- where appropriate, take further steps to prevent the disclosure of their information, including seeking an injunction and/or by applying to the court for review of the ACCC's decision to disclose their information.

Consistent with the principles of natural justice, a person who maintains a claim under section 95ZN must be provided with these opportunities prior to the disclosure of their information to the public.

In this context, we consider that the Draft Guidelines could significantly improve the confidentiality consultation process and inform market participants about their rights, by providing additional information about:

- the timeframe within which the ACCC will notify parties of its decision, as against the date of publication;
- the rights of a person who is affected to notice of the ACCC's decision; and
- in the event that a person who is affected by the ACCC's decision does not agree with the ACCC's decision, the rights which that person has to protect their confidential information.

Please contact Geoff Carter, Chair of the Competition and Consumer Committee (geoff.carter@minterellison.com or 0402 891 372) in the first instance, if you require further information or clarification.

Yours sincerely,



Greg Rodgers
Chair, Business Law Section