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Law Council
OF AUSTRALIA
Business Law Section

Dr Allan Hawke AC
c/o Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Via email: foireview@ag.gov.au

26 March 2013

Dear Dr Hawke,

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

We have pleasure in enclosing a submission which has been prepared jointly by the Taxation Committee of the Business Law Section of the Law Council of Australia and the Taxation Institute.

If you have any questions in relation to the submission, please contact either the Chair of the Taxation Committee, Mark Friezer, on 02-9353 4000 or via email: mfriezer@claytonutz.com or The Tax Institute Tax Counsel, Stephanie Caredes on 02-8223 0011 or via email: Stephaniecaresdes@taxinstitute.com.au.

Yours sincerely,

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enc.

Joint submission to the Hawke Review of the *Freedom of Information Act*
1982 and the *Australian Information Commissioner Act 2010*
Taxation Committee of the Business Law Section of the Law Council of
Australia
and The Tax Institute

This submission has been prepared by the Taxation Committee of the Business Law Section of the Law Council of Australia and The Tax Institute (the Professional Bodies). The Professional Bodies welcome the opportunity to comment on the Review of the *Freedom of Information Act 1982* (Cth) (FOI Act) and the *Australian Information Commissioner Act 2010* (Cth) (IC Act).

This document has been prepared as a response to the submission to the Review by the Australian Taxation Office (ATO) dated 9 January 2013 (ATO Submission). The Professional Bodies note that a submission to the Review has already been made by the Administrative Law Committee of the Federal Litigation Section of the Law Council of Australia, incorporating its earlier submission to the Australian Information Commissioner's *Review of Charges under the Freedom of Information Act 1982*. This document is not intended to address the broader range of issues discussed in the Administrative Law Committee's submission or to limit that submission in any way.

As noted by the Administrative Law Committee, the FOI Act serves an important and central role in Australia's system of government and its administrative law. By providing a general right of access to documents of agencies, with external merits review and ultimate enforceability in the Federal Court, the FOI Act promotes representative democracy. These are laudable objects that can only be achieved by adequate resourcing of both agencies and the Office of the Australian Information Commissioner.

The Professional Bodies acknowledge and welcome the ATO's commitment to "the intent and advancement of open government" and agrees that it enhances the community's understanding, trust and confidence in the administration of the tax and superannuation system.¹ This commitment is expressed in numerous documents published by the ATO,

¹ ATO Submission, p 1.

including as an organisational value² and as a right of taxpayers under the Taxpayers' Charter.³ It is also expressed on a practical level by the volume of information available to the public through the ATO's website, amongst other sources.

However, the Professional Bodies have some concerns regarding some of the suggestions made in the ATO Submission to which it was considered necessary to provide a response, having regard to the approach adopted in the ATO Submission. As an introductory comment, the ATO Submission appears to be based on a philosophy that FOI is a distraction from the true functions of agencies. The Professional Bodies would, however, suggest that FOI is in fact a core function of government agencies, which exist to serve the public. This is, for example, expressed in the objects provision to the FOI Act, which notes that:

- information held by the Government is to be managed for public purposes and is a national resource; and
- the functions and powers given by the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest possible cost.

It also appears to be based on a view that FOI requests are made by taxpayers for strategic reasons, rather than with the intention of seeking information to understand ATO decisions. In the Professional Bodies' experience, this is not the case. Even if there were a few instances of such use of FOI processes, the ATO Submission would amount to an overreaction disadvantaging the whole taxpayer community.

Responses to the ATO's suggestions are discussed below, following the headings used in the ATO Submission.

Fees and charges

The Professional Bodies do not support the introduction of a 40 hour rule. As noted in the Administrative Law Committee's submission to the *Review of Charges*, this

² Commissioner of Taxation, Annual Report 2011-12, p 2.

³ Taxpayers' Charter, available at www.ato.gov.au.

recommendation fundamentally undermines the operation of the FOI Act. Applicants will not be in a position to pursue effective review of an agency's estimate of time to process an FOI request and 40 hours is too low a ceiling for an agency as large and well-resourced as the ATO.

The Professional Bodies also note that an arbitrary, bright line limitation such as the 40 hour rule would effectively reward agencies which do not maintain good record management systems allowing easy retrieval of materials. In this context, it is understood that the ATO maintains numerous separate record management systems, which are not necessarily compatible or easily accessible, but which may contain important and relevant information for taxpayer applicants.

As noted below, taxpayers generally have limited legal rights to obtain information from the ATO, in contrast to the ATO's broad powers for obtaining information from taxpayers. In the absence of a legal right to information, the ATO has developed appropriate administrative processes for supplying information to taxpayers. For instance, the ATO often issues a paper setting out its position on the application of the law to a taxpayer before making an adjustment to the taxpayer's assessments. This is crucial to a taxpayer in understanding the issues to which it needs to respond if it wishes to object to the assessment, given that objections must state fully and in detail the grounds of objection and the taxpayer bears the burden of proving the assessment was excessive.

However, the ATO does not invariably issue a position paper and, in any event, taxpayers and advisers at times find that this process does not entirely work in the intended manner to provide them with all the information necessary to understand and consider the ATO's position. When this occurs, FOI can serve as an important resource for taxpayers seeking to understand action being taken against them or, in this context, seeking support for their position. In particular, FOI requests are used to facilitate taxpayers' understanding of the approach taken by the ATO to their affairs and keeping the ATO accountable for its decision-making, including:

- understanding facts that have been relied upon by the ATO but have not been put to the taxpayer fully or accurately, including material provided by third parties (where this is available for disclosure);

- understanding relevant material available to the ATO that has not been taken into account in decision-making;
- understanding factors taken into account in assessing penalties; and
- understanding the administrative steps taken and approaches adopted in reaching positions, such as the extent of impartiality, delays, confusion regarding factual materials or legal principles.

Disclosure of these matters is likely to assist with overall dispute resolution in a prompt and efficient manner.

The 40 hour rule would increase the imbalance against the interests of taxpayers on an arbitrary and, therefore, unjustifiable basis. In appropriate cases, a "user pays" system would be preferable to the proposed 40 hour rule, provided that the system was sufficiently flexible and had proper regard to the limited financial resources that may be available to taxpayers and to achieving the objects of the FOI Act.

It is also noted that the ATO is empowered to undertake reviews and, subject to certain limitations, adjust historical tax liabilities. Situations can arise where a taxpayer no longer holds relevant records due to the passage of time or other factors and so the taxpayer may need to seek this information from the ATO itself. It may be expected that the greater the age of the records, the more time consuming it may be to retrieve them but this does not diminish the importance or relevance of those records in the particular circumstances. A flexible, principles-based approach to practical refusal, such as that in section 24, may allow such factors to be taken into account in a manner that an arbitrary time limit does not.

Administrative release (terms of reference (g))

The Professional Bodies do not support the general denial of the exercise of FOI rights unless a person has tried a relevant available administrative release route and is not satisfied with it. This denial would only be appropriate to the extent it is limited to types of information which an agency has clearly stated it will provide under the terms of its administrative release scheme.

In particular, unless the relevant request is very simple (such as for recent tax returns or assessments), it is unlikely that they could be processed through administrative release in a timely and satisfactory manner. The effect of the denial would simply be to extend the timeframes within which applicants can expect to receive information requested or to exercise their rights in the event the information is not provided under administrative processes.

Deferment of FOI processing during compliance or enforcement action (terms of reference (g))

The Professional Bodies strongly disagree with the ATO's proposal that agencies be permitted to defer processing of FOI requests during compliance or enforcement action. The ATO's proposal is antithetical to the ATO's stated commitment to openness and accountability and the objects of the FOI Act. In the Professional Bodies' opinion, the exemptions currently available in FOI Act provide a more than adequate balance with the operational needs of agencies.

In particular, it is noted that:

1. Limited legal rights of taxpayers

As noted above, despite the ATO's stated commitment to openness and its development of processes to assist taxpayers' understanding of its views, taxpayers have generally limited rights to access to information under the tax laws. Instead, taxpayers must rely on the ATO's administrative processes to be able to understand the ATO's approach and decision-making in any given scenario.

Taxpayers and advisers often find that these processes do not entirely work in the intended manner. When this happens, FOI has proven to be an important resource for the taxpayer in understanding why action is being taken and the issues to which the taxpayer needs to respond for the reasons stated above.

2. Contrast with broad ATO powers

By contrast to a taxpayer's limited rights, the ATO has broad and broad-ranging powers under the tax laws, including in relation to information gathering, and is

generally well-resourced. This tilts the balance of power in the direction of the ATO and against the taxpayer.

It is noted, anecdotally, that the timeframes for processing FOI requests by an agency such as the ATO can exceed the timeframes those agencies apply in the exercise of their information gathering powers or other statutory timeframes applicable to taxpayers.

3. **Denial of rights at time of greatest need for information**

Taxpayers are likely to have the greatest need for information held by the ATO in relation to their tax affairs at precisely the time the ATO is conducting an investigation into the taxpayer's affairs or is otherwise taking action against a taxpayer. In particular, placing the burden of proof on taxpayers suggests that they should be given fulsome access to information held by the ATO to assist them to discharge it. It does not support arguments for further restrictions on such access.

To seek effectively to deny the exercise of FOI rights at that time appears to be a retrograde and unnecessary step, and may negate much of the utility of FOI.

4. **ATO settlement practice**

In recent years, the ATO has emphasised the importance of settlements and alternative dispute resolution as the most efficient and effective methods of resolving disputes between it and taxpayers.⁴

The ATO's Code of Settlement Practice and model deed for settling disputes between it and taxpayers seeks to deny taxpayers their right to make requests under the FOI Act in respect of settled matters. In practice, the ATO also requires any requests made previously and not finalised by the time of settlement to be withdrawn. Without addressing the propriety of this approach, its effect, if coupled with the ATO's proposal, would be to prevent taxpayers from ever having access to FOI in contentious circumstances.

⁴ For instance, see the ATO Code of Settlement Practice, *Practice Statement Law Administration PS LA 2007/5: Settlements* and *Practice Statement Law Administration 2007/6: Guidelines for settlement of widely-based tax disputes*.

Providing taxpayers access to information during compliance or enforcement action can allow parties to avoid disputes entirely or at least facilitates resolution of disputes outside of litigation. By contrast, withholding that information can increase uncertainty, confusion and suspicion making early resolution more difficult and less attractive. Such an outcome is not in the public interest and is, therefore, undesirable. It would be contrary to the ATO's own views of efficient dispute resolution.

5. **No substantial adverse effect to ATO**

As the ATO's own submission notes, a large agency like the ATO could reasonably be expected to take action to reduce the adverse impact of a FOI request on the conduct of an audit. It is therefore unlikely to suffer any substantial adverse effect in complying with a request.

The Professional Bodies note that, although the costs of processing FOI requests may be significant, it is always necessary to assess these costs against the benefits and objects of open, transparent and accountable government. Again, in appropriate cases, these costs would be better alleviated by a properly designed and flexible "user pays" system.

In any case, the ATO Submission seeks to justify its proposal on the basis that a tax officer undertaking an audit may have to divert themselves from audit work to deal with a taxpayer's FOI request which would delay compliance work. It is hard to understand how there would be any less diversionary effect in deferring consideration of an FOI request until after compliance action was taken. It may be reasonably assumed that, on completing compliance action against one taxpayer, relevant officers would simply move on to the next taxpayer. In such a case, the later diversion would merely be from the conduct of action against the subsequent taxpayer. It would also appear likely to be the case that, at that later point, the audit officer would have moved on from the earlier action and therefore require a greater effort to process an FOI request. The Professional Bodies therefore suggest that the reasons set out in ATO Submission do not adequately justify the proposal.

6. **The real issue is proper resourcing of FOI functions**

It seems from the ATO Submission that the ATO does not oppose the objectives of openness, transparency and constructive engagement with taxpayers, nor that the ATO wishes to hide its internal processes. Rather, the ATO's proposal appears to be an issue of cost and resources available to attend to FOI requests giving rise to delays in processing and in compliance action. The ATO Submission notes that the ATO has a significant investment in FOI processing, regularly supplemented by calling on external legal services with \$3.3 million having been spent on external legal services in connection with processing of requests.

The Professional Bodies acknowledge that open government comes at a cost. However, the Professional Bodies understand that the allocation of personnel by ATO is relatively minor, with only 20 - 25 employees who are dedicated FOI officers out of a total staff of nearly 25,000. Additionally, in the Professional Bodies' experience, the processing of FOI requests by the ATO can be a slow and laborious process. This at times leads to requests by the ATO for extensions of time or for narrowing of the scope of requests due to difficulties in identifying and accessing relevant material.

It is suggested that resolving issues with processing of FOI requests should focus more on operating the existing system more efficiently and effectively, rather than providing further legislative constraints to its operation.

7. **Broad and ill-defined concept of "compliance and enforcement action"**

The ATO Submission does not explain what is meant by "compliance or enforcement action" as defining the circumstances in which it would seek to deny an applicant's rights under the FOI Act. However, it is noted that it could apply to a wide range of situations, ranging from informal, standardised information requests to court proceedings. Some taxpayers, due to their size, significance or the ATO's perceived risk profiling, can find themselves under near perpetual reviews or audits and would likely be prevented from ever having FOI requests processed. Further, the ATO's recent approach to tax compliance has tended towards early engagement, including through reviews prior to a taxpayer even lodging its tax return.

Having regard to the expanding but ill-defined nature of compliance and enforcement action available to the agencies such as the ATO, the ATO's proposal would be likely to severely limit taxpayer's rights under the FOI Act without adequate justification or balance.

8. **Adequate range of existing exemptions**

It is noted that the FOI Act already contains a number of exemptions from production for documents which already provide a balance between an agency's obligation to disclose information and the need for certain information to remain undisclosed or to avoid undue burdens on agencies. In addition to section 47E addressed in the ATO Submission, sections 24 (practical refusal for substantial and unreasonable diversion of resources), 37 (disclosures prejudicing the enforcement and proper administration of the law) and 47C (documents disclosing deliberative processes) also facilitate non-disclosure of information during the conduct of ATO action.

The Professional Bodies also note that the FOI Act does not prevent the disclosure of exempt documents; it merely allows an agency not to allow access. To the extent there is concern over the double-handling of documents, agencies could consider providing access to all documents, whether exempt or not, on a first request and thereby avoid the need for a second application to be made. Alternatively, agencies could develop procedures to make the process more efficient such as identifying on an initial review documents that could be subsequently released once relevant processes are finalised.

The Professional Bodies therefore suggest that the arguments made in the ATO Submission do not provide an adequate justification for compromising the objectives of openness and transparency by deferring processing of FOI requests. In particular, it does not appear to have due regard to the prejudice that may be suffered by the taxpayer community, most of which consists of individuals and small businesses. This would be contrary to the public interest.

Electronic FOI applications (terms of reference (g))

The ATO Submission raises the issue of whether rights under the FOI Act should be limited to Australian citizens, as use of the internet means agencies could potentially be inundated with FOI requests lodged electronically.

While the Professional Bodies do not oppose the "'denial of service' attack" proposal of the ATO, any limitations on the rights of "any person" to make FOI requests would need to be approached with great care. In particular, the Professional Bodies would not support any limitation to Australian citizens or persons located in Australia. Australian tax laws can apply extraterritorially to a variety of entities, including Australian citizens residing abroad, non-citizens residing in Australia, corporations or other entities which may not be considered "citizens" within the ordinary meaning of the term and even non-citizens residing abroad. It is submitted that persons to whom Australia seeks to apply its laws should also be entitled to the benefit of the FOI Act.