

**dti**

Part 9 of the Enterprise Act 2002 (Information)

Summary of Responses to the Consultation

URN 06/887

## Executive Summary

---

On 23 August 2005 the DTI launched a public consultation on whether to amend Part 9 of the Enterprise Act 2002 to allow information to be released more easily for private civil court proceedings. The consultation closed on 18 November 2005. The Government has considered all representations very carefully and is grateful to everyone who took the time to submit views. A copy of the consultation document can be downloaded from [here](#).

### Responses received

A total of 90 responses were received representing 21 organisations: These included a total of 16 responses from enforcement or regulatory organisations, 43 responses from industry including representative organisations, 1 response from a consumer organisation, 5 responses from organisations representing intellectual property (IP) rights holders, 13 responses from law firms/societies/associations, 2 responses from private individuals and 10 responses from a mixture of the above organisations who provided general comments on the consultation.

A full list of respondents is attached at Annex A.

The Government invited views from interested parties on four options. These were:

- (i) Do nothing. Part 9 remains unchanged.
- (ii) Part 9 remains unchanged, but we explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways.
- (iii) Amend Part 9 to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not required by Community law.
- (iv) Amend Part 9 to allow the release of information for the purpose of private civil proceedings in some cases only, again respecting Community law restrictions.

There was a considerable degree of support for option (iv), although there was some concern on how much information would be released. There was also some concern about whether an amendment to Part 9 could lead to an inadvertent release of commercially sensitive information.

Respondents also raised a number of additional issues that were not in the consultation document, but were related to Part 9 of the Enterprise Act 2002.

Ministers have agreed that option (iv) should be implemented (an amendment to Part 9 of the Enterprise Act 2002 is currently being taken forward via the Company Law Reform Bill). The rationale for this decision is outlined in the

response to this option below. Stakeholders will be consulted further once a draft Statutory Instrument is available. It is expected this will be later this year. Ministers have also agreed to explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways.

Below is a detailed summary of responses to the questions asked in the consultation and to the additional issues raised by respondents – together with the Government response by option, highlighted in bold.

## Summary of responses by option

---

A number of questions were asked in the consultation, however not all respondents replied to them and instead provided a more general response on amending Part 9. These responses have been incorporated within the 'general comments' section under each option. The additional issues raised that were not in the consultation document, but were related to Part 9 of the Enterprise Act 2002 are summarised under the section heading 'comments on clause 867 in the Company Law Reform Bill'.

### **Option (i) - Do nothing. Part 9 remains unchanged.**

#### ***Q1. What are your experiences of obtaining consumer and competition information from public authorities?***

Three organisations responded and said that Part 9 made it difficult for trading standards departments (TSDs) to release information to consumers and businesses, and, in some cases public authorities were finding it difficult to obtain information from other public authorities.

#### ***Q2. Have you examples of when you have been unable to obtain information?***

The two responses to this question commented that as public authorities could not release information this prevented the organisations from investigating intellectual property theft further.

Although not in direct response to this question, the Citizen's Advice Bureau (CAB) commented that clients were unable to access basic information about the true identity and whereabouts of businesses they traded with, including their address for the service of documents. TSD's also stated that many traders kept their correct business address or phone numbers from consumers, by using untraceable mobile phones and giving false addresses. Although a TSD held the correct trading address they were unable to release the information and as a result, Court Orders could not be served.

#### ***Q3. If you were unable to obtain information for a civil case, can you estimate the cost to your business/yourself in not pursuing this case?***

One respondent commented that it is difficult to quantify the size of the problem or the cost to a business, as enforcers did not release sufficient information when a counterfeiting case had being identified; as a business had no knowledge of the counterfeiting activity, the cost to the company could not be calculated.

#### ***Q4. If you are a public authority, how often do you get asked to release information for civil cases?***

There were six responses to this question. One trading standards regional group estimated their authorities could receive in excess of 200 requests for

information annually for personal claims including injury; potentially four times that number of requests concerning basic identity, such as name and location of a trader and in excess of 100 cases where information could be provided to IP owners.

One Scottish Council received requests to release information about 10 times a year, another regional trading standards group received requests approximately 50 times per year.

The Society of Chief Officers of Trading Standards in Scotland (SCOTSS) received frequent requests for information for civil investigations. Durham TSD said that around 20 such requests were received by them annually and Birmingham TSD averaged such requests as 3 or 4 times a week.

***Q5. Do you think Part 9 as drafted is causing problems? If so, please state how big a problem in quantitative terms.***

From the six responses received, organisations commented that it was difficult to quantify the problem. This was due to the restrictions in Part 9, as public authorities did not alert the business when a counterfeit case came to light. Therefore organisations were unaware of the actual number of counterfeit cases.

TSDs said there were significant problems in restricting disclosure in relation to consumer detriment cases and it was difficult to put a numerical value on the size. They did however, state that an example of damage could include where traders had started a job and not completed it to standard. In one such case a consumer had paid a workman for new worktops and units for her kitchen. The trader started the job but in attempting to do the work, caused damage amounting to £400. The TSD had the trader's address but was unable to provide it to the consumer to take civil proceedings.

The CAB submitted an example involving a consumer who had been unable to trace a trader who failed to supply the land rover he bought, or, to return the £3,000 deposit. In this instance, the consumer was unable to receive details for the trader's address and therefore lost his deposit.

***Q6. Do you think a problem is caused by the drafting of Part 9 or by an over-cautious interpretation by authorities?***

All nine respondents to this question said that the drafting of Part 9 had caused the problem. Additionally, three of those nine commented that Part 9 seemed to be interpreted differently between authorities and in some cases there had been an over cautious interpretation.

***Q7. Do you think Part 9 should remain as drafted? Please give reasons why.***

Two responses were received in direct reply to this question and said that Part 9 needed to be amended. In addition, as highlighted further in this document, over seventy responses were received favouring an amendment in the semblance of either option (iii) or option (iv).

## **General Comments on option (i)**

In total, three responses were received in favour of this option and believed that Part 9 should remain unchanged.

The Confederation of British Industry (CBI) opposed an amendment to Part 9 and felt that reducing the safeguards would undermine business confidence in the regime operated under the Enterprise Act. However, as closing the civil gateway had had unintended consequences, the CBI were willing to support an amendment which would create a narrow gateway for information to be released to IP rights holders only. The British Retail Consortium (BRC) and the Newspaper Society supported the views of the CBI. Additionally the BRC commented that the current Part 9 provisions provided safeguards against disclosure of information under the Freedom of Information Act 2000.

Eight comments were received against option (i). The Trade Marks, Patents and Design Federation (TMPDF) said that option (i) was not acceptable. Redcar and Cleveland Borough Council and Yorkshire and Humber Trading Standards Group felt that option (i) was inadequate to correct the problem. The law firm Simmons and Simmons felt this option would leave IP rights holders in their current predicament and the National Consumer Council (NCC) felt that option (i) would not improve consumer access to information.

The Scottish Information Commissioner commented that the interpretation of Part 9 had been causing difficulties for trading standards and environmental health professionals in the discharge of their duties under the Freedom of Information Scotland Act 2002 (FOISA). He suggested that the current DTI consultation should also consider the interplay between the provisions of Part 9 and the FOISA.

## **Government Response**

**The Government does not agree with this option. The responses submitted give a strong indication there is a need for Part 9 Enterprise Act 2002 to be amended. We recognise that under this option, business would continue to be assured that sensitive information could not be disclosed, and we recognise the risk of unintentional disclosure of sensitive information if Part 9 were amended. However, this option would also mean that public authorities would continue to be unable to disclose information to consumers/business for the purpose of enabling them to seek compensation or redress through civil law procedures.**

**Option (ii) – Part 9 remains unchanged, but we will explore the best way to provide public authorities with examples of current best practice on how to use Part 9 disclosure gateways.**

***Q8. What are your views on whether this option should be considered in addition or in isolation of any of the other options?***

All five responses to this question commented that option (ii) should be considered in addition to the other options.

An example provided of how this option in isolation would not improve the status quo included where traders advertised under a trade name and used an 0800 number. In one case, a particular trader collected computers from customers' homes, and repaired them poorly (or sometimes failed to return them). The details of the business address were not public information and the TSD was unable to disclose the address to frustrated consumers. If this option were implemented in isolation, information such as a traders business address would continue to not be disclosed.

***Q9. If you are a public authority can you give examples of when you have innovatively used Part 9 gateways to release information?***

There was one response to this question. A TSD that was unable to release a trading address to consumers who had received shoddy workmanship from a particular trader, obtained a copy of a photograph of the trader and published it in the local paper in a bid to track him down and serve an order on him.

***Q10. Do you think option (ii) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.***

The four responses received to this question commented that this option would not improve the current situation.

### **General Comments on option (ii)**

In total three responses were received supporting this option and felt that examples of current best practice on how to use Part 9 disclosure gateways would be the best way forward.

The law firm, Ashurst felt guidance would be useful and the Federation of Small Businesses (FSB) commented that this was their preferred option. The Office of Fair Trading (OFT) said that guidance in isolation, would not be sufficient to address the difficulties currently faced. Simmons and Simmons commented that this option was not a solution, and could lead to greater confusion about the types of disclosure that were permissible.

Redcar and Cleveland TSD felt that option (ii) was inadequate to solve the problem as ultimately interpretation of the legislation and the decision as to whether to release information was for the public authority at a local level. The NCC felt that this option did not improve the situation for consumers.

## **Government Response**

**The Government considers this option could be effective in spreading awareness of what Part 9 permits, and could contribute to a more consistent application of Part 9 across public authorities. It would also make clear to business the information they would be able to receive for civil proceedings.**

**However if this option were to be implemented in isolation, all consumer detriment costs would remain, as Part 9 is more restrictive on the release of consumer information for civil proceedings than the previous information disclosure regime under the Consumer Protection Act 1987. Consequently the Government will explore the possibilities of implementing this option in conjunction with another option.**

**Option (iii) - Amend Part 9 of the EA02 to allow the release of information for the purposes of private civil proceedings for all cases where restrictions on disclosure of the information are not imposed by Community law.**

***Q11. If you are a business and feel this statement (market sensitive information could be released to competitors) would apply to you please could you provide examples with quantitative data of this.***

No responses were received for this question.

***Q12. Do you think option (iii) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.***

Three responses were received for this question. Birmingham TSD favoured this option as it would enable consumers to gain information to enforce their consumer rights. LACORS and the Trading Standards South East region said that although many trading standards authorities preferred option (iii) others were concerned that it was too broad a gateway and sensitive information could accidentally or inadvertently be disclosed.

One of the examples LACORS provided on how this option could enable consumers to seek redress, included where personal injury had occurred. In one instance, a member of the public had a tin of hair mousse that, when cleaning out a cupboard, exploded in her hand severing bones and tendons. Under this option, had the TSD held the traders details they could have released this information to the consumer or her solicitor to be used for a personal injury claim.

### **General Comments on option (iii)**

In total five responses were received supporting this option believing that Part 9 should be amended to allow the release of information for private civil proceedings in all cases.

Association of Personal Injury Lawyers (APIL), Yorkshire and Humber Trading Standards and the NCC expressed a preference for option (iii). The NCC also felt this option would be the most likely to yield consumer benefits in terms of access to justice and prevention of repeat consumer detriment.

Redcar and Cleveland TSD, the Office of Communications (OFCOM), Simmons and Simmons, Freshfields Bruckhaus Deringer and TMPDF said that option (iii) was too broad and went further than necessary to meet the concerns expressed in the consultation.

The OFT were concerned about the impact this option could have on its ability to carry out its functions and did not see a need for such a broad gateway. The FSB did not favour option (iii) because of its potential detrimental effect on small and medium sized enterprises in terms of the level of information that could be released by such an amendment.

## **Government Response**

**This option could address concerns raised by consumers and IP rights holders, however it would also be a wider gateway than the previous civil gateway under the Consumer Protection Act 1987, as Part 9 applies more extensively than the 1987 Act. In particular, it would include information gathered on competition issues. Business have previously voiced concern about the release of sensitive competition information particularly to competitors overseas. The Government recognises this option carries the risk of sensitive information being released. This in turn could have a negative impact on competition between firms, and, industry in the future might be less willing to co-operate in sharing data with the competition authorities. For these reasons the Government does not support this option.**

**Option (iv) - Amend Part 9 of the EA02 to allow the release of information for the purpose of private civil proceedings in some cases only. Keeping the gateway narrow to reassure business that sensitive commercial information could not be released.**

***Q13. Is the list of legislation (set out further in this document) sufficient? If not should anything be added/deducted? Please give reasons why.***

Four responses were received to this question. It was suggested that any list of legislation should take account of all Regulators' enforcement powers including the Unfair Commercial Practices Directive (which will be implemented in June 2007).

It was also suggested that SI 2004/1473, the Goods Infringing Intellectual Property Rights (Customs Regulations) 2004, be included in the list of legislation mentioned in the consultation paper (and added to Schedule 14 of the Enterprise Act). This would enable HM Revenue and Customs to disclose certain information (details of consignee, declarant or holder of goods, etc.) to the relevant IP owner. (Currently, EU Regulations only allow information to be used for the purposes of deciding whether an IP right has been infringed, unless national law allow the information to be used for other purposes.)

One of the respondents said it would be more helpful to have a generic list of commercially sensitive legislation for which information should not be disclosed, rather than a specific list of legislation for which information may be disclosed. Another respondent said that the civil gateway should allow information to be disclosed to, and be used by, all stakeholders.

***Q14. Can you think of any implications to both business and consumers, not indicated here of opening the gateways for release of information for civil proceedings?***

One response was received commenting that if a gateway were only opened for civil proceedings it could be too narrow for consumers to obtain much benefit – as they may not be in a position to start court proceedings until after the information has been released. Additionally, consumers may require information in relation to alternative dispute resolutions rather than court proceedings, therefore the gateway could be widened to including prospective legal proceedings and alternative dispute resolutions instead of being limited to civil proceedings.

***Q15. Do you think option (iv) is the best way to ensure that business and consumers can get access to information to pursue redress in the civil courts? Please give reasons why.***

Although not in direct response to this question, in total, seventy of the respondents to the consultation were in favour of option (iv). This included responses from enforcement or regulatory organisations, consumer bodies, industry and organisations representing intellectual property (IP) rights holders, law firms/societies/associations and private individuals.

Of the seventy responses, five replied directly to this question and all felt that option (iv) would be the best way to allow access to information for pursuing redress. Additionally, two of the five commented that option (iv) should not be too restrictive in disclosure.

Examples were submitted highlighting how this option could benefit consumers. One of these included the case of a taxi driver who had purchased an air freshener for his car from a market trader. The solution came out of the can and damaged the interior of his car. As the car was a sports model, the cost of rectification was high. The taxi driver wanted to seek compensation, but because of Part 9, the TSD could not supply details of the market trader. If option (iv) were implemented, then consumers would be able to seek redress for this type of claim.

***Q16. Do you think there are better options, not identified here for ensuring that business and consumers can have access to this information without releasing sensitive competition information, not otherwise subjected to restrictions on disclosure under Community law?***

Two responses were received. One said they could not suggest a better alternative to option (iv). The other suggested removal of consumer legislation from Schedule 14 of the Enterprise Act 2002 and allowing enforcers to disclose information which came to them under their duties under Part 8 of the Enterprise Act 2002.

### **General Comments on option (iv)**

In total seventy responses were received supporting this option believing it provided the right balance in disclosure of information to consumers and rights holders whilst not allowing disclosure of sensitive information. Additionally two respondents said that the gateway should be kept narrow to ensure the protection of sensitive commercial information.

Three respondents felt that this option was still too restrictive and could potentially prevent the release of information required for the instigation of some civil actions.

### **Government Response**

**The Government believes this option to be the best way forward as it could contribute towards tackling counterfeiting and benefit consumers for the purposes of seeking redress. We wish to strike the right balance between protecting business from the disclosure of sensitive information and enabling disclosure of information necessary to help businesses and consumers seek redress for legitimate harm they have suffered. We realise there is a small risk of the disclosure of sensitive information, however, by limiting the type of information disclosed, this risk will be minimised.**

**Under Part 9, before a public authority decides to disclose information, they must apply a proportionality test. They must consider whether there is a need to disclose commercial information if it may significantly harm legitimate business interests. They must also consider if it is necessary to release all or only part of the information they hold to achieve the desired outcome. If it is not necessary to release all the information then they must not do so. This test further protects the interests of the individual or business about whom the information is held.**

**Part 9 already applies safeguards when information is disclosed. For example by ensuring that recipients of information do not disclose it to anyone else unless they have permission from the public authority who gave them the information in the first instance; or by ensuring that a recipient of information will only use it for the purposes for which it was disclosed. We intend that the latter safeguard will apply to disclosure for the purposes of civil proceedings.**

**The Government believes these safeguards to be sufficient to manage the risk of inadvertent disclosure and proposes to consult with interested parties on the draft secondary legislation later this year. We will be seeking further suggestions for minimising risks to business in the design of these regulations.**

## **The Current Situation**

During the consultation period, an opportunity arose to amend Part 9 via the Company Law Reform (CLR) Bill. An amendment was drafted which would insert a new power in Part 9 and enable a civil proceedings gateway to be opened whilst ensuring competition information could not be disclosed. The gateway itself could only be used once secondary legislation came into force. The definition of the kinds of civil proceedings for which disclosure might be made and the types of information which might be disclosed would be left for secondary legislation.

Stakeholders were informed of this change and were advised that we would consult with them on the draft secondary legislation.

## **Comments on clause 867 in the Company Law Reform Bill**

In general, stakeholders welcomed the amendment to Part 9 of the Enterprise Act 2002 as clause 867 in the CLR Bill. Most were in favour of the exclusion of competition related information for civil litigation purposes and felt it was vital the DTI consulted on the secondary legislation to fully understand its impacts.

Some stakeholders were concerned because clause 867 placed limitations on what could be disclosed, they felt that the scope of the secondary regulations should be wide enough to address both the current and the likely future needs of consumers. Others recommended that that the scope for disclosure should allow for better sharing of information and should include alternative dispute resolution avenues as well as cases taken through the civil courts.

In light of the early amendment, a few stakeholders said that they did not consider it appropriate to respond to the specific questions raised in the consultation document. Some saw the clause as a positive step but felt it needed to be amended further, whilst others were unhappy with the drafting of the clause and felt the enabling power was too wide, and, that the secondary legislation should be subject to affirmative, not negative resolution.

## **Next Steps**

We will continue to work with stakeholders to understand their concerns about clause 867 in the CLR Bill, and, will meet with them when developing thinking for policy on the secondary legislation. The DTI will conduct a short consultation on the types of information to be disclosed under Part 9 later in the year and introduce a statutory instrument that will amend it.

## Annex A

Responses to the consultation on whether to amend Part 9 of the Enterprise Act 2002 to allow information to be released more easily for civil court proceedings were received from the following organisations. (Please note: this list excludes responses made in confidence).

Copies of responses may be viewed by appointment in the DTI, 1 Victoria Street, London. Please contact Sandra McNeish on 020 7215 6439 for further information on viewing the responses.

Adidas  
Alliance Against IP Theft  
Anti-Counterfeiting Group  
APACS  
Aquascutum  
Arsenal Football Club  
Ashurst  
Association of Manufacturers of Domestic Appliances  
Association of Personal Injury Lawyers  
Association of the British Pharmaceutical Industry  
Autodesk  
BBC  
Berwin Leighton Paisner  
Birmingham TSD  
Blaenau Gwent TSD  
BP  
British Music Rights  
British Retail Consortium  
British Society of Plant Breeders Ltd  
British Telecom  
British Video Association  
Burberry  
Chanel  
Chorion PLC  
Citizens Advice Bureau  
Collyer Bristow  
Competition Law Association  
Confederation of British Industry  
Cornwall TSD  
Davenport Lyons Solicitors  
Dr Gordon Hayward  
Durham TSD  
EMI Group PLC  
Entertainment and Leisure Software Publishers Association  
Estee Lauder  
European Brands Association  
Federation Against Software theft  
Federation of Small Businesses  
Financial Services Authority  
Freshfields Bruckhaus Deringer  
Gillette

Harley Davidson  
Her Majesty's Courts Service  
Highland TSD  
Hugo Boss  
Lacoste  
Law Reform Committee  
Law Society  
Levi Strauss  
Linklaters  
Local Authority Coordinators of Regulatory Services  
Lord Justice Jacob  
Man United  
Mechanical-Copyright Protection Society  
Microsoft  
Mishcon de Reya  
Mulberry Group PLC  
Napp Pharmaceuticals Holdings Ltd  
National Consumer Council  
Newspaper Society  
Nike  
Nokia  
North Lanarkshire Council  
Ofcom  
Office of Fair Trading  
Ofgem  
Ofwat  
Pakharenko and Partners UK  
Pentland Brands PLC  
Puma  
Redcar and Cleveland TSD  
Rolex  
Society of Chief Officers of Trading Standards in Scotland  
Scotch Whiskey Association  
Scottish Information Commissioner  
Simmons & Simmons  
Somerset TSD  
Staffordshire TSD  
Timberland  
Trade Marks Patents and Designs Federation  
Trading Standards South East Group  
Yorkshire and Humber Trading Standards Group

DTI  
Consumer and Competition Policy Directorate

April 2006