CHARTERED SECRETARIES AUSTRALIA

Leaders in governance

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Freedom of Information Reform

Chartered Secretaries Australia (CSA) is the independent leader in governance, risk and compliance. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency. Our members are all involved in governance, corporate administration and compliance with legislative and regulatory obligations, including those under privacy legislation at both Commonwealth and state levels. They work in listed, unlisted, private and government-owned corporations, as well as in government agencies and departments.

General comments

CSA welcomes the opportunity to comment on the freedom of information (FOI) reform. CSA believes that government should be as open and transparent as possible. CSA notes that governance comprises four critical elements:

- transparency, which entails a true dialogue with a range of stakeholder groups and a serious effort by leaders to listen and learn
- accountability — this means asking the questions: Who is responsible and to whom? What are they responsible for? What are the consequences if the rules are violated?
- stewardship, which involves a clarity in all organisational decision-making so that those controlling the destiny of an organisation do so not for their own benefit, but rather for the benefit of the range of individuals and groups who have an interest in the affairs of the organisation, that is, the stakeholders
- integrity — developing a culture committed to ethical behaviour.

The capacity to examine and understand the decision making processes of government, which sits at the heart of FOI is clearly an issue central to governance.

We leave it to others to comment in detail on the two draft bills that have been released by the government for comment: the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009.

The issues we raise in this submission are governance and risk management issues that we believe should be considered by the government in the FOI reform process.

Risk management issues in relation to implementation of proposed FOI reform

CSA notes that any reform of FOI legislation needs to ensure that the policy objective of greater transparency is achieved without imposing unreasonable compliance obligations on public sector organisations that could impair their capacity to deliver the services for which they are constituted; that is, the opportunity cost of providing greater transparency must be aligned with ongoing service delivery requirements. This is a risk management issue that must be considered when reforming the law.

Any reform of the legislation should be developed on the basis of ensuring the greatest number of agencies, departments and individuals can understand and engage with their obligations under FOI law. CSA strongly supports any FOI reform taking a principles-based approach, as such an approach:

- provides real guidance on how the laws will be administered and the expectations of the Office of the Information Commissioner as to how public sector agencies and individuals should conduct themselves to ensure compliance with the FOI laws
- assists users to understand the legislation, and
- enshrines the aspirations of the community concerning FOI.

Consistency in drafting, interpretation and enforcement with state-based FOI legislation is required, as without such consistency, compliance obligations will be unclear.

CSA notes that the reformed FOI legislation needs to ensure that it does not create the risk of FOI providing a ‘cheap’ form of pre-discovery in the pre-litigation process. For example, if the legislation does not address this issue, litigators would not be limited by the normal rules of discovery when using FOI, ie, the documents would not need to be relevant to an issue, and the documents obtained would not need to be limited to use in the legal proceedings. CSA notes that the use of FOI in this way would not achieve the policy objectives.

The reformed FOI legislation also needs to ensure that any obligations placed on public sector agencies, departments and individuals to publish any document sought under FOI on the organisation’s website does not place the organisation or individual in breach of other legislation, such as privacy laws that prohibit the publication of personal information, including the personal details of third parties.

Impact on agencies where there may be secrecy provisions to which agencies need to adhere

CSA notes that the proposed reform requiring publication with 10 working days on a website of the information contained in a document to which access has been granted under the FOI Act will create particular difficulties for agencies where there may be secrecy provisions to which agencies need to adhere.

Under the new s 11C of the FOI Act, agencies will be required to publish information contained in any document to which access has been granted under the FOI Act, unless the information is personal information relating to the applicant or a member of the applicant's family, or information about the business, commercial, financial or professional affairs of the applicant. The information must be published on a website within 10 working days of giving access to the document.

CSA notes that this would place agencies in breach of any secrecy provisions to which they may be required to adhere.

CSA recommends that there should be a carve-out in the legislation in respect of compliance with any such secrecy provisions, so that companies are not in breach of them.

Impact on private sector organisations

The government has provided the Australian Law Reform Commission (ALRC) with a reference to consider whether FOI should be extended to, or another disclosure regime provided for, the private sector.

CSA notes that this seems at odds with the government's statement that 'The FOI Act is concerned with access to *government* information. Importantly, the Act gives members of the public, upon application, a right of access to documents of *Australian Government agencies* and to *official documents of Ministers*' (our italics).

The public sector at all levels has been and will be expected to play an increasing role in the real economy. Going forward, as the government's stimulus package is rolled out, there will be an increasing number of public private partnerships (PPPs). Clearly, there will also be increased scrutiny that those PPPs adequately protect the taxpayer's interest.

CSA believes that such scrutiny will bring increased requirements for rigour in governance arrangements to promote better decision-making and accountability. Such arrangements include:

- ensuring transparent and accountable procedures
- appropriate robust direction and control
- achieving successful engagement and communication with stakeholders
- effective forecasting and budgeting
- actively engaging positive risk, and
- monitoring conformance and performance.

CSA believes that these arrangements should be subject to increased scrutiny.

However, CSA has serious concerns with extending legislation governing public sector agencies and departments to private individuals and private organisations.

CSA does not believe that the government should apply a ‘public interest test’ to private individuals and private organisations.

CSA notes that the draft bill proposes the repeal of several exemptions, including exemptions for documents arising out of companies and securities legislation (s 47). CSA believes that this could place public private partnerships (PPPs) in jeopardy, as companies may find they have no protection for commercial-in-confidence matters. This may result in corporations being unwilling to participate in PPPs.

A further issue relates to the application of FOI legislation to government-owned corporations (GOCs) and government-trading enterprises (GTEs).

Assuming that the government accepts CSA’s submission that the FOI regime ought not be extended to the private sector, GTEs and GOCs ought not be placed at a commercial disadvantage to their competitors in the private sector by virtue of being subject to the FOI regime.

CSA recommends that GTEs and GOCs should have a limited exemption from FOI that prevents competitors in the market from exercising FOI rights that would subject the GOC or GTE to tactical or economic disadvantage. There would be particular difficulty in imposing obligations on GOCs and GTEs to release commercial-in-confidence information that could harm the company. This would also apply to information in contracts with third parties (eg, tenders). This limited exemption may also need to be considered for some government departments and agencies that interact with third parties where similar commercial-in-confidence issues may arise.

Companies are already subject to significant public disclosure obligations. These disclosure obligations are, if anything, more onerous in many respects than those imposed on government through current and proposed FOI. Members of the public also have the right under the Privacy Act to obtain private information about them held by a company.

To further encroach on the private sector would be to significantly affect a company's right to be competitive, to deal in commercial confidence and would expose them to requests for information from people who have no formal relationship with the company. With government, all citizens have a relationship, and the government is there to serve the citizen's interests. That is not the relationship of a company with the general public.

The government notes that its policy objective is weighted in favour of disclosure, with, among other things, the application of a new single form of the public interest test.

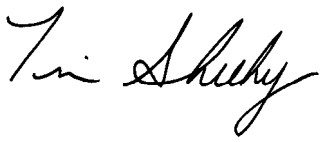
However, CSA notes that the government had previously required the ALRC to review whether FOI should be extended to the private sector. In its 1996 report on Open Government, the ALRC came to the view that the democratic accountability and openness required of the public sector under the FOI Act should not be required of the private sector. That was because, as a general rule, private sector bodies do not exercise the executive power of government and do not have a duty to act in the interest of the entire community. Accordingly, the ALRC concluded that private sector bodies should not be under an obligation to disclose to any member of the public any document in their possession.

CSA believes that the ALRC’s arguments remain valid.

Conclusion

In preparing this submission, CSA has drawn on the expertise of the members of its three internal national policy committees. We would welcome the opportunity to meet with you to discuss any of our views in greater detail.

Yours sincerely



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