

National
Competition
Council



ACCC – NCC Protocol for handling confidential information

March 2023

Version Control	
August 2018	The date this Protocol first commenced.
March 2023	Revised with minor amendments.

Background

Relationship of the Parties

1. The Australian Competition and Consumer Commission (ACCC) and the National Competition Council (NCC) entered into a Memorandum of Understanding (MOU) in relation to the provision of corporate and professional services in March 2014. The most recent version of the MOU was finalised in March 2023.
2. Under the MOU, the ACCC agreed to provide certain services to the NCC, including 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 appropriately qualified officers of the ACCC designated to perform the duties of the NCC's
 - a. Executive Director, and
 - b. Executive Officer.
4. The ACCC and NCC have agreed to this Protocol for handling confidential information pursuant to clause 19 of the MOU. This Protocol seeks to ensure appropriate protection to confidential information provided to either organisation, and will be made publicly available. The ACCC and Australian Energy Regulator's (AER) general approach to the use of information is outlined in the ACCC/AER Information Policy,¹ and the internal Confidential Information Policy.

Legal context

5. 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.
6. ACCC staff are only permitted to disclose confidential information in accordance with the law. For example:

¹ <http://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information>. At the time of finalising the 2023 version of this Protocol, this Information Policy was under review.

- 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.
7. A person providing a submission to the NCC can request that confidential commercial information not be made publicly available (see sections 44GB, 44LE and 44NE of the CCA). The NCC may also agree to protect confidential information provided to it.
8. The ACCC, AER and NCC may also be subject to other requirements to protect confidential information, such as those imposed by other legislation (for example, the *Criminal Code 1995* (Cth) or the *Public Service Act 1999*), court orders, or contractual or equitable obligations. The ACCC, AER and NCC may be legally required to produce information or material in certain circumstances, including for example in response to an order of a Court, in response to another government agency's power to obtain information, under the *Archives Act 1983* (Cth) or in response to a request under the *Freedom of Information Act 1982* (Cth).

Operational Provisions

Treatment of unrestricted information

9. ACCC/AER staff obtain extensive unrestricted information² 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/AER staff may use this information to inform their work without restriction.

Treatment of confidential information

10. The ACCC and NCC are committed to treating confidential information responsibly and in accordance with all relevant laws.
11. The ACCC and NCC recognise that ensuring the responsible treatment of confidential information is essential to the performance of their functions.

² 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.

12. 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.
13. 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.
14. ACCC staff will:
 - a. Store confidential information securely; and
 - b. Limit ACCC staff access to confidential information to staff who are performing services for the NCC.³
15. 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;⁴
 - b. If the claim is accepted, put in place appropriate measures to protect the information (see below); and
 - c. If the claim is not accepted, provide the opportunity for the party to withdraw the information if they choose.
16. As required under 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 providing services to the NCC may disclose this information to other staff of the ACCC (who are not performing services for the NCC) or other appropriate bodies for further investigation.
17. 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.
18. In some circumstances, the NCC, the ACCC or the AER 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.

³ 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.

⁴ For example, at the time of writing, the NCC has published [guidance](#) on its public website regarding making a submission which discusses confidentiality.

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).

19. ACCC staff commit to complying with the ACCC's protocols to report any inadvertent disclosure or near miss confidentiality breach that may arise in the provision of services to the NCC.