

28 March 2013



**Institute of
Chartered Accountants
Australia**

Dr Allan Hawke AC
c/o Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: foireview@ag.gov.au

Dear Dr Hawke

Review of the Operation of the *Freedom of Information Act 1982* and the *Australian Information Act 2010*

The Institute of Chartered Accountants Australia (**Institute**) welcomes the opportunity to make a submission to the review of the operation of the *Freedom of Information Act 1982* (**FOI Act**) and the *Australian Information Act 2010* (**Review**).

The Institute is the professional body for Chartered Accountants in Australia and members operating throughout the world. Representing more than 70,000 current and future professionals and business leaders, the Institute has a pivotal role in upholding financial integrity in society. Members strive to uphold the profession's commitment to ethics and quality in everything they do, alongside an unwavering dedication to act in the public interest.

The Institute refers to the submission to the Review by the Australian Taxation Office (**ATO**) dated 9 January 2013 (**ATO Submission**) which we read with concern. Our comments to the Review are limited to a consideration of the merits of certain propositions advanced by the ATO. In this regard the Institute has had the benefit of reading the joint submission of The Tax Institute (**TTI**) and the Law Council of Australia (**LCA**) to the Review dated 26 March 2013 (**TTI/LCA Submission**).

The TTI/LCA Submission made a number of points with which the Institute agrees, and endorses, in particular their concerns regarding some of the suggestions made in the ATO submission in relation to the deferment of FOI processing during compliance or enforcement action (Terms of Reference (g)). The Institute wishes to emphasise that in our experience taxpayers are not motivated to make FOI requests for strategic reasons. This experience accords with that of the TTI and LCA as noted on page 3 of the TTI/LCA Submission. FOI requests are sometimes made by taxpayers not simply to understand ATO decisions but to understand the process the ATO is undertaking in forming those decisions. These FOI requests may be made during the course of a review or audit being undertaken by the ATO. Typically, these FOI requests are made where the ATO decision making process has been undertaken over a lengthy period of time and sufficient information has not been provided by the ATO to allow the taxpayer to understand the position the ATO may be forming. In our view, FOI requests of this nature are not inconsistent with the objectives of the FOI Act overall, indeed it falls squarely within the intention of the FOI Act to facilitate and promote public access to information, promptly and at the lowest possible cost. The rights of taxpayers under the FOI Act operate to counterbalance the very wide ranging information gathering powers of the ATO under the Tax Acts.

The Institute also wishes to make the following additional comments in relation to the ATO recommended deferment of FOI processing during compliance or enforcement action (terms of Reference (g)):

- Rather than impeding the ATO in its operation as a tax administrator, the FOI process assists in providing a better functioning tax system as it enables the taxpayer to uncover any erroneous assumptions or factual errors that the ATO may be making in pursuing certain enquiries or indeed litigation. This may reduce administration time devoted to inappropriate paths and potential "dead ends".

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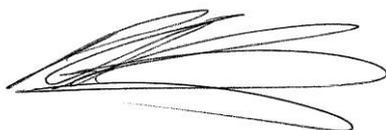
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- A taxpayer's greatest need for information from the ATO will be precisely when the ATO is conducting an audit or review of the taxpayer's affairs. The TTI/LCA Submission covers off on many of the reasons why taxpayers should have access to information during this period. In addition to the rights of taxpayers to obtain the necessary information, the ability of the taxpayer to lodge an FOI request with the ATO also operates as an effective internal control measure in respect of the ATO decision making process. In this regard, the ability of a taxpayer to lodge an FOI request should create an additional safeguard for those taxpayers by reason of the fact that ATO Officers will be mindful during decision making that the processes adopted in reaching those decisions will be available to taxpayers via an FOI request. In our view, it is critical that a taxpayer continue to have the ability to lodge FOI requests during the conduct of an audit or review to ensure this added safeguard in respect of ATO decision making.
- At paragraph 16 of the ATO submission, it is noted that the ATO spent \$3.3 million on external legal services in connection with the processing of FOI requests. It is argued by the ATO that these costs are grounds for the reduction in the ability of a taxpayer to lodge an FOI request during the conduct of a review or audit. In our view, the onus should be on the ATO to reduce the costs associated with FOI requests not reduce the ability of taxpayers to lodge those requests with the ATO. As noted in the TTI/LCA Submission, the real issue appears to be a lack of internal ATO resources to manage the FOI requests submitted by taxpayers rather than the external legal costs incurred by the ATO in managing those requests.
- Further to the above point, the Institute endorses the TTI and LCA's observation that the FOI request process can be slow and laborious, which is often exacerbated by lengthy extension requests lodged by the ATO. In some cases, the extension requests have been granted to a point in time that is after the expected conclusion to the review or audit being conducted by the ATO. This has acted as a de facto deferment of the FOI request in the manner argued for by the ATO in the submission. We would recommend that consideration be given to reviewing the extension process as part of the review that is currently being undertaken to ensure that the extension process is operating in an appropriate way.

If you have any questions regarding our submission please contact me on 02 9290 5609.

Yours sincerely



Paul Stacey
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