

ACCC – NCC Protocol for handling confidential information

August 2018

Background

1. The ACCC and NCC entered into a Memorandum of Understanding (MOU) in relation to the provision of secretariat services in March 2014.
2. Under the MOU, the ACCC agreed to provide certain services to the NCC, being advice and support in relation to NCC recommendations, decisions and reports; and administrative services. These services will be provided to the NCC by ACCC staff.
3. The services include an appropriately qualified officer of the ACCC designated to perform the duties of the NCC's Executive Director.
4. Under clause 11 of the MOU, the ACCC and NCC have undertaken to agree a protocol for handling of confidential information that provides appropriate protection to confidential information provided to either organisation. This document is that protocol, and it will be made publicly available.
5. The ACCC and AER's general approach to the use of information is outlined in the ACCC/AER Information Policy [<http://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information>].

Legal context

6. The *Competition and Consumer Act 2010* (CCA) and other legislation requires the ACCC and AER to protect confidential information, and permits its disclosure in certain circumstances. For example:
 - a. Under s.155AAA of the CCA, ACCC Commissioners, staff and consultants must not disclose protected information unless certain criteria are met
 - b. Under s.44AAF of the CCA, the AER must take all reasonable measures to protect information given in confidence or under compulsion from unauthorised use or disclosure
7. A person providing a submission to the NCC can request that confidential commercial information not be made publicly available (s.44GB, 44LE, 44NE). The NCC may also agree to protect confidential information provided to it.
8. The ACCC, AER and NCC may be subject to other requirements to protect confidential information, such as those imposed by a court or through contractual or equitable obligations.

9. ACCC staff are only permitted to disclose confidential information in accordance with the law. For example:
 - a. Under s.155AAA(12) of the CCA, an ACCC staff member may disclose protected information to a particular government agency if the Chairman is satisfied that the information will assist the agency to perform its functions.
 - b. Under s.44AAF(3) of the CCA, the AER is permitted to disclose confidential information to certain government agencies for use in connection with the performance of their functions or the exercise of their powers.

Treatment of unrestricted information

10. ACCC staff obtain extensive unrestricted information¹ through their work for the ACCC and AER, in providing services to the NCC, and more generally. This information may be relevant to the ACCC, AER and/or NCC. ACCC staff may use this information to inform their work without restriction.

Treatment of confidential information

11. The ACCC and NCC are committed to treating confidential information responsibly and in accordance with all relevant laws.
12. The ACCC and NCC recognise that ensuring the responsible treatment of confidential information is essential to the performance of their functions.
13. The ACCC and NCC acknowledge that in order to provide services to the NCC, ACCC staff will need to access confidential information generated by or provided to the NCC.
14. ACCC staff will take reasonable steps to protect confidential information received on behalf of the NCC from unauthorised disclosure, including further disclosure within the ACCC.
15. ACCC staff will:
 - a. Store confidential information securely
 - b. Limit ACCC staff access to confidential information to staff who are performing services for the NCC².

¹ That is, material not subject to non-disclosure obligations (for example, not confidential information and not protected information under s.155AAA of the CCA) and not otherwise subject to restrictions on how it may be used.

² Information in electronic form will be separately identified within the ACCC's IT system and access limited to ACCC staff who are performing services for the NCC.

16. In the course of providing services to the NCC, ACCC staff may receive information from parties that is claimed to be confidential. ACCC staff will:
 - a. Assess the claim in accordance with relevant NCC policies and practices
 - b. If the claim is accepted, put in place appropriate measures to protect the information (see below)
 - c. If the claim is not accepted, provide the opportunity for the party to withdraw the information if they choose
17. In some circumstances, the NCC may be legally required to produce confidential information to third parties. In most cases, ACCC staff undertaking services for the NCC will endeavour to notify and consult the person who provided the confidential information about the proposed release of that information. However, in some cases, prior notification and consultation may not occur (for example, where the NCC is required to produce material to another government agency and notification would compromise the other agency's performance of its functions).
18. As required by their legal duties as Australian public servants, if in the course of providing services to the NCC, ACCC staff receive confidential information that indicates a potential contravention of the CCA or other laws, either by itself or when considered in conjunction with other information, ACCC staff may disclose this information to other staff of the ACCC (who are not performing services for the NCC) or other appropriate body for further investigation.
19. ACCC staff providing services to the NCC may access confidential information held by the ACCC or AER that is relevant to the performance of the NCC's functions or the exercise of the NCC's powers. However, ACCC staff must comply with applicable legal requirements (such as under s.155AAA of the CCA) prior to any disclosure of such information to the NCC President or Councillors, or other third parties.