

## ACCI Preliminary Submission – Government Consultation on ALRC Report 108

### Introduction

1. The ALRC's final report, *For Your Information: Australian Privacy Law and Practice* (ALRC 108) was delivered to the Attorney-General on 30 May 2008 and was launched by the Cabinet Secretary, Senator the Hon John Faulkner, and the Attorney-General, the Hon Robert McClelland MP, on 11 August 2008. The three volume report recommends 295 changes to improve Australia's privacy framework.
2. ACCI contributed two submissions to the ALRC inquiry on the *Privacy Act 1988* (the Act) (**attached**). The ALRC inquiry follows a number of previously held inquiries into privacy laws, which ACCI and its members have participated in on a constructive basis.
3. ACCI has consistently argued for the retention of both the small business exemption and the employee records exemption.

### Key Issues

4. ACCI notes that the Government is now conducting its own two-stage review of the ALRC's recommendations before it makes a formal response to the ALRC's recommendations:
  - a. The first stage is to consider the ALRC's proposed model Unified Privacy Principles (UPPs), which will replace the current privacy principles.
  - b. The second stage is to consider the existing exemptions, and a possible statutory cause of action for breach of privacy.
5. We reiterate that Australian business continues to support both exemptions. The small business exemption is well balanced and appropriate to balance the needs of reducing red-tape and costs on smaller firms.
6. The employee records exemption is an appropriate recognition that documents which are routinely held in the employment context should not be subject to the full gamut of privacy laws. ACCI maintains that there continues to be no evidence of partial or systemic abuse. This was acknowledged by the ALRC itself in its draft report at paragraph 36.57:

*Although there is no empirical evidence of misuse of information on employee records, the ALRC notes that the OPC received a large number of inquiries that related to this exemption.*

7. Suffice to say, inquiries, telephone calls or letters from the public do not translate into evidence of misuse or exploitation or privacy laws.
8. Other observations that the ALRC made in its final report also need to be viewed in its proper context. The fact that some other international jurisdictions do not currently exempt employee records from privacy legislation does not provide justification for introducing the privacy regime to Australian business and employers.<sup>1</sup> Government is able to implement international obligations according to its own domestic circumstances.
9. With respect to any possible differences between public sector and private sector regulation, consistency of laws between the public sector and the private sector should also not be a goal in itself. There must be a demonstrated need for regulation that may apply to the private sector.
10. Before introducing new regulation that would affect industry, business expects there would be a cost-benefit analysis, coupled with a close examination of how any problem that exists may be addressed without new regulation. Education (non-binding guidelines etc) and further support to business may also lead to compliance or behavioral change without additional regulation.
11. Employers ensure that all employee related information gathered during before, during and after the employment relationship, are handled with utmost sensitivity and privacy. The fact that privacy laws do not apply, does not necessarily mean that such records are not treated as such. An employer will always treat personal information as confidential information and would only generally provide such information to a third party if (a) it was required by law, or (b) the employee provided some form of consent.
12. Business needs to be confident that the UPPs won't add to their costs or regulatory burden. The UPPs, if they are to apply to all business, needs to be flexible enough to allow employers to continue with their current (lawful) employment arrangements and practices.
13. We would also not want to see the privacy regime turn into a new source of litigation in the future by disgruntled employees, nor see

---

<sup>1</sup> Paragraph 40.13 ALRC report (108).

business exposed to new penalties for breaches of the UPPs, (particularly smaller businesses).

14. Even if minimal costs are imposed on business as a result of the UPPs applying to all firms and employers, Government must recognise that this will still be a new cost impost.
15. It will also occur during the current economic crisis where imposing new costs and regulation on business should be constrained as much as possible (particularly where the current exemptions appear to be working sufficiently).
16. That said ACCI wishes to this opportunity to make a number of preliminary submissions on the UPPs as it applies to the general employment context. We also provide a number of alternative policy solutions at the end of this paper.

## **UPPs**

17. As the Government is to consider the exemptions in the second part of its review of the ALRC recommendations, industry would expect an opportunity to comment on the UPPs should the exemptions be removed.
18. However, there are a number of initial issues on the proposed model UPPs which we have identified. We suggest should these should be considered further before the UPPs are finalised. Reiterating that business expects an opportunity to comment upon any new regulations (including any finalised UPPs done during stage one) should the exemptions be removed at a later stage by Government.
19. Legal/HR Concerns: Employers are concerned that privacy laws may limit their ability to gather information for either HR management purposes (conduct, performance, appraisal material etc), or compliance with applicable laws. Such laws may be those dealing with terminations (unlawful, unfair etc), EEO, workers compensation / OHS, corporations legislation, trade practices. The UPP's must be sufficiently flexible to allow employers to continue to gather information for the above purposes. ACCI raises the following UPPs as potential sources of inflexibility:
20. **UPP 2.5** states that *"an agency or organisation must not collect sensitive information about an individual unless ... (a) the individual has consented, [or under (b) – (g)]."*
21. Employers require employees to provide health information as part of OHS and other requirements (some to fulfill inherent requirements of a

position). The ALRC comments in its report (at p.1409) that if an employee applying for a position does not provide health information, then they risk not getting the job. However, they don't appear to consider what would happen to existing employees who would have to provide consent under the model UPP.

22. **UPP 2.5(b)** does not appear to be sufficiently certain in scope, for employers to rely upon in the OHS context, as employer's actions under OHS laws would not be necessarily be "*required or authorised by or under [OHS] law*". However, **UPP 2.5(e)** may provide more assurance in that such information can be collected without the consent of the individual.
23. **UPP 5(f)** appears to apply to an "enforcement body". This is amorphous: is it intended to cover all regulators or specific regulators? This does not appear to cover situations where employers wish to use and disclose information for the purposes of complying with legal obligations under federal, State and Territory OHS, workers compensation, EEO and IR legislation (this also doesn't appear to be captured by **UPP5(e)**).
24. The UPPs should also be amended to provide ability for an employer to use and disclosure personal information to comply with contractual obligations.
25. **UPP9(j)(i)** does not appear to capture remedies such as unfair dismissal where reinstatement or compensation (not civil penalties) are the remedy. We are also not sure whether a reference to a "prescribed law" refers to one that is listed in the privacy law itself (or regulations). Similar to **UPP5(f)** we unsure as to what "by or on behalf of an enforcement body" means. For example, does this cover industrial and administrative tribunals or does this refer to the public regulators and police? We would want it to cover tribunals and Courts that may determine legal matters under legislation (Commonwealth, State or Territory laws).
26. HR Management: The collection of personnel information is a routine HR practice. Such information could include file notes on employees that seek to monitor performance or conduct. The detail could include claims or evidence of sabotage, general and serious misconduct, OHS breaches, EEO, harassment, or bullying matters.
27. We are concerned that the UPPs do not provide certainty for employers. For example, it is not clear whether an employer would (a) be required to disclose prejudicial information to the employee (whether they be the offender or victim) or (b) that the employer could continue to collect

personal information and use it in all future and potential legal actions without any potential privacy implications.

28. We are concerned that employees may argue under **UPP 2.2** that information was collected in an “unreasonably intrusive way” in some instances. For example, if they are not informed at the outset of the employment relationship that information may be gathered and how it may be gathered during the employment relationship (ie. depending on the circumstances and what may or may not be reasonable), interviewing and collecting information from one employee on another employee may be claimed to be intrusive. Collecting information on an employee’s internet usage or monitoring access into different parts of an employer’s premises may also be intrusive in some cases. This should be re-considered for the employment context.
29. Costs/Red-Tape: **UPP 3** appears to require an employer to notify the employee of their privacy rights each time information is collected. In an employment relationship, an employer may collect personal information many times over. Does this mean that an employer must notify the employee each time that it receives a medical certificate of its privacy rights? Or each time the employee is monitored for its internet use, or is performance managed? It should be made clear that an employer does not need to provide notification of privacy rights at each stage they collect “personal information”.
30. **UPP 4.1** requires all firms to have a “Privacy Policy” that sets out the firm’s policies on managing personal information. **UPP 9.1 and 9.5** requires firms to provide access to information within reasonable time, and **UPP 9.6** require firms to make sure information is not misleading or inaccurate and that is up-to-date and relevant. **UPP 9.8** states that if a firm refuses access it must provide reasons for denial and notice of potential avenues for complaint. This all adds to the regulatory burden of an employer, both in additional time and costs, in order to comply with the UPPs.
31. It may also lead to employees raising claims of privacy breaches for currently lawful and routine HR management practices. As stated above, we do not want to see this as a new avenue of litigation for disgruntled employees, particularly for smaller firms.
32. Possible Alternatives: Whilst ACCI strongly believes that the current exemptions should remain, there are other approaches to this area of regulation that may reduce the regulatory burden on business. The following examples, are provided on a without prejudice basis, and are merely preliminary submissions on alternative privacy frameworks:

- a. The Government should work with business, employers and other stakeholders, to develop a Code of Privacy, similar to the Fair Dismissal Code<sup>2</sup>. This could possibly be a simple statement/list of privacy obligations that would govern the privacy obligations of employers and business. This would apply for smaller firms instead of the UPPs.
- b. A Code of Privacy for Employee Records could also be developed in consultation with stakeholders, which would also be part of the above Code or could be a separate Code.
- c. Consideration of generating a broad privacy principle for smaller firms and employers rather than all the UPPs. One general principle could be that employers should not provide personal information to third parties unless there is consent or it is required by law or to fulfill legal obligations. There should not be UPPs of access, correction, use etc applying.
- d. Another principle could be for the application of the UPPs to be modified (ie. access, correction or use) on "*reasonable business grounds*". Business grounds would not be required to be defined, but could be a useful and flexible concept to be used by smaller firms.

---

<sup>2</sup> *Fair Work Act 2009*. A copy of the Code can be found here:  
[http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfactsheet\\_09.pdf](http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfactsheet_09.pdf)