



**DEPARTMENT OF PRIME
MINISTER AND CABINET**

**Freedom of Information (FOI)
Laws Review**

ACCI SUBMISSION

May 2009



LEADING AUSTRALIAN BUSINESS

ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nationwide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.

- Business representation on a range of statutory and business boards, committees and other fora.
- Representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Australian Safety and Compensation Council, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.
- Research and policy development on issues concerning Australian business.
- The publication of leading business surveys and other information products.
- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- The *ACCI Policy Review*; a analysis of major policy issues affecting the Australian economy and business.
- Issue papers commenting on business' views of contemporary policy issues.
- *Policies of the Australian Chamber of Commerce and Industry* – the annual bound compendium of ACCI's policy platforms.
- The *Westpac-ACCI Survey of Industrial Trends* - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The *ACCI Survey of Investor Confidence* – which gives an analysis of the direction of investment by business in Australia.
- The *Commonwealth-ACCI Business Expectations Survey* - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.
- The *ACCI Small Business Survey* – which is a survey of small business derived from the *Business Expectations Survey* data.
- Workplace relations reports and discussion papers, including the ACCI *Modern Workplace: Modern Future 2002-2010 Policy Blueprint* and *Functioning Federalism and the Case for a National Workplace Relations System*.
- Occupational health and safety guides and updates, including the *National OHS Strategy* and the *Modern Workplace: Safer Workplace Policy Blueprint*.
- Trade reports and discussion papers including the *Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper*.
- Education and training reports and discussion papers.
- The ACCI *Annual Report* providing a summary of major activities and achievements for the previous year.
- The ACCI *Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014*.
- The ACCI *Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success*.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

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INTRODUCTION

1. ACCI has had an opportunity to review the “**Companion Guide – FOI Reform**” which provides some context to the Government’s underlying policy rationale for the proposed reforms, as contained in the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009*.
2. However, the changes to the *FOI Act 1982* (FOI Act) are complex and extensive. Without the assistance of detailed explanatory memoranda, our analysis is somewhat constrained. This submission does not intend to articulate all of industry’s concerns or views of the proposed changes, but rather, attempts to engage constructively with some of the key preliminary issues identified by business.

EXTENSION OF FOI TO THE PRIVATE SECTOR

3. On 24 March 2009, the Government indicated that it would require the Australian Law Reform Commission (ALRC) to examine the issue of whether FOI, or an “*alternative disclosure regime*”, should be introduced for the private sector. Private enterprise needs confidence that it is able to perform its inherent functions (generate profits, create employment opportunities and ensure this is done on a competitive basis) – its ability to do that is based in a large upon confidentiality in its commercial operations.
4. ACCI notes that former Government’s have already considered this issue. Employers and other have already spent considerable time and resources responding to such inquiries. The ALRC/ARC’s Report *Open Government* ultimately concluded as follows:

No general extension of the FOI Act

15.5 The Review remains of the view that the democratic accountability and openness required of the public sector under the FOI Act should not be required of the private sector. As a general rule, private sector bodies do not exercise the executive power of government[17] and do not have a duty to act in the interest of the whole community. Private sector bodies should not be under an obligation to disclose to any member of the public any document in their possession. This does not mean that private sector bodies are not accountable to the public at all. Private sector bodies are already subject to a wide range of federal, State and local government regulations that affect their management, policies, operations and products. These regulations cover such matters as health and safety, environmental protection, company and financial management, fair trade practices and consumer protection. They have been imposed in response to a demonstrated need for accountability. In addition, some industries have voluntarily adopted

disclosure policies to enhance consumer access to information.[18] In the Review's view strong justification would be needed to subject private sector bodies to the additional resource burden and potential threats to commercial operations that could result from a general extension of the FOI Act. The Review does not consider that such justification exists. Accordingly, it recommends that the FOI Act not be extended to the private sector.

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Recommendation 97

The FOI Act should not be extended to apply generally to private sector bodies.

Recommendation 98

If there is a need for greater disclosure of particular information in a particular area of the private sector, the legislation regulating that industry should be amended, or new legislation introduced, to require greater disclosure of that information. Depending on the identified need, disclosure might be to the relevant regulator, to the public on request or, in appropriate cases, to the public at large by means of public register or other automatic disclosure mechanisms.

Policy Rational

5. Business would be concerned if it were compelled to provide commercial information to applicants in a similar manner as the FOI laws operate vis-à-vis Government held information. The objectives of FOI are for accountability and transparency of Government decision making (ie. pro disclosure). FOI is rather at odds with the underlying policy objective of privacy laws (ie. pro non-disclosure) and also other legal and practical commercial issues for incorporated, unincorporated and listed firms.
6. Commercial imperatives include:
 - a. Ensuring that sensitive information (not limited to “trade secrets”) which could be used by competitors is protected.
 - b. Ensuring that confidential and sensitive information is not obtained unilaterally by various interest groups (ie. trade unions, would use such laws to gain sensitive information which is currently prohibited by industrial relations laws). Other interest groups, (ie. community activist organisations) could also use such information for public relations purposes or to assist with legal proceedings against a firm.
 - c. Ensuring that firms are able to comply with other legal obligations, such as competition, corporation and privacy laws. Other laws include common law (and equitable) legal obligations to other parties.

7. In some cases, business is required to publicly report on certain aspects of their operations or provide public regulators with an enforcement function with certain documents and information (ie. ACCC, ATO, OHS regulators etc). This is not contested. However, there is no extant underlying policy rationale for extending the FOI (or similar disclosure) regime to the private sector – this is something that Australian business feels very strongly about.
8. As a general principle, new policy (and laws) should be introduced if there are problems in existing legal frameworks (and only after consultation with stakeholders affected by those laws). In this case, there does not appear to be any ostensible problems in the business community that would warrant such measures being considered.
9. We are concerned that a further review would require extensive submissions and consultation with business. Time and resources expended on such a process, particularly given the current Global Financial Crisis would be unwarranted. Government must be clear to business as to what its policy intention is in reviewing this matter. It would send a signal to the business community that the Government would not be looking at this issue again, unless it expected a different outcome from the previous review. Not much has changed since 1995, either in the way business operates nor community expectations about what business should publicly disclose. There is also no apparent mandate that could be claimed from such a review.

ACCI Recommendation

The Government should re-consider directing the ALRC to inquire into extending FOI (or similar measures) to the private sector.

The Government should make a statement as to why it is requesting the ALRC to inquire into this issue, if it does make a formal request to the ALRC.

FOI AMENDMENT (REFORM) BILL 2009

Exemption of Business Documents

10. Section 43 of the FOI Act currently exempts certain sensitive business information from disclosure. ACCI supports such measures as appropriate and balanced. We understand that it is not a blanket protection for business and commercial affairs and there is discretion to release “exempt” documents according to Government’s policy guidelines. However, the policy of exempting documents is to legitimately restrict access to documents which are likely to have an adverse affect on the person or firm concerned. The very nature of such documents are sensitive, some extremely sensitive (ie. trade secrets).

11. Under the Bill business information falls into a category of a “conditionally exempt document” (CED) (cl.31A). The key difference proposed under the Bill, is that the Minister/Agency must disclose CED document unless it is contrary to the “public interest” (see cl.11A(5)).
12. This is a significant change to the existing regime. ACCI does not support such measures without clear evidence that its benefits would outweigh its costs or potential prejudice to the business community. Such documents should remain exempt, unless waived voluntarily by the business concerned.
13. These provisions were created to balance the commercial interests of a firm, and are still required for firms to operate on a profitable and viable basis. By shifting such documents into a CED class, now exposes prejudice to a firm which is what the existing provisions are intended to protect and prevent. A CED document will generally be released under the proposed framework unless it is not in the public interest. The note under item 7 of the Bill alerts readers to this:

Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

14. A presumption of disclosure is therefore created which will require an affected person or firm to defend. This is unnecessary burdensome and will impose costs and resources on a person or firm, where there does not appear to be any justification. ACCI is not aware of any inherent problem with the current framework or systemic issues identified by Government, the Courts or the community. The PI test also requires Government to decide whether complicated, sensitive and commercial information should be released. Whilst the current laws require an examination and assessment as to whether it is an exempt document, the proposals in the Bill requires the added task of then determining whether it is not in the public interest according to a range of criteria. How will the Government determine whether a document is or isn't a trade secret and then assess the public interest to determine whether it should not be released?
15. Sensitive Documents: ACCI is concerned that trade secrets, by their very nature, are extremely sensitive information. This should remain as exempt information under the Bill. Other documents that could cause potential damage to a person or firm if released should continue to be exempt.
16. Whilst not all cases will fall under the exemptions, the AAT and the Courts have found in many cases examples of where certain sensitive information should not have been released, information which would damage the firms profitability and viability.

ACCI Recommendation

1. The Government should continue to exempt business documents from FOI regime. They should not be CED documents.

2. Given the potential for damaging a firm's legitimate interests, the Government should continue to exempt trade secrets (s.43(1)(a)), information having a commercial value that would be, or could reasonably be expected to be destroyed or diminished if the information were disclosed (s.43(1)(b)) and documents which would, or could reasonably be expected to, unreasonably affect that person or business adversely (s 43(1)(c)(i)).

Public Interest Test

17. Given that the public interest (PI) will be determinative in the release of currently exempt documents, it is important that the Government carefully considers the construction of this test. PI is defined under 11B.
18. ACCI can identify a number of preliminary issues with the current drafting:
 - a. It is not appropriate to apply a "reverse onus of proof" under cl.11A(5). A business will be required to persuade the IC not to disclose information on PI grounds (as defined in cl.11B). A business will be required to expend valuable time and resources to consider, obtain legal advice and if need be, defend such applications.
 - b. Cl.11A(5) states that a CED must be released unless access to the document at that time would be contrary to the PI. What happens to documents that may not be contrary to the PI at that point in time, but may in the future? There should be a further provision that allows the agency to consider future harm.
 - c. The PI test appears to be a high threshold for business to satisfy. The test should be reformulated so that disclosure only occurs if it is *in* the public interest. This shifts the emphasis in these matters on withholding business documents (which could contain sensitive commercial information) unless there are cogent reasons for disclosure (which must be in the PI).
 - d. Cl. 11B outlines the factors that are used to determine whether the disclosure is contrary to the PI. ACCI recommends that there should be additional factors which would ensure that businesses are not prejudiced by the possible release of the information. Such additional factors include (but are not limited to) the actual or probable:
 - i. Harm or prejudice (whether legal, equitable, commercial, financial interests) to the business, or associated entities (as defined under the *Corporations Act*) its employees or officers.
 - ii. Harm or prejudice to the value of listed or non-listed securities of the business of associated entities.

- iii. Harm or prejudice to the ongoing operational requirements of the business or associated entities.
- iv. Harm of prejudice to the wider Australian community, economy, and others persons or bodies potentially affected by access of such documents.

Requirement to Inform Business

19. Proposed cl.27(b) of the Bill states that the section applies “*if it appears to the agency or Minister that the person, organisation or proprietor of the undertaking ... might reasonably wish to make a contention ...*” It then allows discretion as to whether to allow the business to make a submission in support of the exemption contention.
20. ACCI supports a business affected by a decision which could lead to currently exempt documents being accessed to be notified in all but some cases. The current Government policy guidelines states:

However, it is only where it is absolutely clear that the information is not commercially sensitive (for example, promotional material about a company product which is available from its web site or on the product itself) that there is no need to consult.
21. There may be a legitimate reason for not notifying an affected business where the information is trivial or minor (such as the example provided in the Guide). But the presumption should be that all information is not trivial or minor and therefore the agency should notify the relevant person or firm before information is released.

ACCI Recommendation

The Government should amend the existing draft laws to ensure that:

- A document is only released if it is *in* the public interest (and not contrary).
- Additional criteria should be added to the public interest test to ensure that business is not prejudiced by the possible release of information.
- Business affected by the release of information is notified and can respond to the application before release of the information.

Extensive Powers/Penalties

22. ACCI is unsure as to who the wide and extensive coercive gathering powers under the Bill are targeted towards. ACCI would be concerned that a business (or its officers) may be liable to significant penalties, including imprisonment. It would also be concerned if these powers were used against business that provided services on contract for Government. Should that be the case, firms would be required to consider its legal and

- business liabilities should it decide to contract or tender for Government work.
23. The IC powers during review process are extensive:
- a. conduct reviews/hearings as it sees fit; obtain information from any person (cl.55)
 - b. must give parties a copy of its decision (cl.55J)
 - c. require person to produce a document or information - 6 months imprisonment for failure to comply (cl.55Q)
 - d. require person to produce the exempt document subject to the application (cll.55S and 55T)
 - e. require a person to appear - 6 months imprisonment (cl.55V)
24. In conducting an investigation the IC can exercise similarly broad and extensive powers:
- a. power to enter premises of agency or contracted service provider if they consent to entry (cl.77)
 - b. require a person to provide information or documents - 6 months imprisonment (cl.79)
 - c. require a person to appear to answer questions - 6 months imprisonment (cl.82)
25. It would appear that the only persons who could provide relevant information would be public servants.
26. ACCI would be concerned that a business (or its officers) may be liable to significant penalties, including for a person, 6 months imprisonment. It would also be concerned if these powers were used against firms that provided services on contract for Government. Should that be the case, firms would be required to consider its legal and business liabilities before it decide to contract or tender for certain Government work and services.

ACCI Recommendation

The Government should amend the existing draft law to ensure that new powers (including coercive information gathering powers) of the Information Commissioner are not exercised against business, its employees or officers.

Other Matters

27. ACCI reserves its position on the implications of the extension of FOI to entities that contract on behalf of the Government. We will require further time to consider the policy implications of such extensions.

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