Working for business.
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Privacy Act Review Discussion Paper

Attorney-General's Department

ACCI Submission

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Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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1. INTRODUCTION

1. ACCI considers that while the Discussion Paper presents some constructive areas of reform to privacy law at the Commonwealth level, any consideration of removing or weakening the small business exemption and employee records exemption would be unwarranted, damaging and inadvisable.

2. ACCI strongly recommends that these exemptions be retained.

3. This submission responds to various stakeholder viewpoints on the two exemptions outlined in the Discussion Paper and demonstrates that its other proposals cannot be evaluated alongside concurrent consideration of the removal of these important protections for employers.

4. This review must also unavoidably be conducted in the overwhelming and dominant context that is confronting the lives of all Australians. Small business people, their employees and their clients in the community continue to confront extraordinary and enduring adversity, unseen by Australians outside of war and depression. This is particularly true for the retail and hospitality sectors.

5. Small businesses and their employees are knee-deep in the personal, local, financial and mental consequences of a global crisis that is in its third year.

6. Businesses throughout the country are struggling to recover after extended closures and restrictions, facing a massive lack of consumer confidence, and unable to staff their businesses each day due to isolation rules and constantly changing testing requirements. Safety and health regulation is the dominant regulatory concern, retaining customers is the dominant customer concern, and getting anxious employees back to work is the dominant employment concern.

7. It is very hard to see how during a time of such widespread uncertainty and a time of such sustained economic hardship for our smallest businesses, a radical change to a long-standing status quo to expose small businesses to entirely new regulation, unrelated to the adversity they are facing and unsought by their clients or customers, could be entertained.

8. This is simply not the time to even contemplate such a change. Interested parties need to recognise this and not seek to apply privacy law to small businesses during the period of COVID recovery. The countries that are going to succeed in their recovery and maintain or improve upon their place in the world are going to exercise empathy, proportionality and practicality in what they choose to prioritise and particularly what they ask of their job creators, the engines of economic growth in the small business community. Smart and successful countries will not prioritise regulatory neatness and completeness over real challenges impacting on small business families, small business employees and local communities.

9. The significant additional administrative burden that has been imposed on businesses over the past two years must also be noted when considering any further regulation. This burden largely still exists, including requirements for COVIDSafe Plans, QR code sign ins, customer record keeping, check-in marshals, vaccine registration and notifications of close contacts. Small businesses have faced incalculable stress and strain over the past two years enforcing the government's health policies, sometimes to the detriment of the harmony of their workplaces or stores. The last thing they now need is a greater regulatory burden and new obligations.

2. SMALL BUSINESS EXEMPTION

Retain the existing exemption

10. ACCI opposes removing the long-standing small business exemption from the Privacy Act.

11. We welcome the substantial contributions that have been made to the discourse from the 'diverse range of stakeholders including government agencies, academics, research centres, private sector organisations and consumer advocates' on the appropriateness of whether small businesses should be subject to privacy law obligations.[1]

12. Nevertheless, ACCI encourages the Attorney-General to give foremost consideration to the representatives of businesses, whom this change will ultimately burden.

13. Many of the other interests, however eminent, are engaging with this academically or on a basis of principle, and not through sufficient consideration or understanding of the capacities and circumstances of small businesses, nor the impact upon them of being subject to Commonwealth privacy law.

14. ACCI agrees that the size of an entity is not a proxy for the importance of privacy protections for the individuals with which it engages or the potential impact of its actions on privacy.[2] However, it is indicative of the entity's capacity to divert resources into compliance with a greater regulatory burden. Size of an entity, its capacities and potential impacts on the social goods it provides are relevant considerations to balanced policy setting as well as proportionate and effective imposition of regulation.

15. This is the fundamental importance of the small business exemption — that fulfilling privacy law obligations would be onerous and costly for smaller entities and thus subjecting them to requirements constrains their ability to increase their productivity and employ more workers.[3]

16. Hence, philosophical, absolutist arguments about the irrelevance of size in relation to the importance of their customers' privacy protection are in themselves immaterial to the actual purpose of this exemption.

17. It is also well established across a wide range of Commonwealth legislation that regulation can and is applied differentially to small businesses, or through outright exemption of small businesses. For example, this is the case in workplace relations.[4]

18. Similarly, overseas comparisons are useful for observing the consequences of policy, but their absence does not render a policy gratuitous. ACCI views assertions about an absence of comparable exemptions overseas and Australia's exemption being 'an international anomaly' as extraneous to a question that must be about whether subjecting small businesses to a greater regulatory burden will benefit or harm their viability, employment, and contribution to our economy.[5]

[1] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 40.
[2] See ibid.
[3] Laurits Christensen et al, 'The Impact of the Data Protection Regulation in the E.U.' (2013) *Journal of Economic Literature* 2.
[4] See, eg, *Fair Work Act 2009* s 66AA.
[5] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 43.

19. Harming small businesses or risking their viability through an unnecessary intensification and extension of the regulatory demands upon them hurts not only small business families and employees, but also the communities in which they operate.

20. The points raised about the impact on business competitiveness in the Discussion Paper better approach this integral question.[6] ACCI agrees with the latter paragraph in this section ('Impact on business competitiveness')[7] and submits that small businesses are disproportionately burdened by the cost of privacy law compliance and that the removal of the exemption would disadvantage them and make them less competitive.

21. Further, ACCI proposes that if compliance with the Privacy Act did in fact enhance the competitiveness of small businesses, including internationally due to the removal of apparent trade barriers,[8] then the small businesses who would benefit are freely able to comply on a voluntary or opt-in basis. The exemption is not an exclusion. Small businesses are not barred from compliance with privacy law obligations.[9] Any benefits that are provided to some businesses who choose to adhere to these laws does not mean that all businesses should be forced to emulate this strategic commercial decision.

22. However, ACCI recognises that voluntary compliance with the Privacy Act by small businesses may not deliver the suggested benefits without official recognition. ACCI therefore supports the introduction of a voluntary domestic privacy certification scheme for the rare instances where a small business can and wants to comply with the Privacy Act but is ordinarily exempt. This in effect would nullify the merits of any argument that the exemption should be removed because compliance would actually benefit small businesses, unless the proponents of these arguments somehow believe that their commercial expertise is superior to small business owners, who are just ignorant of what is in their own best interests.

23. Any attempt to extend the application of privacy law to small businesses on any basis would need to be supported by the provision of practical assistance, such as template privacy policies, advice and targeted education by the OAIC, not a sweeping removal of an exemption which in effect would subject thousands of businesses to unfamiliar and stringent laws overnight.[10]

24. Practical advice and assistance to small business should be delivered and coordinated by Australian Small Business and Family Enterprise Ombudsman (ASBFEO), with supporting engagement from the Privacy Commissioner. Respectfully, ASBFEO is in a better position than the Privacy Commissioner to work with the small business community given the long history of the small business exemption. It is crucial that agencies sensitive and supportive of small businesses provide any lead in this area.

25. Engagement with representative organisations of small businesses, such as consulting the ACCI network and working with our members, will be a central to attracting any interest and cooperation from small businesses.

[6] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 43.
[7] See ibid.
[8] Ibid, 44.
[9] Privacy Act 1988 (Cth) s 6EA.
[10] Australian Bureau of Statistics, Counts of Australian Businesses, including Entries and Exits, June 2017 to June 2021 (Catalogue No 8165.0, 16 December 2021).

26. Finally, we stress that ACCI constructively engaging with an opt-in option above should not be taken as any tacit endorsement for removing the small business exemption or any proposition that there should in time be no differential application of privacy law by business size and capacities for compliance. Small business will not support any opt-in system if this leads to calls for an all-in system.

27. In the context of the current period, it should also be noted that in the enforcement of many of the existing administrative requirements for small businesses as part of government health policy, many small businesses have been threatened with legal action of accused breaches of privacy. While these claims are generally frivolous, if any of the COVID-19 regulatory requirements on businesses are going to continue into the future, we must not remove the exemption and create a fertile ground for further belligerence against small businesses.

Alternatives

28. ACCI notes and emphasises that no submissions proposed reducing the annual turnover threshold for eligibility for the exemption.[11] Increasing the annual turnover threshold to be in line with that which is used for the purposes of taxation law ($10 million) would in fact be more sensible in the pursuit of consistency.[12]

29. Any calls to substitute the turnover threshold for an employee number threshold should be resisted for the reasons outlined in the Discussion Paper,[13] such as its unsuitability for privacy law and the volatility of workforce size which may intermittently expose businesses to privacy law obligations. In addition, an employee number threshold may actively discourage hiring more workers above the threshold, if the consequence for the business would be incurring privacy law obligations (along with a perverse incentive to prefer full time employment over part time, which can negatively impact on parents and carers). It is foreseeable that for many small businesses, the resultant compliance costs would exceed any new employee's additional value, disincentivising workforce expansion and hiring of new staff. For some small businesses, such impositions can lead to owners substituting their labour for new hiring or having family members work in their business instead.

30. ACCI agrees with the contention in the Discussion Paper that subjecting small businesses to some but not all of the APPs would increase only increase complexity, both for businesses that are currently subject to the Act and those who would incur new obligations.[14] Further, the lack of consensus as to which APPs to apply to small businesses among the submissions that canvassed such an approach is indicative of its problematic nature and lack of sufficient shared foundation for implementation.

31. Inconsistency between even opponents of the status quo exemption points to this being an under-thought out proposal and not one driven by practicality.

32. One submission suggests that APP 7 is among the three most important and should apply to small businesses.[15] Another suggests that APP 7 is among the three least important and is not necessary for small business compliance.[16]

[11] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 45.
[12] Income Tax Assessment Act 1997 (Cth) s 328-110.
[13] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 46.
[14] See ibid.
[15] FinTech Australia, Submission to Attorney-General's Department, *Privacy Act Review Issues Paper* (December 2020) 9.
[16] Financial Services Council, Submission to Attorney-General's Department, *Privacy Act Review Issues Paper* (2 December 2020) 10.

33. Both submissions make reasonable arguments about the relative importance of various privacy principles, but the lack of consensus, among other things, demonstrates the incoherence and inevitable problems inherent in attempting to apply any APPs to small businesses. Additionally, many of the obligations under the APPs are heavily interwoven with others, making it extremely difficult to isolate compliance with only a selection.

34. ACCI agrees with ASBFEO that the superior solution to any deficiency in the existing application of the Privacy Act with respect to small businesses is to prescribe further high-risk acts and practices while retaining the exemption.[17]

35. This approach directly addresses any sectors and types of businesses where privacy law compliance may be needed,[18] without broadly imposing costly and time-consuming burdens on thousands of small businesses.

36. Any necessity of privacy protections varies most fundamentally not with size but with sector. An early-stage facial recognition software company with 10 employees and $2 million annual turnover cannot reasonably be compared with a firm of the same size that engages in clothing retail, for the purposes of privacy law.

37. It is ACCI's considered view that prescribing further high risk acts and practices where necessary would be the only sensible approach to any demonstrated, specific anomalies or inadequacies in the operation of the existing small business exemption. ACCI urges the retention of the long-standing and proven exemption and not entertaining any of the alternative proposals advanced by interests that are well removed from the realities of running a small business.

Responses to specific questions

Are there further high privacy risk acts and practices that should be prescribed as exceptions to the small business exemption?

38. No high privacy risk acts and practices have been brought to ACCI's attention requiring prescription as exceptions to the small business exemption. Nevertheless, as discussed above, we are open to discuss any real-world exigencies in this area.

39. Any further prescribed exceptions would need to:

    a. Arise only in response to sufficient evidence of a need for a potential change of approach.

    b. Be limited, targeted and carefully implemented.

    c. Be preceded by considerable and genuine consultation with industry representatives.

[17] Australian Small Business and Family Enterprise Ombudsman, Submission to Attorney-General's Department, *Privacy Act Review Issues Paper* (29 January 2021) 1.
[18] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 47.

What regulatory impact would this have on small businesses who engage in these acts and practices?

40. The regulatory impact of subjecting small businesses to privacy law obligations should not be understated and needs to be canvassed with industry prior to any actions being undertaken. However, some additional costs may be justifiable in certain sectors where practices or the doing of business inherently poses a high risk to privacy, such as those that fall within the range of existing exceptions to the small business exemption.

41. As submitted by Australian Business Industrial to the Australian Law Reform Commission's inquiry into privacy law,[19] 47% of respondents to a survey by NSW Business Chambers reported that compliance with privacy requirements was a 'moderate or major concern in the context of their business'.[20]

42. In the European Union, over 40% of small businesses reported spending at least €10,000 (AUD $15,657 as of 1/1/2022) on GDPR compliance.[21] Further, 18% of small businesses reported spending over €50,000 (AUD $78,284) on compliance.[22] GDPR rules are of course more stringent than those in Australia or those proposed in the Discussion Paper, however privacy regulation advocates generally support greater symmetrisation with that framework,[23] and it is valid to assess European compliance costs in assessing proposals to have Australia move in the European direction. These costs are simply unmanageable for most small businesses.

43. Evidently, the cost of privacy compliance for small business is or would be significant, and would be a new cost on top of all the other costs and regulatory time demands on small business people. However, that is not the only regulatory impact on small businesses that are subject to privacy obligations. It should be noted that any further prescription of exceptions to the small exemption that are implemented carelessly or too widely or without proper consideration and consultation, may lead to extensive non-compliance and illegality.

44. In the EU, nearly half of small businesses were reported to be often failing to comply with GDPR obligations.[24] This presents a serious problem in itself — due to the sheer cost and burden of compliance, small businesses can become unable to cope with their obligations and resultantly run the risk of illegal activity. An extraneous, unbalanced or impractical obligation that is ignored in practice is not protecting anyone or changing the management of information in any way, it is just endangering already massively vulnerable small business people to whom the obligation should never have been imposed.

45. The substantial regulatory impact on small businesses of privacy law obligations demonstrates that any further prescribed exceptions to the small business exemption should be implemented carefully, narrowly and only after extensive consultation with industry stakeholders.

[19] Australian Business Industrial, Submission PR 444 to Australian Law Reform Commission, *Review of the Privacy Act 1988* (10 December 2007).
[20] NSW Business Chamber, 2007 Australian Business Priorities — Fixing the Federation (Report, September 2007) 21.
[21] GDPR.EU, *2019 GDPR Small Business Survey* (Report, May 2019) 5.
[22] See ibid.
[23] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 8.
[24] GDPR.EU, *2019 GDPR Small Business Survey* (Report, May 2019) 3.

What support for small business would assist with adopting the privacy standards in the Act and realising the benefits of improved privacy practices?

46. ACCI supports the introduction of any non-coercive or non-regulatory measures that encourage the improvement of privacy protection by small businesses. In particular, greater education and advice provided by the OAIC working with ASBFEO on a targeted basis (especially to those in higher risk sectors), could be of benefit to small businesses.

How can small businesses be encouraged to adopt best practice information collection and handling?

47. In regard to information collection and handling by small businesses, if any additional of extended regulatory burden is proposed to be imposed upon them, a grace period of at least two years should be allowed to ensure they have any realistic opportunity to adjust practices to meet privacy standards.

48. For example, if IT products are required to be acquired, implemented and become accustomed to in order to meet any extended compliance obligations, this is not going to happen overnight, and two years presents a reasonable opportunity for small businesses to be supported in even attempting to meet such obligations.

49. When the Federal Government repealed the IP exemption in the *Competition and Consumer Act 2010* (Cth) that formerly exempted some conduct relating to intellectual property rights from certain anti-competitive conduct prohibitions,[25] a six-month grace period was provided to allow businesses to ensure their practices adhered to their new obligations.

50. Similarly, a grace period should be provided to small businesses if there is any change to the exemption, excluding urgent, narrow and precisely targeted further prescriptions to the excepted industries, where there is no prosecution or penalties for breaches of the Privacy Act. During this time, OAIC could take a more educative approach to enforcement. This would allow small businesses sufficient time to adopt the appropriate information collection and handling practices, which may require significant investment and alterations to existing commercial arrangements.

51. Two years is a more appropriate grace period than six months because unlike industries which rely heavily on IP rights (to which the repeal of the IP exemption applied), many small businesses who may incur privacy obligations are not as technologically sophisticated or experienced.

52. Additionally, a framework such as small business privacy guidelines may be useful to improve the information collection and handling practices of small businesses.

53. However, it there is a tendency in public policy for governments to over time attempt to convert guidelines into enforceable codes of conduct or standards. If any further guidelines are produced for small businesses, they should be general and implemented with a strict promise to the business community that they will not be enforced against them in the future.

54. Other methods such as various financial aid to small businesses or industry-specific employer associations to run and implement privacy programs may also be useful.

[25] *Competition and Consumer Act 2010* (Cth) s 51(3), repealed by *Treasury Laws Amendment (2018 Measures No. 5) Act 2019*.

To what extent do small businesses that trade in personal information currently rely on the consent provisions? Would Proposal 9.1 to require consent to be voluntary, informed, current, specific and unambiguous address concerns about the privacy risks associated with the consent provisions of the small business exemption?

55. In the context of small businesses, ACCI is unaware of any systemic or prevalent problem concerning the existing consent provisions in the Privacy Act.

56. ACCI has some reservations about Proposal 9.1 and its application to small businesses, particularly around the specificity of consent.

57. The provision of consent by customers in a general form is often appropriate because unless they are providing highly sensitive information, individuals are often more concerned with the binary choice of whether or not to provide their information to particular entity than an open question about its specific uses. Usually, the decision made by individuals is not primarily premised on the purposes for which an entity will use the information but rather on the trustworthiness of the entity at large.

58. The problem of restricting consent to be specific is that it can reduce flexibility and potentially innovation. If a small business discovers an innovative way to use data more effectively, they would be required under this proposal to reobtain consent from every customer. This produces inefficiency and can prove difficult for small businesses, with fewer staff and less capacity.

Would Proposal 23.2 to introduce a voluntary domestic privacy certification scheme be useful to small businesses that wish to differentiate themselves based on their privacy practices?

59. ACCI supports the introduction of a voluntary domestic privacy certification scheme because it would enable specific small businesses to make strategic commercial decisions to recoup the benefits of privacy law compliance, in the minority of circumstances in which such benefits are present, without depriving all small businesses of the necessary and proven exemption.

60. As aforementioned, a series of submissions contend that compliance with privacy law would offer benefits to small business in competitiveness and international trade.[26] This proposal could enable those small businesses which would benefit in this manner to do so, while still maintaining the exemption for the wider majority that would be disadvantaged or harmed.

61. It should be noted that there are currently only 697 small businesses out of over 2 million that have taken the opportunity to opt-in to the existing privacy register.[27] Based on this evidence, it is doubtful as to whether many small businesses would participate in a voluntary domestic privacy certification scheme. It is more likely that the obstacle to current opting-in to the privacy register is the significant regulatory burden of complying with the APPs for small businesses, rather than a lack of certification.

62. Nevertheless, this proposal is far more desirable than the unfeasible removal of the small business exemption. If this proposal were to be enacted, proponents of removing this exemption could no longer hide behind the façade of purporting to have the interests of small businesses at heart.

[26] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 43.
[27] 'Privacy opt-in register', *Office of the Australian Information Commissioner* <https://www.oaic.gov.au/privacy/privacy-registers/privacy-opt-in-register?result_11193_result_page=1>.

3. EMPLOYEE RECORDS EXEMPTION

General views on submitted proposals

63. As indicated in our submission to the Issues Paper,[28] ACCI is unequivocally opposed to any repeal of this established, well understood and uncontroversial exemption and to modification that would increase the regulatory burden on businesses with respect to maintaining employee records.

64. The exemption should be retained in its current form because its fundamental policy rationale, that the personal information of employees should be protected under workplace relations legislation rather than privacy law,[29] remains unchanged. Employers have existing responsibilities in relation to employees records under the *Fair Work Act 2009*,[30] its subordinate legislation and state work health and safety laws.[31] Regulation should remain exclusively in this domain, where the employer-employee relationship is governed and regulated. If the existing laws in relation to employee records are proven to be inadequate, then it is in workplace relations legislation that this should be addressed. Both major political parties have been involved in the implementation of the existing regulations that pertain to employer record-keeping obligations.

65. However, the allegation of the existing regulation of employee records being somehow inadequate indicates an additional major reason against the removal of the exemption – its objectors can rarely demonstrate that there is any widespread misuse of this information by employers. The calls to remove this exemption are attempting to fix a problem that exists only theoretically, but not in reality. If the existing regulations were inadequate, then examples would be widespread and obvious.

66. Exemptions should not be repealed simply because they may appear anomalous or unnecessary to observers well-removed from their practical application. Often, there are important reasons for their existence that may not be fully appreciated until they no longer exist, and the challenge of restoring common sense and practicality is presented.

67. No national business representative has called for the removal of this exemption.[32] No union made a submission to the Issues Paper calling for its repeal. With all due respect to their valuable contributions, those that have called for its repeal, are primarily representatives of the legal profession, civil liberties organisations and government bodies.[33] They are generally not directly engaged in the day-to-day maintenance or usage of employment records in Australia's workplaces.

68. Such perspectives should not be ignored; however, it is crucial that foremost consideration and weight is given to those, and the direct representatives of those, who will be actually affected by the proposed change.

69. ACCI, Australia's largest representative of businesses and the millions of workers they employ, along with various other national bodies, have recommended against removing this exemption.[34]

[28] Australian Chamber of Commerce and Industry, Submission to Attorney-General's Department, *Privacy Act Review Issues Paper* (December 2020) 3.
[29] Explanatory Memorandum, Privacy Amendment (Private Sector) Bill 200 (Cth) 5.
[30] Fair Work Act 2009 (Cth) s 535.
[31] Fair Work Regulations 2009 (Cth) regs 3.31-3.44.
[32] Australian Chamber of Commerce and Industry, Ai Group, Australian Small Business and Family Enterprise Ombudsman and Clubs Australia, Submissions to Attorney-General's Department, *Privacy Act Review Issues Paper* (December 2020).
[33] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 50.
[34] Australian Chamber of Commerce and Industry, Submission to Attorney-General's Department, *Privacy Act Review Issues Paper* (December 2020).

70. The consequence of removing this exemption will be an additional layer of complexity for employers in the management of employee records. There is no evidence that the regulation of managing employee records under privacy law will enhance protection for employees. Instead, the enabling of access requests and other implications of bringing it under the Privacy Act will have poor consequences for confidentiality, and risks creating workplace problems and disputation that:

    a. Do not presently arise in workplaces.

    b. Detract from the harmony and productivity of workplaces, which has been the core purpose of our industrial relations laws for more than a century.

71. Employee records are fundamentally different in nature to other information protected by privacy law. ACCI strongly maintains that they should remain regulated under workplace relations law, as was the basis for the exemption at its inception.

72. There have not been any widespread issues of misuse of employee records, nor major change in their scope and content, and there is no basis to alter the long standing exemption from privacy law. If any future privacy problem presents itself due to technological change, specific and targeted amendments should be made to existing workplace relations legislation; a process to which the privacy policy sphere may contribute.

Responses to specific questions

To what extent are employers collecting personal information about employees beyond what is reasonably necessary for their functions or activities?

73. No serious issues of employer over-collection of personal information have been brought to ACCI's attention. Employment records require collection of various prescribed information, typically with standard forms and payroll software. Incident and complaint information (warning letters, investigations of complaints) are maintained in sufficient detail to meet possible detailed examination in litigation.

74. Employers would rarely collect personal information about employees beyond what is reasonably necessary for their functions or activities and would likely only do so through misunderstanding what is required, rather than for any other purpose.

75. Employers are generally not collecting information with wide discretion, as the 'reasonably necessary' assessment implies. Rather, employers collect and maintain employment records to comply with the law, either (a) directly as prescribed, (b) as a defence to claims of underpayment, or (c) to have legal records for litigation such as unfair dismissal or allegations of sexual harassment. The law is dictating the keeping of records and the information that is collected and retained.

76. If there were to be patterns of record collection or collection of personal information that was undesirable or necessary to change at any point:

    a. Information and materials through the Fair Work Ombudsman, promotion by employer organisations, and cooperation with payroll and software providers may be impactful.

b. The time and wages records obligations, for example in the Fair Work Act, could be amended instead of using privacy law.

c. There would at no point be a justification to remove the existing, proven, sensible separation of the two areas.

Are employers using or disclosing personal information about employees in ways that meet community expectations?

77. Employers are using such personal information to meet their legal obligations, which are overwhelmingly geared to protecting employees, and do so with appropriate respect for privacy and compliance with their legal obligations. This is in line with community expectations and values.

78. The broadly favourable view of employers' use of employee records is demonstrated by the rarity of resistance to the provision of personal information by employees. This is not a consequence of the existence of the exemption — few workers would know that such information is not subject to obligations under privacy law — but rather a community understanding that personal information is essential in the context of employment relationships for management and administration purposes.

79. Employers have collected personal information to comply with industrial relations laws, awards, taxation law, and work health and safety law for a century, and across a workforce of now over 12 million people. We so rarely hear of any concerns regarding the information employers hold on employees that it is rather extraordinary, and this indicates that a status quo should be maintained not departed from.

How might the employee records exemption be modified to address the impact of the Full Bench of the Fair Work Commission's decision in Lee?

80. ACCI shares the view expressed by Ai Group in their submission to the Issues Paper that the Full Bench of the Fair Work Commission's decision in *Lee v Superior Wood Pty Ltd*[35] engenders a need for significant consideration to be given to extending the employee records exemption to personal information requested in the context of an employment relationship.[36] As Ai Group stated:

> Employers should not be prevented by the application of the Privacy Act to requesting personal information which is necessary to engage in reasonable management action.[37]

81. ACCI shares this view, noting the Full Bench's view that section 7B(3) of the Privacy Act (the exemption) only applies to existing records and not their creation:

> In context, it is clear that the wording of section 7B(3) speaks to an act or practice in relation to an actual record held by the organisation that relates to a particular individual. It does not encompass employee records that are yet to be held by an organisation.[38]

[35] [2019] FWCFB 2946.
[36] Ai Group, Submission to Attorney-General's Department, *Privacy Act Review Issues Paper* (December 2020) 13.
[37] See ibid.
[38] *Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946 [55].

82. This presents a variety of problems for employers, some of which are illustrated by the facts of *Lee*, in the procurement and solicitation of employees' information. For example, if prospective employees have the right to remain anonymous or pseudonymous in accordance with APP 2,[39] then obvious problems will arise.

83. This information should not be subject to the Privacy Act because it generates considerable uncertainty for employers as to the rights of prospective employees and difficulty in hiring and management procedure.

How might the employee records exemption be modified to better protect those records while retaining the flexibility employers need to administer the employment relationship?

84. Apart from the amendment initially proposed by Ai Group in response to *Lee*, no necessary modification of the employee records exemption has been brought to ACCI's attention or demonstrated by submissions to the Issues Paper.

85. As previously discussed, ACCI contends that any other changes to the regulation of employee records management should occur in the sphere of workplace relations and its legislative framework.

To what extent would the fair and reasonable test for the collection, use and disclosure of personal information proposed in Chapter 10 be suitable for the employment context?

86. The overwhelming determinant of the collection, use, and disclosure of information on employees is for legal compliance and potential disputes.

87. While lawfulness is entirely appropriate, the subjective concept of 'fairness' would prove extremely problematic in the employment sphere, in the absence of an employee records exemption. It would be a recipe for disputation and poorer workplace relations.

88. First, Professor Lee Bygrave, not only argues that 'the notion of fairness in data protection law requires entities to "take account of the interests and reasonable expectations of data subjects"' as referenced in the Discussion Paper,[40] but also that '[t]he notion of fairness is less obvious in meaning but potentially broader' than lawfulness.[41]

89. Professor Bygrave continues:

> An exhaustive explication of the notion of fairness probably can not be achieved in the abstract. Moreover, general agreement on what is fair will inevitably change over time.[42]

90. This has the potential to prove difficult for employers to engage with when dealing with their employee records due to the uncertainty and developing nature of its meaning.

91. Second, Professor Bygrave further argues that 'fairness requires balance and proportion'.[43]

[39] *Privacy Act 1988* (Cth) sch 1 s 2.
[40] Attorney-General's Department, *Review of the Privacy Act 1988* (Discussion Paper, October 2021) 84.
[41] Lee Bygrave, 'Core Principles of Data Protection Law' (2001) 7(9) *Privacy Law and Policy Reporter* 169.
[42] See ibid.
[43] See ibid.

92. The notion of 'balance' in the context of employment is relatively unsuitable if it denotes balance of parties' interests. For instance, the collection of data about employees' performance will not easily be able to balance the interests of employees with those of the employer. In fact, that data collection may be entirely at odds with the employee's interests, if it arises from a suspicion of poor performance and leads to the possibility of dismissal.

93. There are many other areas within the employment relationship where a balance of interests cannot be fully entertained, including workplace investigations, for self-evident reasons. The use and collection of data by an employer may have an inherent imbalance of interests if it relates to employee conduct.

94. As so often is the case in workplace relations, we also face the question about for *whom* a particular rule or practice is fair. Consider the following scenario: an employer maintains records on all its employees, including Employee A. Employee B alleges sexual harassment against Employee A. The investigation into Employee A's conduct is then recorded in Employee A's records, including the sensitive and confidential testimonial evidence of Employees C, D and E. The balance of interests and evaluation of fairness is evidently extremely complex in many workplace problems. The status quo better supports these important investigations by allowing them to be undertaken without quite unnecessary privacy law complications.

95. Third, Professor Bygrave continues, arguing that 'fairness':

> … means that when personal data obtained for one purpose are subsequently used for another purpose which the data subject would not reasonably anticipate, then the data controller may have to obtain the data subject's positive consent to the new use.[44]

96. In the employment context, this may pose several related issues. Often in the management of employees, such as for performance monitoring or conducting workplace investigations, data that may have been collected for a purpose such as during the hiring process may be necessary for other activities. Obtaining the consent of employees for this additional use may compromise the efficacy of these management actions and the capacity of employers to take essential actions in workplaces.

97. Fourth, the absence of an employee records exemption would mean that every business that has employees would be subject to privacy laws, even if they do not collect any data or information from its customers or stakeholders. The notion of 'fairness', unlike 'reasonableness' and 'lawfulness', requires a greater degree of legal expertise and knowledge. This will prove difficult for laypersons small businesspeople who do not enjoy the luxury of inhouse legal teams.

To what extent would the current exceptions in APPs 12 and 13 address concerns about the need for employers to conduct investigations and manage employee performance if the exemption were modified?

98. The current exception to access requests in APP 12 for organisations would insufficiently address the substantial concerns about the need for employers to conduct investigations and manage employee performance.

[44] Lee Bygrave, 'Core Principles of Data Protection Law' (2001) 7(9) *Privacy Law and Policy Reporter* 169.

99. Only some circumstances would be covered by this exception, such as where unlawful behaviour is suspected or there are health and safety risks.[45] More general investigations into and management of the behaviour and actions of employees seem unlikely to fall within this exception.[46] This once again demonstrates why the employee records exemption should not be repealed or watered-down.

100. While the ability for APP entities to refuse correction of personal information appears to adequately protect the investigative and management procedures of employers, subjecting employee records to these rules would have other negative ramifications.

101. This process, which would enable employees to request that their employer correct information about them that they perceive to be partial and contentious, is liable to create workplace conflict. Employer experience is that employment-related grievances can be very deeply held and be pursued against all logic and merit on a highly emotional and subjective basis by employees. Disputed characterizations of past performance and conduct, disquiet at the evidence or feedback of other employees or complainants, or disputation of facts upon which employers have chosen not to act or sanction, are a recipe for fundamentally unnecessary and damaging new workplace conflict. Regardless of how this was framed, some people are going to demand 'their' record be corrected, and by corrected they will mean a record that reflects their subjective views.

102. It is not conducive to a harmonious workplace to have requests made about information collected for performance monitoring and subsequent refusals. These matters should remain in control of the employer unmolested.

What would be the benefits and costs associated with requiring employers to take reasonable steps to prevent employees' personal information from misuse, interference or loss?

103. ACCI believes that any such proposal should be considered only under the workplace relations system, rather than privacy law.

104. Further, as with other arguments raised in the Discussion Paper, there is no evidence of a widespread issue of employers taking insufficient precautions to prevent employees' personal information from misuse, interference or loss, that has resulted in harm.

105. If there is statistical proof of such widespread misconduct, it should be presented.

106. Comparatively, the notable and newsworthy examples of data and information breaches have not been by employers of employees' personal information, but often in government or the public sector.

107. It was the prime minister's department that lost confidential files that found themselves in a second-hand shop in Canberra.[47] It was Queensland Health who appear responsible for missing medical files discovered on the side of a busy Brisbane road.[48]

[45] *Privacy Act 1988* (Cth) sch 1 s 12.3(a).
[46] Ibid sch 1 s 12.3.
[47] Katharine Murphy, 'Cabinet files: prime minister's department admits it lost secret papers', *The Guardian* (online 2 February 2018) <https://www.theguardian.com/australia-news/2018/feb/02/cabinet-files-prime-ministers-department-admits-it-lost-secret-papers>.
[48] Josh Bavas, ' Queensland Health launches investigation after medical files found on busy Brisbane road', *ABC News* (online, 26 June 2019) <https://www.abc.net.au/news/2019-06-26/medical-files-dropped-on-busy-brisbane-road/11249460>.

What challenges or barriers would there be to requiring employers to comply with the NDB scheme in relation to eligible data breaches involving all employee records?

108. ACCI supports the NDB scheme and believes that as a principle, employers should always strive to inform employees if any of their data or information has been accidentally provided to third parties.

109. However, the complexity and onerousness of the scheme cannot be overstated.

110. In addition, it has the propensity to create workplace conflict. A significant challenge of the NDB scheme is its mandatory notification of affected individuals, even when the data breach may be relatively low risk. As a consequence, requiring employers to notify employees about low risk breaches may cause disproportionate concern and subsequent friction. In some circumstances, it may be more advantageous to require employers to assess and address the risk, than to notify.

111. Further, consider a scenario where an employer is undertaking performance monitoring and when providing a spreadsheet to a senior manager containing that information, accidentally includes in an email recipient list a third party.

112. Although the performance data is confidential among senior employees and the management team, under the NDB scheme, the data breach may require the employer to inform the employee as to what the specific data was that was leaked.

113. This would breach the confidentiality of the data and also risk causing workplace conflict.

114. This is one example that demonstrates the uniqueness of data handling and collection by employers and why privacy law obligations often cannot be easily extended to the employment context without ramifications for workplaces.

What would be the benefits and limitations of providing enhanced protections for employees' privacy in workplace relations laws?

115. Overall, as has been stated above, ACCI is not aware of any systemic problems relating to the existing privacy protections for employees' personal information.

116. However, if there are or they arise in the future, workplace relations laws are the appropriate sphere for reform.

117. It is in that framework where employers must familiarise themselves with their legal obligations with respect to employment relationships. It is also in that sphere that expert trade unions and employer representatives engage with government to inform the best possible policy.

118. Less complexity improves compliance and thus spreading legal obligations across different spheres of law will not improve outcomes for employees or the workplaces in which they are engaged.

4. OTHER PROPOSALS

119. Outside of canvassing amendments to the small business exemption and employee records exemption, there are important and valuable proposals in the remainder of the Discussion Paper.

120. However, these reforms cannot be pursued while simultaneously removing these vitally important exemptions, given the additional regulatory burden placed on small businesses and employers on top of their acquisition of the existing privacy law obligations. It would effectively subject small businesses and employers (in relation to their employee records) to more onerous privacy obligations than are currently borne by large corporations and those that deal with highly sensitive data.

121. Ultimately, a choice must be made between:

    a. Subjecting thousands of small businesses to significant additional compliance costs and regulating the maintenance of employee records under an entirely new legal framework; or

    b. Enacting worthwhile reforms to the existing privacy laws whilst retaining their existing scope, application and exemptions.

122. ACCI does not consider both courses of actions feasible and supports the latter option.

Proposal 8.1 — Clear, Current and Understandable Privacy Notices

123. ACCI supports an amendment to APP 5 that expressly requires privacy notices to be clear, current and understandable. Complex and long privacy notices discourage individuals from properly reading them and considering their contents, as widely occurs with privacy policies.

124. If implemented alongside a removal of the small business exemption, however, this existing problem would be particularly acute. It would further burden small businesses who often do not have the available staff or resources to ensure that privacy notices are current. Ensuring that privacy notices are clear, requires specificity, and current requires regular updating. Many small businesses may not have the capacity to fulfill this obligation, without incurring significant costs.

Proposal 9.1 — Voluntary, Informed, Current, Specific and Unambiguous Consent

125. ACCI broadly supports the proposal to clarify and strengthen the essential elements of consent under privacy law.

126. However, as discussed above at [55]-[58], the fourth and fifth elements of this proposal, which require specificity and unambiguous consent may prove problematic for small businesses.

127. Although consent should not be sought for undefined future uses, it is not unreasonable to allow small businesses to obtain relatively broad consent that enables them to have a capacity to innovate and improve businesses practices and data usage. Broad, simple consent is also more straightforward for small businesspeople, their customers and the nature of their transactions. We contend that the community usually expects their interactions with smaller businesses to be simple, straightforward and brief.

128. A higher bar of specificity in consent may restrict this behaviour and burden smaller entities by making them reobtain consent whenever alternative uses are conceived.

Proposal 10.1 — Fair and Reasonable Collection, Use or Disclosure

129. ACCI sees some value in requiring collection, use and disclosure to be fair.

130. However, as discussed above at [86]-[97], the notion of fairness cannot be easily applied to employee records.

131. Further, fairness may prove difficult for small businesses to determine, given their lack of access to in-house legal teams or extensive legal knowledge. The unfair dismissal system in particular is littered with decisions against employers who attempted to be fair and use common sense in extremely difficult situations.

132. The meaning of the legal concept of fairness is not obvious, particularly to laypersons. While the list of factors in Proposal 10.2 may somewhat assist with clarifying its definition, an evaluation against these factors will still be unnecessarily complex for small businesses.

Proposal 10.2 — Legislated Factors for Fairness and Reasonableness

133. If Proposal 10.1 were to be adopted, ACCI supports legislated factors to assist entities with evaluations as to whether their interactions with personal information are fair and reasonable in the circumstances.

134. However, these factors cannot be practically applied to the collection, use or disclosure of employee records.

135. For instance, transparency in the collection of employee records for the purposes of performance monitoring or workplace investigation may jeopardise those management practices. Transparency of purpose may also of itself endanger other employees or create workplace disputation. Simply telling an employee that there has been a complaint against them, or indeed that complaint for example involves sexual harassment, may result in the identification of their accuser and lead to confrontation, threats, or even legal action for defamation.

Proposal 10.3 — Reasonable Steps to Ensure Third Party Compliance

136. ACCI has some reservations about holding entities liable for privacy law breaches due to the unlawful actions of other entities.

137. If implemented alongside the direct right of action proposal, a consequence of this requirement may be that bona fide third parties are litigated for breaching APP 3.6 because the entity collecting the information was not acting lawfully.

138. This would prove particularly challenging for small businesses who may be perceived as an easier litigant than the larger collecting entity.

139. Additionally, small businesses may not have the capacity to sufficiently ensure that every entity from which they obtain information is complying with APP 3.

140. This proposal alongside a removal of the exemption could lead to significant burden on small businesses to ensure that third party providers and software are completely privacy compliant, which is a major challenge for laypersons without legal expertise or extensive knowledge of privacy law.

141. It would be difficult enough for a small business to assess whether it complies with privacy law, let alone whether another party with which they engage does too.

142. If this proposal were to be introduced, it must be on the basis that the small business exemption is retained.

Proposals 14.1 and 15.1 — Right to Object and Right to Erasure

143. The proposals to introduce both a right to withdraw consent and a right to erase information are well-intentioned, however they would prove extremely challenging for small businesses to deal with, if the exemption were to be removed.

144. Small businesses often do not have the idle or available staffing resources to efficiently respond to such requests, particularly given that any information stored may only be accessible by single or few individuals.

145. These rights are also unpractical in the employment context, given that employers often need to retain employee information for management purposes even if that is contrary to the employee's desires.

146. These rights cannot be enshrined in legislation while also removing the small business and employee records exemptions.

147. Additionally, if the employee records exemption were to be removed, the right to withdraw consent and a right to erase information collected by employers is a recipe for workplace conflict. These rights could be misused as a weapon to antagonise employers or other employees.

Proposal 18.1 — Source of Personal Information

148. Requiring organisations to identify the sources of personal information upon request is a positive reform for Australian privacy law.

149. However, it is completely incompatible with the management of employee records.

150. As in scenarios outlined previously, relating to workplace investigations and performance monitoring, requiring source disclosure can jeopardise important management practices.

151. Employers would be unable to deny such requests on the basis of impossibility or disproportionate effort, as is suggested as an exemption to this proposal.

152. It is not the amount of effort or degree of possibility that prevents employers from disclosing sources of personal information, but the very objective of its collection.

Regulation and enforcement

Proposal 24.7 — Levies for OAIC Funding

153. ACCI is strongly opposed to the introduction of any levy on industry to fund the OAIC. If such regulation is required, government should fund it. Privacy law enforcement should find its place in government budgetary priorities along with every other function of government. It may be that during a time of unprecedented crisis and recovery, that priority is not a high one.

154. ACCI has not seen any analysis that suggests that the OAIC's $24 million in annual appropriations is currently insufficient for their operations.

155. In particular, an additional levy imposed on small businesses (were the exemption to be removed) would be debilitating in this time of economic recovery.

156. We urge in the strongest possible terms against introducing any new extended or substantially changed obligations and failing to back them up with proper explanatory and promotional efforts to support those who are being regulated. This is a recipe for damage to businesses, a complete failure to deliver on the regulatory purpose of any changes, and for widespread hostility to privacy protections.

157. If money is tight, prioritise and act on those areas where privacy protection is genuinely urgently needed, not just nice to have in some people's perception, or somehow thought to fall short of regulatory neatness and universality based on the existence of exemptions. If the current national priority is rapid change and new challenges through online information and online privacy and data protection, direct legal change and financial provision to those areas, and leave existing in satisfactorily operating exemptions alone for small businesses and employment records.

Proposal 25.1 — Direct Right of Action

158. ACCI has wide-ranging reservations about introducing a direct right of action for privacy interference.

159. Specifically in relation to small businesses and employee records, such a right would cause significant challenges.

160. It may open the door to extensive and unnecessary litigation of small businesses, which can be avoided when left at the discretion of the OAIC.

161. In the context of employment, it may pit employer against employee and lead to considerable workplace conflict.

162. Additionally, a direct right of action may risk the class action industry identifying the small business community as a rife target for litigation for a commercial return.

163. A direct right of action should not be introduced without extensive consultation and targeted discussion. It should certainly not be introduced alongside the removal of the small business and employee records exemptions.

5. CONCLUSION

164. ACCI submits that any further consideration of removing or weakening the small business exemption or employee records exemption should cease.

165. Further changes to the Privacy Act can only be properly considered without simultaneously subjecting thousands of new entities and every employee record to its provisions.

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.