



Regulatory Investigations – How to Assist Your Client

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Topics covered today

- Formal requirements for statutory notices
- Representing your client at an oral examination
- How to respond to a statutory notice for production of documents or provision of information
- Lawful excuses for failing to comply with a compulsory notice: 'reasonable excuse', 'reasonable search', legal professional privilege, privileges against self-incrimination and self-exposure to penalty
- Confidentiality issues
- Insurance and indemnification of legal costs incurred during a regulatory investigation
- Other practical considerations

What is a regulatory investigation?

- Regulators serve a public function of detecting and investigating offences and contraventions of the law.
- A statutory investigation often precedes, but is not itself, a judicial proceeding.
- Regulators are granted investigative powers by an enabling statute. There are broadly similar powers and concepts across many regulatory regimes.
- A common precondition to the use of investigative powers is that a regulator has 'reason to suspect' or 'reason to believe' that a contravention has occurred.

Investigative Powers: ACCC & ASIC

Power	<i>Competition and Consumer Act 2010 (Cth)</i>	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
Oral examination	Section 155(1)(c)	Sections 19-25
Production of documents	Section 155(1)(b)	Sections 30-33
Furnishing of information	Section 155(1)(a)	Section 30A and 30B
Lawful excuse: reasonable search	155(5B)-(6)	Section 63(1)
Lawful excuse: not capable of complying	Section 155(5A)	Section 33, 63(5)
Lawful excuse: reasonable excuse	***	Section 63(5)
Lawful excuse: legal professional privilege	Section 155(7B)	Section 69

Section 155 Competition and Consumer Act 2010 (Cth)

155 Power to obtain information, documents and evidence

(1) Subject to subsection (2A), if the Commission, the Chairperson or a Deputy Chairperson **has reason to believe** that a person is capable of furnishing information, producing documents or giving evidence **relating to a matter** referred to in subsection (2), a member of the Commission may, by notice in writing served on that person (whether in Australia or outside Australia), require that 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 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, or before an associate member of the Commission who is an AER member and who is specified in the notice, or before a member of the staff assisting the Commission who is an SES employee or an acting SES employee and who is specified in the notice, at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) For the purposes of subsection (1), the matter must be a matter that:

(a) constitutes, or may constitute, a contravention of:

(i) this Act

...

Formal requirements for a statutory notice

- A notice must comply with the express requirements set out in the enabling statute.
- A notice must comply with the implied requirements of:
 - Clarity and certainty. Ambiguous statutory notices will be invalid.
 - Disclosing the basis and scope of validity. The notice must disclose, on its face, the suspected contravention and the specific legislative provision relied on. However, a notice is not a pleading.
- Notices are valid even where they are:
 - 'Harsh, oppressive or unreasonable': *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 39 ALR 565
 - Burdensome to comply with: *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519, 529
 - Requires a considerable amount of time and expense to comply with: *Riley McKay Pty Ltd v Bannerman* (1977) 15 ALR 561, 567

Hypothetical statutory notice

The matters that constitute or may constitute contraventions of ss. 18, 29(1)(m) and/or 29(1)(n) of the Australian Consumer Law (ACL):

1. Between 1 January 2020 to the date of this [Company Example] caused a statement to be published on the [Company Example] website (companyexample.com.au) under the heading 'Refunds and Remedies': a. [Company Example] does not give refunds or any other remedies for any faulty goods purchased from it. Customers must contact the manufacturer of the goods in relation to faulty goods and obtaining any remedy.
2. In addition, between 1 January 2020 to the date of this Notice, sales representatives of [Company Example] made representations to consumers to the effect that the consumer was not entitled to a refund or any other remedy from [Company Example] for faulty goods purchased and that the consumer should contact the manufacturer to obtain a remedy for faulty goods.
3. The website statement set out in paragraph one above and the representations to consumers set out in paragraph two above were made in circumstances where: a. the supply of products by [Company Example] was covered by a guarantee under s. 54 of the ACL that the products were of acceptable quality b. consumers had rights to remedies from [Company Example] under Division 1 of Part 5–4 of the ACL in circumstances where the products supplied by [Company Example] were not of acceptable quality, and c. in relation to the representations to consumers set out in paragraph two, certain products supplied to consumers by [Company Example] were not or may not have been of acceptable quality.
4. Publishing the website statement set out in paragraph one above and making the representations to consumers in paragraph two above in the context referred to in paragraph three, [Company Example] made representations in trade or commerce in connection with the promotion, supply or possible supply of [Company Example] products that were false, misleading or deceptive, or likely to mislead or deceive, in contravention of ss. 18, 29(1)(m) and/or 29(1)(n) of the ACL, because consumers may have been entitled to a remedy, including a refund, from [Company Example] in relation to a faulty [Company Example] product, in addition to any remedies which may have been available to them from the manufacturer.

Source: ACCC, Section 155 notices: a basic guide for individuals and small businesses (October 2022), with dates amended.

Oral examination

- Usually, an inspector or examiner will examine a person under oath or affirmation. This requires the examinee to give truthful answers.
- The inspector or examiner may compel a witness to answer relevant questions and, usually, refusal to do so is an offence.
- Typically the privileges against self-incrimination and/or self-exposure to a penalty are abrogated by the legislation, either entirely or in part: ASIC Act s 68; CCA s 155(7).
- Legal professional privilege will usually apply unless excluded by clear words in the enabling statute: *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543.
- Examinations are usually conducted in private and recorded as an audio recording and/or video recording, and a written transcript produced.

Oral examination: role of lawyers

- Examinees usually have the right to legal representation. For example, s 23(2) ASIC Act.
- The right to legal representation is qualified.
- A legal representative may object to questions which are unclear, unfair or irrelevant and re-examine the examinee in order to clarify previous answers given.
- A legal representative is not permitted to interrupt or disrupt the examination. For example, s 23(2) ASIC Act, which is an offence.
- An inspector or examiner may direct that a particular lawyer not be present at the examination:
 - The lawyer was personally involved in the affairs of the examinee and there was a real risk that the lawyer may have also committed offences: *Australian Securities Commission v Bell* (1991) 32 FCR 517, 520
 - The same firm represents multiple examinees: *Stockbridge v Ogilvie* (1993) 43 FCR 244
 - The legal practitioner declined to provide an undertaking not to disclose the information acquired during an examination: *Constantine v Trade Practices Commission* (1994) 48 FCR 141
- During the examination, ask for document IDs of any documents shown to the examinee for the transcript.
- *Always* ask for a written transcript of the examination if permitted by the enabling statute.

Oral examination: tips for examinees

- Do not discuss the evidence given with other examinees before or after the examination
- Say 'privilege' before answering the question where penalty privilege applies
- Answer questions truthfully and accurately
- Listen carefully and respond *concisely*
- Ask to be shown documents referred to by the inspector or examiner
- Ask for clarification where necessary
- Stay focused on the immediate question
- Take your time to respond
- Be respectful
- Ask for breaks where needed

Provision of information

- *Some* regulators have the power to compel information: ACCC and s 155(1)(a) CCA.
- The term ‘information’ has been described as ‘broad and far reaching’: *Seven Network Ltd v ACCC* (2004) 140 FCR 170 at [18].
- Limits on the power to provide information include interpreting a document and identifying possible witnesses: *Riley McKay Pty Ltd v Bannerman* (1977) 15 ALR 561.
- *ASIC v Vanguard Investments Australia Ltd* [2024] FCA 308: a notice was valid which compelled the preparation and provision of a spreadsheet recording the categories, number and market value of various securities as at various dates.

Production of documents

- Many regulators have the power to compel the production of documents.
- A 'document' will usually be defined and construed in light of the objects of the enabling legislation.
- A notice requiring the production of documents must describe the documents with sufficient clarity and precision to enable the recipient to know what documents fall within the notice.
- A notice to produce documents is not analogous to a subpoena, discovery or interrogatories. The test of an impermissible 'fishing expedition' in the context of challenging a subpoena, is not a fitting analogy to challenging a notice to produce documents.
- Where a party is compelled to produce documents, this is likely to extend to any documents that are within its possession, custody or control. The ASIC Act requires a notice recipient to produce documents in its 'possession', which has an extended meaning akin to possession, custody or control: *ASIC v Maxi EFX Global AU Pty Ltd* (2020) 148 ACSR 123; ss 9 and 86 *Corporations Act 2001* (Cth).

Should your client volunteer to assist a regulator with an investigation?

- Voluntary production of documents, or attending a voluntary interview, may, in certain circumstances, be viewed as cooperation and reduce the penalty to be imposed should a regulator commence civil penalty proceedings against your client.
- Your client may prefer to be compelled to produce documents, information or attend an interview because of confidentiality or privacy obligations it owes to third parties.
- Your client may also want to avoid being seen cooperating freely with the regulator to be protected from retaliation from the party the subject to the regulatory investigation.
- Conversely, a regulator may prefer to compel documents, information and attendance where they are concerned that a voluntary request may be met with delays, a party does not want to cooperate with the regulator, or the information the regulator has obtained from other sources is inconsistent with the information voluntarily provided by the party under investigation.

Lawful excuse: reasonable search

- For notices requiring the production of documents, perfect compliance may be practically impossible.
- *CCA s 155(5B)*: a person must comply with the notice unless the person proves that, after a reasonable search, the person is not aware of the documents that were failed to be provided, and the person provides a written response to the notice describing the scope and limitations of the search.
- *ASIC Act s 63(1)*: a person must not intentionally or recklessly fail to comply with a statutory notice. In practical terms, either of those two states of mind are inconsistent with conducting a reasonable search, so the lawful excuse of 'reasonable search' arguably applies.
- Relevant factors to determine whether a search is reasonable: s 155(6) CCA
 - the nature and complexity of the matter to which the notice relates
 - the number of documents involved
 - the ease and cost of retrieving a document relative to the resources of the person who was given the notice
 - any other relevant matter.

Lawful excuse: Reasonable excuse

- Many compulsory powers require a person to comply, unless they have a 'reasonable excuse': s 63(5) ASIC Act.
- A reasonable excuse is 'no more or no less than an excuse which would be accepted by a reasonable person': *Bank of Valletta PLC v National Crime Authority* (1999) 164 ALR 45.
- Where the privilege of self-incrimination has been abrogated, it is not a reasonable excuse that compliance with a notice might tend to incriminate the recipient or expose them to a penalty: *Australian Securities Commission v Kutzner* (1997) 25 ACSR 723.
- Case law examples where it was found not to be a reasonable excuse:
 - Compliance with notice would result in the bank committing a privacy offence under Maltese law and potentially trigger banking license restrictions: *Bank of Valletta PLC v National Crime Authority* (1999) 164 ALR 45
 - Examinee refused to answer questions on advice of his lawyer: *ASIC v Albarran* (2008) 169 FCR 448
 - Books and documents were in possession of third parties, but those parties were within the notice recipients' control: *ASIC v Maxi FX Global* (2020) 148 ACSR 123

Lawful excuse: not capable of complying

- ‘Not capable of complying’ is narrower in scope than a ‘reasonable excuse’ defence.
- Section 155(5)-(5A) CCA: a person shall not refuse or fail to comply with a notice under this section ‘to the extent that a person is not capable of complying with the notice’.
- Section 33 ASIC Act: ASIC may give to a person a notice requiring the production of specified books that are in the person’s possession or control. If those specified books are not in their possession or control, the person is not capable of complying with the notice.

Confidentiality issues

- The fact that certain documents are confidential is not a reasonable excuse from complying with a statutory notice.
- Lawful compulsion by statutory notice will override any private obligations of confidentiality.
- A notice recipient cannot redact documents unless the redaction is legally justified, such as the document containing information which is protected by legal professional privilege: *Australian Securities and Investments Commission v Provide Nominees Pty Ltd* [2023] FCA 1137.
- A statutory notice can override an undertaking to a court not to disclose documents obtained in discovery or produced on subpoena: *Australian Securities Commission v Ampolex Ltd* (1995) 38 NSWLR 504.
- It is likely that a statutory notice will override privacy obligations owed by a notice recipient under the *Privacy Act 1988* (Cth). Australian Privacy Principle 6 permits disclosure of private information held by an entity if the disclosure is required or authorised by Australian law.

Legal professional privilege

- Legal professional privilege entitles a person to resist giving information or documents that would disclose communications between a client and their lawyer for the dominant purpose of giving or obtaining advice.
- Legal professional privilege is usually not a statutory defence – it is not a ‘reasonable excuse’.
- Statutory investigative powers will be construed as not requiring the production or disclosure of legally privileged material, unless privilege is excluded by clear words or necessary implication. A person may decline to produce documents or disclose information on the basis of that privilege.
- *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543: ACCC served a notice on a firm of solicitors pursuant to s 155 of the *Trade Practices Act 1974* (Cth) (now the CCA), requiring production of documents in their possession as a result of the firm acting for Daniels Corp. The High Court of Australia held that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities. Accordingly, s 155 did not require the production of documents that were subject to legal professional privilege.

Privileges against self-incrimination and self-exposure to penalty

- Privilege against self-incrimination provides that a natural person will not be required to answer a question, or produce a document, where to do so might expose them to a criminal conviction.
- Privilege against exposure to penalty serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it: *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543.
- Corporations are not entitled to the privilege against self-incrimination or the protections afforded by the penalty privilege: *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 500; *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543.
- Penalty privilege can be abrogated by statute. See s 68 ASIC Act; 155(7) CCA. A natural person may still assert the privilege for a limited use immunity – that their answers may not be admitted into evidence against them, in criminal or civil penalty proceedings. However, they may be admitted into evidence against other parties (i.e. employers or principals).

Legal costs incurred during regulatory investigations

- Several statutes prohibit or limit the provision of indemnities in respect of a pecuniary penalty, including indemnifying directors and officers for their legal costs. See s 199A(2)(b)-(3) *Corporations Act 2001* (Cth) and s 77A CCA.
- The indemnification and insurability of legal costs associated with civil penalty proceedings and regulatory investigations are treated differently.
- Broadly, the prohibitions do not apply to legal costs incurred in responding to actions taken by a regulator as part of an investigation before commencing civil penalty proceedings and the final outcome of the proceeding is known.

Conclusion: what to do if your client receives a statutory notice?

- Read the notice carefully to determine the regulator's concerns and devise a strategy as to the response. The notice will not simply disappear.
- Consider whether the notice is valid.
- Consider if the request for information or documents is compulsory or voluntary and, if voluntary, the benefits of voluntarily supplying information to a regulator and the confidentiality protection afforded to information provided voluntarily.
- How long has your client been given to respond to the notice? Should your client request an extension to comply?
- Does the client have a valid excuse for not complying with the notice?
- Is your client entitled to claim legal professional privilege or the privilege against self-exposure to a penalty?
- Consider briefing counsel if the subject matter is not your area of expertise.

Useful resources

- Peckham, Truong KC, Latham and Storey, *Civil Penalties in Australia* (LexisNexis, 2025)
- ACCC *Guidelines on the use of section 155 powers* (29 July 2022)
- ASIC *ASIC's compulsory information-gathering powers* (Information Sheet 145, March 2020)