

OPERATIONAL PROCEDURE: Information gathering powers (2017/01)

This Operational Procedure is issued under the authority of the Assistant Commissioner Charity Services and should be read together with the [ACNC Policy Framework](#), which sets out the scope, context and definitions common to our policies.

Procedure

1. This Operational Procedure sets out when and how the ACNC will use its information gathering powers under Division 70 of the ACNC Act. The procedure must be read together with the ACNC's regulatory approach statement and the Commissioner's Policy Statement: Compliance and Enforcement.

Legal context

2. It may be necessary for the ACNC to ask a charity or other person to give information or documents to the ACNC, or to attend and give evidence before the ACNC under Division 70 of the ACNC Act.
3. Only the Commissioner, a delegate of the Commissioner or an ACNC officer authorised by the Commissioner or delegate can exercise information gathering powers. This is reflected in the ACNC Register of Delegations and Authorisations (internal) and the Delegation, Authorisation and Signing Corporate Policy.
4. The ACNC must use its information gathering powers for a 'proper purpose'. That is, the use of this power must be intended to advance our inquiry. The use of powers must be undertaken in a responsible manner and not misused.
5. Section 70-5 of the ACNC Act states that information gathering powers can only be used if the Commissioner reasonably believes that the charity or a third party has information or a document that is reasonably necessary to obtain in order to determine whether a charity has complied or is complying with a 'provision subject to monitoring', or whether 'information subject to monitoring' is correct.

Definitions

6. A provision subject to monitoring' is defined in section 75-5 to mean:
 - a. a section of the ACNC Act or legislative instrument under the Act that creates an offence (such as a failure to keep records under section 55-5)
 - b. a section of the ACNC Act or legislative instrument under the Act if non-compliance gives rise to an administrative penalty (such as a duty to notify the ACNC under section 65-5)



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- c. a section of the ACNC Act creating a condition that an entity must comply with to be entitled to registration or which, if not complied with, can lead to revocation of a charity's registration (such as the requirement that it is not-for-profit), and
 - d. a section of the *Crimes Act 1914* (Cth) or the *Criminal Code* (Cth) that creates an offence to the extent that it relates to the ACNC Act or a legislative instrument under the ACNC Act (such as giving the Commissioner false or misleading information).
7. Information subject to monitoring is defined in section 75-10 to mean information given in compliance or purported compliance with the ACNC Act or legislative instruments under the Act, or a provision of the *Crimes Act 1914* (Cth) or the *Criminal Code* (Cth) to the extent that the provision relates to the ACNC Act or a legislative instrument under the ACNC Act. Information is also subject to monitoring if a charity has given the Commissioner the information to include on the Register.

Voluntary information gathering

8. The As an alternative to a formal notice issued under section 70-5 of the ACNC Act, the ACNC may seek to obtain the information voluntarily. The approach taken will be informed by the ACNC's Regulatory Approach and the facts and circumstances of the case.

Formal information gathering

9. Under section 70-5, the Commissioner may require an entity (including a charity or a third party), by a written notice, to:
- a. to give information to the Commissioner,
 - b. attend and give evidence before the Commissioner, or an individual authorised by the Commissioner,
 - c. produce documents to the Commissioner, or
 - d. make copies of documents and produce those copies to the Commissioner.
10. These powers are not limited to charities. The powers allow the Commissioner to compel the production of documents and to compel witnesses to attend the ACNC to answer questions.
11. In addition, under section 70-15, the Commissioner may retain original documents provided under a notice issued pursuant to section 70-5 (section 70-5 notice) for as long as is necessary. If the Commissioner decides to retain original documents, a certified true copy must be provided to the owner of the document.
12. Section 70-5 of the ACNC Act states that information gathering powers can only be used if the Commissioner reasonably believes that the charity or a third party has information or a document that is reasonably necessary to obtain in order to determine whether a charity has complied or is complying with a 'provision subject to monitoring', or whether 'information subject to monitoring' is correct. ACNC officers will make a written record of the basis on which they have considered this statutory threshold being met when issuing s.70-5 notices. This may be a brief document or file note.

Self-incrimination

13. A person or organisation must comply with an information gathering notice issued by the Commissioner under subsection 70-5(2), even if it might incriminate them or expose them to a penalty.
14. Where a notice is issued to a person, any incriminating information or document provided by that person cannot be used against the person in a criminal prosecution or proceedings to impose a civil penalty, other than in Commonwealth criminal proceedings for giving false or misleading information or documents, obstructing Commonwealth public officials, or proceedings for non-compliance with section 70-5(2).

Section 70-5 notices to give information or evidence to the Commissioner

15. The ACNC will give entities a reasonable period of time to comply with a notice. This period will ordinarily be between 14 and 28 days depending on the nature of the concerns identified.
16. The notice must set out the rights and responsibilities of the entity receiving the notice, including:
 - a. the manner and form that the Commissioner requires the information or documents, or time and place that the entity (if the entity is a person) must attend to give evidence
 - b. the time frame for compliance with the notice
 - c. the effect of failing to comply with the notice (the penalties that apply to non-compliance, as well as providing false or misleading information or documents)
 - d. informing the recipient of their right to claim legal professional privilege.
17. The notice may request electronic data and files. In this case, the ACNC may assist the entity to give such information (for example, by providing storage devices such as a USB key, or providing assistance to copy relevant material contained on a hard drive).

Section 70-5 Notices to attend and give evidence

18. The ACNC has the power to require a person to attend before the Commissioner (or a person authorised by the Commissioner) to give evidence. The Commissioner may require that the evidence be given on oath or affirmation, orally or in writing. This is known as an examination.
19. The ACNC will generally only use this power if we have reason to believe that a person can provide information that is relevant to an investigation, and that information can only be provided as evidence in person.
20. The notice to attend and give evidence will explain that:
 - a. the examination will take place in private
 - b. the person can be represented by a lawyer or third party
 - c. the information provided in an examination will be kept confidential while the investigation is ongoing. The information may be disclosed to third parties on a confidential basis during the course of the investigation, if necessary for the investigation and allowed under the secrecy provisions of the ACNC Act. In some circumstances, the ACNC may release the transcript and relevant documents to other government or regulatory bodies if authorised by the secrecy provisions of the ACNC Act
 - d. the name of the person who will be conducting the examination (to the extent possible).
21. At the beginning of the examination, the ACNC will state the following:
 - a. the requirement to answer all questions
 - b. the effect of any refusal to answer a question (unless the refusal is due to a claim of legal professional privilege)
 - c. the effect of providing false or misleading information
 - d. the effect of obstructing Commonwealth officials (discussed further below)
 - e. that the information provided in an examination will be kept confidential while the investigation is ongoing. However, the information may be disclosed to third parties on a confidential basis during the course of the investigation, if necessary for the investigation and allowed under the secrecy provisions of the ACNC Act. In some circumstances, the ACNC may release the transcript and relevant documents to other government or regulatory bodies if authorised by the secrecy provisions of the ACNC Act and procedural fairness would usually be given to persons whose interests will be adversely affected by the proposed disclosure; and

- f. that the ACNC will provide a transcript of the examination to the examinee upon request.

Application of information gathering powers to third parties

- 22. As noted previously, the ACNC's information gathering powers are not limited to charities. However, the exercise of these powers must be for a proper purpose relating to a charity under review by the ACNC.
- 23. The ACNC recognises the pressures a request for large amounts of information can place on those receiving notices to produce, especially where the requests are made to third parties not subject to any potential regulatory action. In these cases, the ACNC will adopt a consultative approach to determine the type of notice that would best secure the information sought.

Drafting notices

- 24. The ACNC will only seek information or documents that are reasonably necessary, using the approved notice templates.
- 25. Where appropriate, the ACNC will consult with those to whom it intends to give notices to determine the probable scope and nature of the information required.
- 26. The notice must specify the legal authority relied upon (including the statutory test to be met) for exercising the information gathering power.
- 27. If the ACNC intends to issue the notice to the charity, the notice should precisely identify:
 - a. if the purpose is to determine whether the charity has complied, or is complying with a provision subject to monitoring – the provision/s in question;
 - b. if the purpose is to determine whether the information subject to monitoring is correct – the information in question.

Variation of notices

- 28. The ACNC Act does not make any reference to the ability to vary a notice. However, subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character the power shall include a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. If the recipient of a notice seeks to vary a notice (including the timeframe for a response), this request must be submitted in writing. All variations (including extensions of time) must be approved by a decision-maker with delegation or authority to issue notices.
- 29. In some circumstances, it may be more efficient for the ACNC to issue a new notice.

Obstruction or hindering of investigations

- 30. A person who hinders, obstructs, intimidates or resists an ACNC officer performing their official duties commits an offence under section 149.1 of the *Criminal Code* (Cth).
- 31. A person who may be committing that offence should be warned of the effect of that section. If the person continues to hinder the investigation, the ACNC officer will withdraw from the situation and report the matter immediately to their senior manager.

References

ACNC Policy Framework

Australian Charities and Not-for-profits Commission Act 2012 (Cth), Division 70

ACNC's regulatory approach statement

Delegation, Authorisation and Signing Corporate Policy

Commissioner's Policy Statement: Compliance and Enforcement

Acts Interpretation Act 1901 (Cth)

Criminal Code (Cth)

Crimes Act 1914 (Cth)

Version	Date of effect	Brief summary of change
Version 1 – Initial policy	09/12/2013	Initial Operational Procedure endorsed by the ACBC Executive on 09/12/2013
Version 2 – Revised policy	12/10/2017	Updates to reflect current practice