



Law Council  
OF AUSTRALIA

*Business Law Section*

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Jacqui Thorpe  
General Manager, Compliance & Enforcement  
Australian Energy Regulator (**AER**)  
GPO Box 520  
MELBOURNE VIC 3001

By email: [AERCompliance@aer.gov.au](mailto:AERCompliance@aer.gov.au)

Dear Ms Thorpe,

### **Draft AER Compulsory Notice Guidelines**

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to comment on the Draft *AER Compulsory Notice Guidelines* (**Draft Guidelines**).

The Committee broadly supports the Draft Guidelines and considers they provide a clear guide for Notice recipients. However, the Committee recommends the inclusion of some additional detail in the Guidelines as outlined below.

#### **1. GUIDANCE ON LIMITATIONS OF POWERS AND FORMAL REQUIREMENTS FOR NOTICES**

The *ACCC Guidelines—Use of section 155 Powers*<sup>1</sup> (**ACCC Guidelines**) issued by the Australian Competition & Consumer Commission (**ACCC**) include a discussion on the limits on the use of s 155 powers, including that the power to issue a Notice must be used in good faith and not for a collateral purpose. Given the similarities between the ACCC and the AER in respect of Compulsory Notice powers, the Committee considers the Draft Guidelines should include a similar discussion. This discussion could identify for example:

- that the AER's power to issue a notice must be issued in good faith, not for a collateral purpose but to perform the AER's functions under the National Electricity Law, National Energy Retail Law and National Gas Law; and
- that in most circumstances the AER's power to issue Compulsory Notices expires on the AER commencing proceedings in relation to the matters the subject of the Notice.

#### **2. BURDEN ON THE RECIPIENT**

The Committee is supportive of section 1.2.1 'Burden on the recipient' (p. 7) in the Draft Guidelines which note that the AER 'is required to and will have regard to the burden of the compulsory notice on the recipient before exercising its powers, in

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<sup>1</sup> Accessed at [https://www.accc.gov.au/system/files/1582RPT\\_ACCE%20Guidelines-Use%20of%20section%20155%20powers\\_FAJune20.pdf](https://www.accc.gov.au/system/files/1582RPT_ACCE%20Guidelines-Use%20of%20section%20155%20powers_FAJune20.pdf)

particular, the time and cost burden it imposes on the recipient including having regard to digital technology'. The Committee considers that the equivalent paragraph in the ACCC Guidelines also observes that:

In appropriate circumstances, the ACCC may engage with recipients on any proposals they make or tools used to search electronic and other documents in response to a s. 155 notice.

Given the increasing significance of document analytics and AI technologies in regulatory investigations and discovery, the Committee considers that it would be beneficial for the Draft Guidelines to encourage discussion between the AER and Notice Recipients regarding use of such technologies.

In addition, the Committee is supportive of the AER taking into account whether 'a sample of a category or type of document will suffice or a more limited data set or time series' (p 8). The Committee considers that this is particularly important in respect of investigations involving retail energy where common processes and procedures are routinely used to direct customer interactions. This means that requiring large numbers of customer records is unnecessarily burdensome and that a sample of customer files combined with an explanation of the retailer's general practices should generally be sufficient.

### 3. REASONABLE SEARCHES

The ACCC's exercise of its compulsory information gathering powers under s 155 of the CCA is subject to the 'reasonable searches defence' in s 155(5B). The defence applies where the s 155 Notice relates to the provision of documents and the Notice recipient proves that, after a reasonable search, they are not aware of the documents.

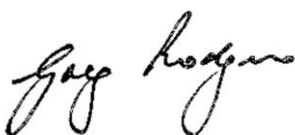
While the legislation granting the AER's Compulsory Notice powers does not contain a similar provision, the Committee considers that there would be merit in the Draft Guidelines making clear that Notice Recipients would be regarded by the AER as complying with a Compulsory Notice where they undertake reasonable searches for the documents requested. The Draft Guidelines could identify that what is reasonable will depend on circumstances, having regard to factors such as:

- the nature and complexity of the matters under investigation;
- the number of documents involved; and
- the ease and cost of retrieving documents and data relative to the recipient's resources.

The Committee would be pleased to discuss any aspect of this submission.

Please do not hesitate to contact Rosannah Healy of the Committee on [rosannah.healy@allens.com.au](mailto:rosannah.healy@allens.com.au) or 03 9613 8421 if you would like to do so.

Yours faithfully,



**Greg Rodgers**  
**Chair, Business Law Section**