

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



‘AEG’ and Australian Charities and Not-for-profits Commission (Freedom of information) [2023] AICmr 72

Office of the Australian Information Commissioner, Toni Pirani, 25 August 2023

Whether disclosure of documents concerning an investigation should be withheld by the ACNC under FOI provisions.

Key words: Freedom of Information, Australia, ACNC, Legal Privilege, Public Interest

1. The applicant charity (identity withheld) applied to the Australian Charities and Not-for-profits Commission (ACNC) under the [Freedom of Information Act 1982](#) (Cth) (the FOI Act) for documents about the applicant charity and another named person. The applicant charity was issued with a show cause notice by the ACNC.
2. The documents concerned the ACNC’s investigation, on referral from the Royal Commission into Trade Union Governance and Corruption (TURC), into findings made by the TURC about the applicant’s conduct in its capacity as a registered charity. The ACNC subsequently discontinued its investigation of the matters referred to by the TURC, and no formal findings were made.
3. The ACNC identified a total of 173 documents.
4. The ACNC claimed that some documents were subject to a claim of legal professional privilege. The applicant charity did not press its claim to such documents, but reserved its rights for future action.
5. Two documents contained material that was publicly available for a fee (from the ASIC register) and as a result, the applicant charity had no entitlement to access under s 12(1)(b) of the FOI Act.
6. Eighteen documents were subject to a claim of legal professional privilege together with an additional claim under ss 47C (deliberative matter) and/or 47E(d). A ‘deliberative matter’ is regarded as a term for opinion, advice, recommendation, consultation and deliberation that is recorded or reflected in a document.
7. For a document to be conditionally exempt under s 47E(d) of the FOI Act, disclosure would have, or could reasonably be expected to have, a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Deliberative processes exemption (s 47C)

8. The Commissioner found that the documents contained deliberative materials and were conditionally exempt under s 47C of the FOI Act. However, s 11A(5) provides that if a document is conditionally exempt, it must be

disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

9. The ACNC argued that the balance of the public interest is that disclosure of documents containing deliberative matter could have the effect of impeding the voluntary and confidential flow of information related to its monitoring and investigation functions, and adversely affect its exercise of those functions.
10. The applicant charity argued the reverse and submitted that transparency (and from this, public confidence) would be enhanced by the disclosure of the documents. It also noted the coercive information-gathering powers of the ACNC as moderating the need for any voluntary information flow.
11. The Commissioner found that disclosure of the documents (other than one document, which was a cut and paste of legislation) would be likely to discourage other regulated entities from cooperating with the agency's regulatory activities in the future. As a result, giving access to the conditionally exempt material at this time would, on balance, be contrary to the public interest.

Certain operations of agencies exemption (s 47E(d))

12. The ACNC contended that the relevant documents contained material which, if disclosed, might impede the flow of information required by it to effectively administer the ACNC Act.

13. The applicant charity argued (at [58]):

...there is no reasonable requirement for secrecy with respect to the part played by AFP and TURC in this matter [and that] ACNC cannot support the assertion that the predicted effect it alleges is reasonably expected to occur or that it would be substantial. ACNC have merely assumed that damage may occur if the documents are released. The ACNC has not clearly or sufficiently described the expected effect and its impact on the usual operations or activity of the ACNC... It is not credible that there will be a substantial adverse effect on the proper and efficient conduct of the operations of ACNC.

14. The Commissioner found that if the material were to be disclosed, it would be reasonable to extrapolate that there would be a substantial adverse effect on its ability to receive information relevant to the exercise of its functions.

15. The relevant documents were conditionally exempt under s 47E(d) of the FOI Act. Thus, it had to be disclosed unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

16. The Commissioner balanced:

- that disclosure of the documents would promote the object of the FOI Act of increasing recognition that information held by the Government is to be managed for public purposes, and is a national resource and would enhance the scrutiny of government decision making;
- with
- that disclosure could reasonably be expected to prejudice the agency's ability to obtain confidential information and could reasonably be expected to prejudice its ability to obtain similar information in the future.

17. The Commissioner considered that the balance was against disclosure because of the considerations of the potential present and future harm to the agency's capacity to undertake its regulatory functions were the documents to be disclosed.

18. Therefore, the documents were exempt from disclosure, apart from one document containing only 'copy and paste' extracts of various provisions of the [Gaming Machines Act 2004](#) (ACT), without analysis, comment or deliberative material of any kind.

COMMENT



The [Royal Commission into Trade Union Governance and Corruption](#) was a Royal Commission established in 2014 by the then Coalition Government of Prime Minister Abbott to inquire into alleged financial irregularities associated with the affairs of trade unions. The Australian Workers Union, Construction, Forestry, Maritime, Mining and Energy Union, Electrical Trades Union, Health Services Union and the Transport Workers Union were named in the terms of reference. The Royal Commission inquired into activities relating to slush funds and other similar funds, as well as entities established by, or related to, the affairs of these organisations. It [reported](#) on 30 December 2015.

Recommendation 17 of the [Strengthening for Purpose: Australian Charities and Not-for-Profit Commission Legislation Review 2018](#) (ACNC Review) recommended that the Commissioner should be given the discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector.

The Government at the time supported the recommendation, and in 2021, Treasury held a [consultation](#) about the issue.

In July 2023, the Assistant Minister for Charities [announced](#) that:

The Albanese Government will amend the secrecy provisions in the ACNC legislation to allow greater disclosure of regulatory activities. To support delivery of this reform, the ACNC will receive additional funding of \$2.9 million from 2023-24 to 2026-27 and \$600,000 on an ongoing basis.

These changes enable the ACNC to publish information to increase public understanding of registration and compliance decisions for educational purposes, with the aim of improving transparency and accountability in the charity sector.

The Government proposes to introduce legislation to support these reforms.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2023/72.html>

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