



Executive Summary

The APVMA supports the thrust of the recent reforms to the FOI Act, and has devoted considerable resources to their implementation. Nevertheless, for the reasons discussed below, the APVMA believes it would be more consistent with the Australian Government's cost recovery policy for those making requests to the APVMA for information they purport to own (and are expected to have in their possession) to pay a greater proportion of the costs associated with obtaining that information than is recoverable under the current FOI charges regime. The APVMA intends exploring options for achieving this objective under its governing legislation, and submits that consideration be given to allowing agencies to charge the actual staff time costs associated with processing FOI requests made for commercial purposes.

Background

The APVMA

The APVMA is an independent statutory authority and an agency for the purposes of the FOI Act. The APVMA administers the National Registration Scheme for Agricultural and Veterinary Chemicals and the scheme's legislation, in partnership with state and territory governments and a number of Australian government agencies. The APVMA is responsible for the assessment and registration of agricultural chemicals and veterinary medicines (agvet chemicals) and for their regulation up to and including the point of retail sale. The APVMA sits within the portfolio of the Australian Government Minister for Agriculture, Fisheries and Forestry.

APVMA funding

The APVMA is funded by fees, charges and levies imposed on the industry it regulates. Chemical companies pay fees for the APVMA to evaluate registration proposals and a levy based on the wholesale sales of chemical products. In accordance with the Australian Government's cost recovery policy, for which the Department of Finance and Deregulation is responsible, these fees, charges and levies are set to fully recover the APVMA's costs of operation. This includes costs associated with providing information on agvet regulatory arrangements to the agvet chemical industry and the public more broadly, which are recovered as overheads attributed to the service delivery sections of the APVMA.

FOI requests to the APVMA

The bulk of the FOI requests the APVMA receives are made for commercial purposes by holders of product registrations or active constituent approvals (predominantly companies) seeking access to confidential commercial information they purport to own. Whilst APVMA encourages companies to maintain good record keeping practices, the APVMA receives many requests from applicants seeking access to information they have submitted to the APVMA in the past or purported to have acquired from previous holders. For various reasons these companies have failed to maintain copies of the information previously submitted to the APVMA, or find it difficult to locate the

information amongst their records. It is the APVMA's experience that many companies misplace information relating to their products, or fail to obtain relevant information about a product they have acquired from another company. The APVMA believes that the current FOI framework, which allows companies to submit FOI applications to access documents they purport to own (but have lost, misplaced or failed to acquire from previous holders), would appear to be an inappropriate use of the FOI Act.

The work involved in processing such requests is considerable. APVMA FOI decisions are typically complex and lengthy. The documents often contain confidential commercial information, and extensive third party consultation is frequently required. In order to decide whether information applicants purport to own may be released, decision makers are required to:

- (a) analyse complex commercial arrangements relating to registration and manufacturing histories by reviewing database reports and relevant product files;
- (b) confirm appropriate authorities regarding transfers of registrations and confidential commercial information, including but not limited to protected data;
- (c) examine relevant sales agreements having regard to principles of commercial and intellectual property law;
- (d) undertake complex corporate relationship mapping with reference to relevant information from the Australian Securities Investments Commission and the Australian Business Register databases; and
- (e) make findings on material questions of facts, apply relevant exemptions and prepare detailed statements of reasons demonstrating government best practice and compliance with administrative law principles.

Support for the recent FOI reforms

The APVMA supports the thrust of the recent reforms to the FOI Act. Considerable resources have been devoted to their implementation. In addition to responding to FOI requests and consistent with the information publication scheme established under the FOI Act, the APVMA provides a great deal of information on agricultural and veterinary chemical regulatory arrangements to the public through its website and corporate publications, and also through various consultative committees, presentations and seminars.

The APVMA's corporate plan emphasises the importance of accountability and transparency and commits the APVMA to actively engage with relevant stakeholders. The provision of information to stakeholders enhances engagement and raises industry standards in general, and these lead to better outcomes. The APVMA supports the emphasis of recent reforms to the FOI Act on improving and enhancing agency transparency and accountability.

Terms of reference

The primary term of reference relevant to the APVMA’s submission is 2(f): the role of fees and charges on FOI, taking into account the recommendations of the Australian Information Commissioner’s review of the current charging regime. However, the APVMA’s submission also responds in effect to the overlapping terms of reference 2(a) (the impact of the recent FOI reforms) and 2(g) (the desirability of minimising the regulatory and administrative burden, including costs, on government agencies).

Term 2(a): the impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the Freedom of Information Act 1982 (Cth), on the effectiveness of the FOI system

Consistent with the experience of many other Australian government agencies, since the implementation of reforms to the FOI Act in November 2010 the APVMA has experienced a significant increase in the number of FOI requests it receives. In 2009-10, the APVMA received 19 requests, while in 2011-12 the APVMA received 99, a 520% increase over 2 years¹. Since the commencement of this financial year (a period of less than six months), the APVMA has received 98 requests. If the APVMA continues to receive requests at this rate for the remainder of 2012-13, the agency would expect an increase of more than 1000% of the numbers received in 2009-10.

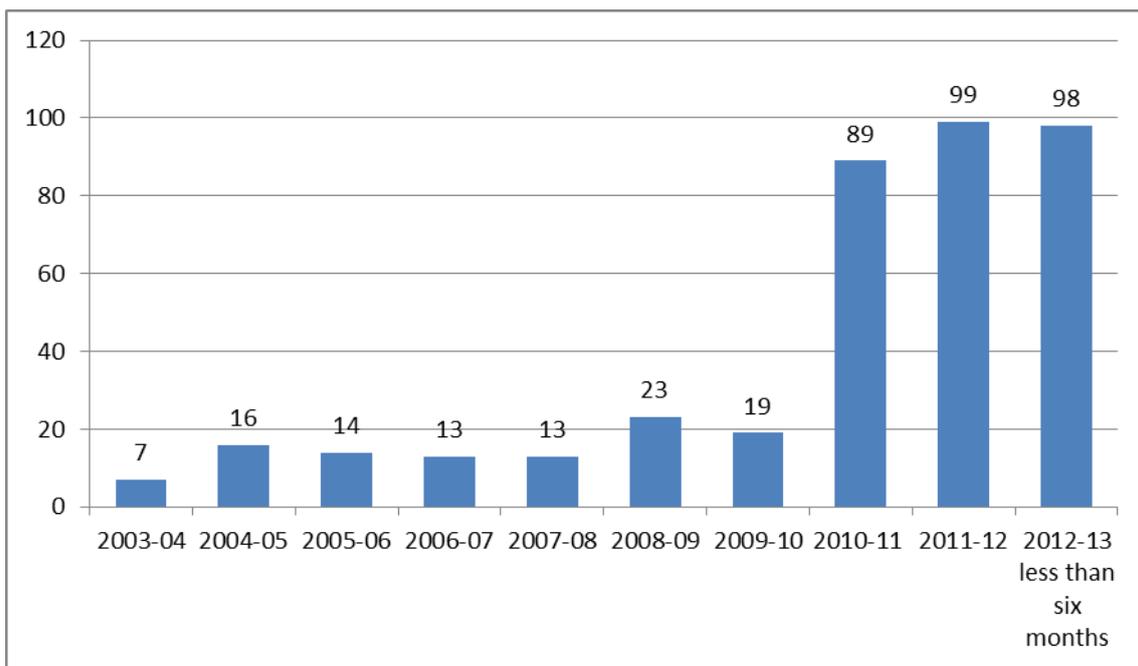


Figure 1: Requests received by the APVMA by financial year

The APVMA has approximately 170 FTE staff and devotes a considerable proportion of those resources to processing FOI requests. In 2009-10, 2.5 FTE staff processed FOI requests, with others making decisions. In 2012-13, 4.5 FTE staff work almost exclusively on processing and making decisions in response to FOI requests; 2.5 FTE administrative staff and 2 Executive Level lawyers. Without including the time of other staff members (who also assist with

¹ Source: the APVMA’s *Annual Report 2011-12*, pages 224-25). The APVMA received 88 requests in 2010-11.

processing or making decisions in response to requests from time to time), the staff costs associated with processing FOI requests have increased from \$19,187 in 2009-10 to approximately \$414,403.70 in 2011-12. The APVMA recovers a small fraction of these costs in FOI charges: in 2011-12, \$15,800 in FOI charges were collected from FOI applicants.

The exponential increase in the number of FOI requests received by the APVMA in recent years is unsustainable having regard to present resources. In the absence of a mechanism to recover the full cost of processing FOI applications, the APVMA's only option is to fund the shortfall from the income received from a levy charged on the sale of agricultural and veterinary chemical products. This ultimately results in FOI costs being almost entirely funded by the agvet chemical industry rather than FOI applicants directly.

The APVMA also refers to the submissions made in relation to term 2(f).

Term 2(b): the effectiveness of the Office of the Australian Information Commissioner (OAIC)

The APVMA does not make a specific submission in relation to this term of reference.

Term 2(c): the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters

The APVMA does not make a specific submission in relation to this term of reference.

Term 2(d): the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account:

- (i) *the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and*
- (ii) *the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government*

The APVMA does not make a specific submission in relation to this term of reference.

Term 2(e): the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act

The APVMA does not make a specific submission in relation to this term of reference.

Term 2(f): the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime

The APVMA submits that consideration be given to allowing agencies to charge the actual direct staff time costs associated with processing FOI requests made for commercial purposes. In the United States of America (USA), federal government agencies impose FOI charges which recover the full direct costs of searching for, reviewing for release, and duplicating the documents in response to 'commercial use' requests². These are defined as requests seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

The Department of Resources, Energy and Tourism referred to the approach taken to imposition of charges in the USA in its 23 November 2011 submission to the *Review of charges under the Freedom of Information Act 1982* conducted by the Australian Information Commissioner,

² See *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines* issued March 27, 1987 by Office of Management and Budget.

Professor John Macmillan. There are brief references to the Department's submission and the approach in the USA in Professor MacMillan's report³, but no detailed consideration.

Enabling agencies to impose charges processing requests made for commercial purposes commensurate with the actual direct staff costs associated with that work would be consistent with the Australian Government's cost recovery policy. The cost recovery policy was adopted among other reasons to promote the efficient allocation of resources, and the policy provides:

*Used appropriately, cost recovery can provide an important means of improving the efficiency with which Australian Government products and services are produced and consumed. Charges for goods and services can give an important message to users or their customers about the cost of resources involved. It may also improve equity by ensuring that those who use Australian Government products and services or who create the need for regulation bear the costs.*⁴

The APVMA appreciates, as is noted in the cost recovery policy, that cost recovery may not be warranted where it would be inconsistent with government policy objectives. The objectives of the FOI Act include giving the Australian community access to information by providing for a right of access to documents, and emphasise that the intention is to "facilitate and promote public access to information, promptly and at the lowest reasonable cost"⁵. Nevertheless, the APVMA submits there is merit in considering amendments to the FOI Act to enable agencies to impose higher charges where applications are made for commercial purposes. Among other things, this would promote more efficient allocation of resources by the commercial parties themselves. The commercial parties would need to weigh up the cost of obtaining their own commercially valuable information from government agencies, against the cost of arranging their affairs more efficiently to ensure they retain such information or appropriately acquire it from previous holders of registrations or approvals.

If this proposal is adopted, it will be important for the Australian Information Commissioner to closely monitor its implementation. The Australian Information Commissioner could issue guidelines under section 93A of the FOI Act to ensure an appropriate approach by agencies to the calculation of charges.

Term 2(g): the desirability of minimising the regulatory and administrative burden, including costs, on government agencies

The APVMA considers the introduction of 'working days' instead of 'calendar days' timeframes would assist to minimise the regulatory and administrative burden on agencies (and therefore, costs), without impacting the statutory right of access to government information.

The APVMA also refers to the submissions made in relation to term 2(f).

³ At page 16 and in appendix E.

⁴ See the *Australian Government Cost Recovery Guidelines July 2005*.

⁵ See s 3, in particular ss 3(1) and 3(4).