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FOI Review
Attorney-General's Department
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Via email to foireview@ag.gov.au

Dear Dr Hawke

Australian Competition and Consumer Commission (ACCC) submission to the Review of the *Freedom of Information Act 1982*, and the *Australian Information Commissioner Act 2010*

1. Thank you for the opportunity to provide a submission to your review of the *Freedom of Information Act 1982* (FOI Act) and *Australian Information Commissioner Act 2010* (AIC Act).

Background

2. The ACCC is an independent statutory authority formed in 1995 to enforce the *Competition and Consumer Act 2010* (**CCA**) (formerly known as the *Trade Practices Act 1974*) and other Acts. The ACCC promotes competition and fair trading in the marketplace to benefit consumers, business and the community. It also regulates national infrastructure services. The Australian Energy Regulator (AER) is also an independent statutory authority and Australia's national energy market regulator. The AER has an independent Board, with its staff, resources and facilities provided by the ACCC.

3. A primary responsibility of the ACCC is to ensure that individuals and businesses comply with Commonwealth competition, fair trading and consumer protection laws. The ACCC investigates and is involved in litigation relating to serious civil and criminal contraventions of the law, including cartel conduct such as price fixing and market sharing, misuse

of market power and merger transactions where the ACCC considers whether there will be a substantial lessening of competition in a market. Given the nature of these investigations and the ACCC's involvement in litigation, the ACCC holds material containing highly commercially sensitive information relating to competitors, suppliers and customers in many industries.

4. The ACCC regularly receives requests for information under the FOI Act from a range of parties. Whilst the nature of requests vary, many requests relate directly to investigative and litigation activities and seek access to commercial information about the business affairs of corporations and entities that are not related to the applicant.

5. In the ACCC's experience, vigorously investigating and enforcing the law often results in the FOI regime being used to 'game' law enforcement processes by seeking to divert agency resources away from investigations and enforcement activity or seeking to circumvent court based processes.

6. The ACCC, as a law enforcement agency, regularly makes decisions to take enforcement action, including court proceedings, in relation to contraventions of the law. Its role is very different from Departments and agencies which make decisions that affect people's entitlements through the delivery of services. The application of the FOI regime to law enforcement agencies should be seen in the context of their functions. It is important to recognise that those corporations and individuals who are the subject of ACCC investigation or litigation may have motive and incentive to seek to disrupt the ACCC's processes or proceedings by employing tactics that include use of the FOI regime.

Overview

7. The ACCC considers that ensuring the FOI regime provides an efficient and effective mechanism for applicants to seek and obtain access to information relating to government activities is critical to ensuring an appropriate level of transparency, fairness, and good governance. At the same time, care must be taken to ensure that the regime is not misused or 'gamed', or imposes unreasonable burden and cost on an agency and the Commonwealth as this will undermine the public policy in independent regulators vigorously enforcing the law.

8. In this regard, there are still a number of matters that the ACCC considers should be addressed to ensure the effective and efficient operation of the regime, and minimise the risk of unwarranted additional costs being borne by agencies and the Commonwealth. In particular, the ACCC believes that legislative amendments are required to:

    - ensure that FOI requests cannot be used as a tactic in litigation/investigations;

- close loopholes that are enabling unreasonable conduct or gaming by a small number of FOI applicants such as use of multiple sequential applications; and
- improve the efficiency and timeliness of the two-tier merit review process.

9. Details of these issues and the ACCC's views about how they could be dealt with are set out below. The ACCC has also identified some further procedural and practical improvements that it believes could enhance the regime for your consideration.

10. Further, the ACCC believes that there is also a need to continue to carefully monitor how conditional exemptions, particularly the public interest conditional exemption for business, is applied in practice. Inappropriate release of market information to an FOI applicant can have adverse effects on other parties and competitive markets, and could seriously jeopardise the ability of the ACCC to obtain information from market participants in future matters, especially in relation to merger reviews under section 50 of the CCA. This is of particular importance to the ACCC, as its effectiveness depends on the confidence of market participants in the ACCC's ability to protect confidential business information provided in the course of investigations. Inappropriate release of such information has the potential to seriously damage the ACCC's reputation as well as its ability to perform its core operations under the CCA. At the time of writing, the ACCC considers that the scope of the exemptions has not been sufficiently tested to identify whether they are adequate to protect the rights of third parties in such situations, but seeks to alert you to the potential issues that may arise.

Use of FOI applications as a tactic in litigation/investigations

11. Of particular concern to the ACCC is the use of FOI requests as a strategic tool during the course of an investigation by the ACCC or by parties in litigation involving the ACCC.

12. When conducting litigation, a party may seek copies of documents though court processes (such as discovery, subpoenas and notices to produce). In parallel, parties to litigation involving the ACCC Court processes are confined to material that is relevant to the litigation, and 'fishing expeditions' are not permitted. In addition, use of the court processes usually involve reimbursement of the ACCC's actual costs[1], whereas use of FOI involves little or no cost to the applicant. The ACCC is concerned that the ability to obtain documents using FOI during the course of litigation at little or no cost, and to engage in broader searches

[1] The awarding of costs will depend on the circumstances and the relevant court's determination on cost issues on a case by case basis.

than would otherwise be available via court processes, provides an incentive for parties to use FOI to circumvent court processes which has the effects of:

- undermining established court procedures and safeguards, and
- diverting agency resources from the litigation at hand.

13. In addition, the ACCC receives many FOI requests from applicants when they have become aware that the ACCC is conducting an investigation into their conduct. In some cases, such requests may be made to divert resources away from the investigation, by tying up investigation staff in identifying and collating documents and assisting the FOI decision maker, and as a quasi discovery process. In many cases, these requests originate from sophisticated, well resourced corporations. The ACCC is concerned that the FOI process should not be used for the purpose of 'early discovery' of documents outside the supervision of the relevant court where the proceedings (if any following the ACCC's investigation) will be heard.

14. At present, there are no effective means for an agency to counter such tactics under the FOI Act. Section 24 is of limited utility given the way in which FOI requests can be framed and timed to avoid a determination of being a substantial and unreasonable diversion of resources, and the threshold for declaring an applicant vexatious is very high. It should also be noted that s.89L(4)(c) of the FOI Act, which provides that seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document or documents imposed by court may constitute the basis for making a vexatious applicant declaration, is in the ACCC's view too limited in scope to address this issue.

15. While the ACCC understands that these issues may not currently be of concern to all policy and/or service delivery agencies, given the cost implications for the Commonwealth and the potential impact on core operations of law enforcement and regulatory agencies, the ACCC believes this issue should be addressed in the review of FOI.

16. The ACCC recognises that, in general, it is not consistent with FOI policy for the motivation of an applicant to be taken into account in considering an FOI request (though this can be relevant in particular circumstances, such as remission of charges). However, we believe that it is possible to amend the current provisions to provide an objective standard for determining when access to the FOI regime should be refused because it undermines other litigation and investigative processes.

17. The ACCC suggests that an amendment could be made to the FOI Act to enable agencies to prevent the disclosure of materials while litigation or

investigations are on foot. The scope of such a restriction could be limited to certain agencies specified by regulation. In this regard, we draw your attention to s.100 of the *Commerce Act 1986 (New Zealand)* which empowers the New Zealand Commerce Commission to make orders prohibiting the disclosure of information, evidence or documents in relation to investigations or inquiries under that Act. Such orders operate until a maximum of 20 working days from the conclusion of an investigation or inquiry.

18. Additional approaches that may reduce the risk of use of the FOI regime as a litigation tactic are to:

    - amend s.12 of the FOI Act to disallow FOI requests for material available to an applicant through other legal mechanisms (such as discovery, notice to produce or subpoena),

    - allow agencies to recover actual costs incurred in complying with requests for documents via FOI requests made in the course of litigation in the same way that it can for producing documents via subpoena, and

    - expand the concept of 'substantial and unreasonable diversion' to include situations where documents are available or should be sought via other legal avenues such as litigation processes.

Multiple sequential FOI requests

19. Where an FOI applicant lodges multiple sequential FOI requests on different subject matters (or effectively requests similar documents through a re-framing of the scope of their request) the receiving agency has no choice but to process each single request. This is because each request is too small to constitute an unreasonable diversion of agency resources in its own right and the requests are received over an extended time period. By disaggregating requests in this way, an applicant can circumvent the ability of the agency to consider whether processing the requests constitutes an unreasonable diversion of the agency's resources. In this regard, the ACCC has experienced situations where it is receiving, on average, batches of 4-5 applications on a fortnightly basis from a single applicant.

20. This type of behaviour can result in a single or small number of applicants monopolising an agency's scarce FOI resources and imposing additional administrative burden on the agency. Importantly, it is also detrimental to other applicants because an agency may have to refuse to process a request that it would normally have processed had it not been obliged to process multiple sequential requests from another applicant.

21. The existing FOI provisions do not provide an effective avenue to assist agencies to counter such behaviour. At present, s.24(2) of the FOI Act

only allows agencies to treat multiple requests as a single request where the requests relate to the same documents or documents the subject matter of which is substantially the same. A series of requests for different documents about the conduct of a matter or relating to a similar theme would not fall within s.24(2). Nor does s.24(2) allow agencies to treat multiple requests as a single request where requests have been made over an extended time period. Whilst the Information Commissioner (**IC**) has the ability to declare a person to be a 'vexatious applicant' pursuant to s.89K of the FOI Act and that an agency may refuse to consider a request or certain applications from that person, the high threshold which applies to the vexatious applicant provisions does not make this a practical option in most cases.

Amendment to s.24(2) of the FOI Act

22. The ACCC submits that an amendment to s.24(2) of the FOI Act should be made to enable an agency to treat multiple requests from the same applicant as a single request in deciding whether it would constitute an unreasonable diversion of resources, without requiring that the subject matter of requests be the same. The issue of sequential requests also needs to be addressed, so that an agency can consider *all* requests received from an applicant over a period in considering what would constitute a substantial and unreasonable diversion of resources, and not merely those requests that are made at roughly the same time.

Amendment to the vexatious applicant provisions

23. The ACCC also submits that amendments to the vexatious applicant provisions contained in Part VIII, Division 1 of the FOI Act should be considered.

24. As the ACCC previously noted in its submission to the Department of Prime Minister and Cabinet on the *Freedom of Information Amendment (Reform) Bill 2009*:

- it is notoriously difficult to have a person declared vexatious and there are good policy reasons for the threshold for vexatiousness to be kept high;
- having an applicant declared vexatious would be a lengthy process involving appeal rights; and
- s.24 will remain inaccessible where FOI applicants are sophisticated enough to pace their applications so as to overwork but not completely overwhelm agency resources.

25. The term 'vexatious' imports common law jurisprudence arising in a litigation context that sets the threshold very high. The term also has negative connotations for applicants, which is likely to result in any such matters being vigorously contested in a lengthy review process.

26. In this regard, the ACCC notes that agencies made four applications to the Office of the Australian Information Commissioner (OAIC) in the 2012 financial year to have a person declared vexatious but none of these applications were finalised by the OAIC[2]. The IC has stated, '[a] vexatious applicant declaration is not an action that the Commissioner will undertake lightly, but its use may be appropriate at times.'

27. Accordingly, there are significant difficulties associated with utilising the vexatious applicant provisions to deal with multiple sequential requests from a single applicant.

28. The ACCC submits that to address these issues, references to frivolity or vexatiousness should be removed from the provisions, and that an alternate description be substituted that avoids the consequences set out above and assists agencies to appropriately manage unreasonable applicant conduct.

29. One option would be to enable agencies to refuse to process an application where it is unreasonable in nature. Such a decision could be made subject to full merits review by the OAIC. This is broadly aligned with a recent suggestion of the IC that '[a]n option may be to give an agency the explicit power to reject an individual application on the ground that it is... vexatious or frivolous, or lacks clarity' [3]. The OAIC could also provide guidelines on the issue, perhaps based on the NSW Ombudsman Manual 'Managing Unreasonable Complainant Conduct', tailored to an FOI context.

30. Another option would be to require the OAIC to determine agency requests within a set timeframe (such as 30 days) and where no such determination is made the request for a declaration is deemed to be refused thereby enabling an agency to seek Administrative Appeals Tribunal (AAT) review of the deemed refusal.

31. In a general complaint context, the ACCC understands that some jurisdictions have managed such conduct via a resource based approach, whereby agencies have discretion to refuse to deal with applicants where they have exceeded a pre-determined threshold of an agency's time in managing their matters over a certain time period. Such an approach might be adaptable to an FOI context, with review by the OAIC.

Anonymous applications and use of pseudonyms

32. The ACCC considers that the ability of an applicant to make an anonymous request, or use a pseudonym, results in a number of

[2] Office of the Australian Information Commissioner 2011 – 2012 Annual Report, page 104.
[3] Speech titled "Thirty years of the FOI Act – Service, Overhaul or Refit?" published at: http://www.oaic.gov.au/news/speeches/john_mcmillan/JohnMcMillan_ACLA_29November2012.html

unintended adverse consequences for the effective operation of the FOI regime.

33. The ability to make applications without identifying the applicant allows an applicant to circumvent the ability of an agency to determine whether multiple requests should be considered in aggregate pursuant to s.24, and accordingly to properly assess whether such requests would substantially and unreasonably divert resources. In this regard, even if the amendments to s.24 proposed by the ACCC above were to be adopted, an applicant would still be able to circumvent the operation of that provision by using multiple pseudonyms to prevent detection.

34. Anonymous applications or the use of pseudonyms can also be used to make a vexatious applicant declaration ineffective. In practice, even where the IC has declared a person to be a vexatious applicant and that an agency may refuse to consider an FOI request from that person, the vexatious applicant may circumvent the declaration without fear of detection by making applications anonymously or via a pseudonym. In this regard, even if the amendments to the vexatious applicant provisions proposed by the ACCC above were to be adopted, an applicant would still be able to circumvent the operation of those provisions in this way.

35. Also, the lack of transparency in the process when dealing with an unidentified applicant has a significant impact on the consultation process. The nature of much of the information held by the ACCC is such that it is often not suitable for public release on a disclosure log, and in most circumstances, third parties must assess the impact of disclosure to the specific applicant. Where the applicant remains anonymous, this assessment cannot be made. In these circumstances, third parties will usually seek to resist any disclosure at all.

36. We also note that the use of pseudonyms raises real questions as to how review processes can operate effectively where an applicant seeks anonymity at OAIC, AAT and Federal Court stages.

37. Accordingly, the ACCC considers that the FOI Act should be amended such that an application must not be made anonymously or under a pseudonym.

Improving efficiency and timeliness of the merit review process

38. As you are aware, the FOI regime involves a two-tiered system of merits review which enables an applicant to apply to the OAIC for review of a decision of an agency (without requiring the applicant first to seek an internal review by the agency). Subsequently, the applicant may apply to the AAT for a review of the decision of the OAIC.

39. In practice, the ACCC has observed that the process is subject to lengthy delays which is hindering the efficiency and therefore the effectiveness

of the regime. For example, the ACCC has had one matter considered by the OAIC to date. This matter took just under one year from date of application to release of the OAIC's decision. The ACCC currently has three ongoing matters before the OAIC, two of which have been before the OAIC for over a year.

40. In raising this issue, the ACCC makes no adverse comments about the OAIC itself. However, the ACCC believes that the role of the OAIC should be more limited in order to ensure that reviews can be dealt with in a timely and efficient manner.

41. The ACCC considers that appropriate solutions could be to:

    A. Limit the functions of the OAIC to the investigation of complaints, education and merits review in relation to less resource intensive matters such as:

    - a decision under s.29 relating to the imposition of a charge or the amount of a charge,
    - access refusal under s.24A on the basis that the documents cannot be found, do not exist or have not been received,
    - access refusal under s.24 where a practical refusal reason exists.

    If such an approach were adopted, this would enable the OAIC to streamline its operations, and ensure that relatively straightforward matters involving less evidential burden can be dealt with expeditiously.

    B. Reinstate the requirement that applicants and third parties must first seek internal review from within the agency before they can make an application for merits review so matters that can be dealt with between an agency and an applicant can be determined without escalation to the OIAC.

    C. Enable other merits review applications likely to require a more lengthy review to be taken directly to the AAT.

Other Issues

42. In addition to the key issues raised above, the ACCC has identified a number of procedural and practical improvements that it believes could be made to enhance the FOI regime.

Uncontactable applicants

43. The ACCC considers that it would be useful if the FOI Act could be amended to clarify the status of an FOI request where the agency cannot deliver notices to the applicant to the specified address, for example where the agency receives repeated notification from the server that that the email is undeliverable, or mail to a physical address is returned to

sender as the address is unknown. The ACCC takes the view that it is implicit in s.15(2)(c) of the FOI Act that a real and functional address for service of notice needs to be provided and maintained, thereby invalidating a request where the address specified is not real and functional, or ceases to be so during the course of processing a request. However, it would be useful if this scenario was specifically addressed in the legislation, via an amendment to s.15(2) of the FOI Act.

Disclosure logs

44. As you are aware, one of the objectives of disclosure of material released by an agency on a website (eg a disclosure log) was that this would result in less requests over time[4].

45. However, at present, each agency maintains its own disclosure log which results in a duplication of the process across each agency. The current system therefore operates as a potential barrier to the public accessing information as it requires members of the public to know which agency websites to search for information on disclosure logs, which presupposes a good understanding of how government works and the functions of each agency. The ACCC would support the development of a technical solution that would enable all Commonwealth disclosure logs to be searched globally.

Security of redacted material released under FOI

46. There is a tension between Commonwealth accessibility requirements in relation to the formats in which website material can be published and the need for agencies to be able to present redacted materials in a way that maintains confidentiality over redacted text. Currently, pdf is the only satisfactory secure format for dealing with redacted documents, but this does not meet accessibility requirements. It would be useful if the legislative/policy framework was amended to specifically allow agencies to publish such material in a secure format with the option for an applicant to request an alternate format where genuinely required for accessibility reasons. This is the way the ACCC current administers its disclosure log, and believes is the only way this issue can be dealt with in practice.

Fees and Charges

47. The ACCC strongly supports the continuation of processing charges in respect of applications for non-personal information made under the FOI Act. The ACCC agrees that charges must not be used to discourage applicants from seeking access to documents. However, we note that in cases where the ACCC cannot refuse to process a request on the basis that it would constitute a substantial and unreasonable

[4] See pg 9, FOI Reform – Companion Guide to Exposure Drafts, March 2009

diversion of resources, the imposition of charges can nevertheless encourage applicants to narrow the scope of such requests to a level that can more reasonably be processed.

48. In our view, the ability for agencies to impose such processing charges is consistent with the 'lowest reasonable cost' objective, stated in the objects clause in s.3(4) of the FOI Act:

> …functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

49. The lowest reasonable cost objective implies that applicants should bear some of the costs associated with making a request. In our view, this approach strikes an appropriate balance between the rights of applicants against the significant costs borne by agencies in processing requests that is ultimately subsidised by the Government. The ability for applicants to seek a reduction or waiver of those costs should be preserved to allow individual circumstances to be taken into account when making charge related decisions. We also support continued external oversight of such agency decisions by the OAIC and the AAT.

50. As noted above, many FOI requests received by the ACCC are from sophisticated and well-resourced applicants and are made for essentially commercial reasons. In some cases, the ACCC suspects that some applicants are seeking to use the FOI regime as an inexpensive source of market research/intelligence gathering. Such applicants are usually represented by legal practitioners who have a sound understanding of the FOI Act and structure requests in such a way as to minimise the chance of a refusal based on a substantial and unreasonable diversion of resources whilst maximising the number of documents sought and obtained. Under the current costs regime, the cost of processing FOI applications is already heavily subsidised by the Commonwealth. We question the appropriateness of the Commonwealth continuing to subsidise the costs of such FOI applications.

51. As outlined above, the ACCC also considers that requests should not be able to be made under FOI where documents are available through other legal mechanisms such as discovery or subpoena.

Scale of costs

52. Given the OAIC's advice that the current scale of FOI processing charges outlined in the FOI regulations have not increased since 1986, the ACCC supports updating and periodic indexing of these charges to reflect APS staff costs or a proportion thereof. The ACCC also supports the amalgamation of 'search and retrieval' and 'decision making' charges into a single fee for processing costs to maximise efficiency. At present, agencies must undertake two separate

calculation processes and it would be easier and more efficient if the administration of these processes could be combined. As noted above, the ACCC supports the continuation of no fees for an applicant to access their own personal information.

Conclusion

53. The ACCC appreciates the opportunity to provide its comments in relation to the operation of the FOI regime, and would appreciate the opportunity to discuss the issues raised in this submission with you directly or via a roundtable with other law enforcement agencies given the particular issues that arise for law enforcement agencies through the present FOI regime.

Yours sincerely

Brian Cassidy
Chief Executive Officer