

Appendix 2

The Treasury's answers to written questions on notice

Question:

1. Is a safeguard required to proposed subsection 155(8A) to avoid exposing individuals to contempt sanctions in circumstances where production of information, documents and evidence is very difficult or costly?

Answer:

The drafting of Part 9 of the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 is based on section 1303 of the *Corporations Act 2001* (Cth).

It provides the Federal Court with discretion to order compliance with a section 155 notice. In exercising its discretion, the Federal Court may consider any matter it considers relevant, including the difficulty or cost to a business of complying with a section 155 notice and whether the scope and timeframe of such a notice is reasonable.

For example, in applying section 1303 of the *Corporations Act 2001* (Cth), Federal Court Judge Barker noted in *Oswal v Burrup Holdings Ltd* (2011) 29 ACLC 11-031 at paragraph 17 that:

because the court is empowered to order compliance under s 1303, the Court may be considered to have something in the nature of a discretion to grant or withhold a compliance order. Ordinarily one would expect that where contravention is made out the Court would grant the inspection that has been requested. However, the Court is not by the terms of s 1303 obliged automatically to compel compliance, and it may be that, in the circumstances of a particular case, good reasons are advanced as to why the Court should withhold an order. For example, it seems to me that it may be considered relevant to the question whether or not a compliance order should be made, that the request for discovery is unduly onerous, or that the company should not be expected to bear the cost of the large inspection exercise, or that the party requesting inspection already has the documents, or that, as a matter of convenience, the documents are about to be supplied to the person in some other way which makes the need for a compliance order unnecessary or redundant.

In *Oswal v Burrup Holdings Ltd*, the Federal Court did not order the disclosure of all documents sought by the applicant. For example, it did not order the disclosure of a category of documents which had already been required to be disclosed by a court order in related proceedings, or other documents where disclosure was not for an objective that was consistent with the *Corporations Act 2001*.

As proposed subsection 155(8A) provides a discretion to the Federal Court, it differs from subsection 155(5) of the *Competition and Consumer Act 2010*, which provides that a person must not refuse or fail to comply with a notice provided under section 155. Section 155(5A) was inserted in the Treasury Legislation Amendment (Application of Criminal Code) Bill (No 2) 2001

(Cth) to provide that an offence does not occur to the extent that a person is not capable of complying with section 155(5).

An equivalent to subsection 155(5A) is not required with respect to proposed subsection 155(8A) as the Federal Court can consider the extent to which a person is not capable of complying with a notice under section 155 in exercising its discretion, where relevant.

Question:

2. Will proposed subsection 155(8A) increase the likelihood of litigation?

Answer:

Proposed subsection 155(8A) will improve the efficacy of notices under section 155 of the *Competition and Consumer Act 2010* (Cth) without changing business' obligations under the law. It provides the Federal Court with discretion to order a business to comply with a section 155 notice. Currently, the Australian Competition and Consumer Commission (ACCC) may seek a fine of up to 20 penalty units or a term of imprisonment of up to 12 months for a failure to comply with such a notice. The proposed amendment provides an alternative avenue to the ACCC to ensure compliance with section 155. As such, it is not expected to significantly increase the volume of litigation in connection with notices under section 155.

Question:

3. Are consequential amendments required in relation to the proposed amendments to subsection 86(1)?

Answer:

Consequential amendments are required to section 82, 85 and 179 to ensure the definition of the cooling-off period is referred to consistently throughout the Australian Consumer Law. The Government is in the process of finalising these amendments with a view to introducing them when the legislation is debated in the House of Representatives.

The Australian Competition and Consumer Commission's answers to written questions on notice

Question:

1. Is a safeguard required to proposed subsection 155(8A) to avoid exposing individuals to contempt sanctions in circumstances where production of information, documents and evidence is very difficult or costly?

Answer:

The proposed section provides the Federal Court with discretion to order compliance with a section 155 notice. In the course of its consideration, the Federal Court is able to take into account any matters it considers relevant to its assessment. This can include the difficulty or cost to a business of complying with a notice issued under section 155, and whether the scope and timeframe of the notice is reasonable.

The drafting of Part 9 of the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 is based on section 1303 of the Corporations Act 2001 (Cth).

As the proposed subsection 155(8A) provides a discretion to the Federal Court, it differs from subsection 155(5) of the Competition and Consumer Act 2010 (CCA), which provides that a person must not refuse or fail to comply with a notice provided under section 155.

Subsection 155(6A) makes it an offence to contravene subsection 155(5). Section 155(5A) was inserted in the Treasury Legislation Amendment (Application of Criminal Code) Bill (No 2) 2001 (Cth) to provide that an offence does not occur to the extent that a person is not capable of complying with section 155(5).

An equivalent to subsection 155(5A) is not required with respect to proposed subsection 155(8A) as the Federal Court can consider the extent to which a person is not capable of complying with a notice by exercising its discretion. This was affirmed by comments made by Judge Barker in *Oswal v Burrup Holdings Ltd* (2011) 29 ACLC 11-031.

Before issuing every notice under section 155, the Chairman or Deputy Chair assesses the level of burden the notice is likely to impose. This assessment takes into consideration the timeframe for compliance and the scope of the notice including the difficulty of compiling the information or producing the documents the subject of the notice. The ACCC assists traders with compliance, as its main objective is to obtain the information, documents or evidence relating to a matter that may constitute a contravention of the CCA or Australian Consumer Law. The ACCC responds to representations from businesses by varying the scope and compliance date of notices, where appropriate.

Question:

2. Will proposed subsection 155(8A) increase the likelihood of litigation?

Answer:

The ACCC does not consider that the proposed subsection 155(8A) will increase the likelihood of costly litigation. The proposed subsection 155(8A) will not change businesses' obligations for compliance.

Before issuing every notice under section 155, the Chairman or Deputy Chair assesses the level of burden the notice is likely to impose. The ACCC works with businesses to assist compliance with notices. Based on engagement with traders, the ACCC can decide to vary the scope and compliance date of notices to address issues of compliance. The ACCC's interest in compliance with notices is in obtaining information, documents and/or evidence that relate to matters that may constitute contraventions of the Competition and Consumer Act 2010 and Australian Consumer Law.

The proposed amendment will give the ACCC an alternative avenue to seek compliance with notices issued under section 155. Should the ACCC seek an order from the Federal Court for compliance, the Federal Court under the proposed subsection 155(8A) will have discretion to order a business to comply with all or part of a notice. In exercising its discretion, the Court will necessarily consider factors such as the difficulty and cost of compliance.

Question:

3. Are consequential amendments required in relation to the proposed amendments to subsection 86(1)?

Answer:

Consequential amendments are required to section 82, 85 and 179 to ensure the definition of the cooling-off period is referred to consistently throughout the Australian Consumer Law. The ACCC understands that the Government is in the process of finalising these amendments with a view to introducing them as Government Amendments in the Committee-in-detail stage, following the Second Reading Debate, in the House of Representatives.