PRIVATE SECTOR RELEASE OF INFORMATION: FOI ACT EXTENSION OR ANOTHER AVENUE?

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Introduction

On 8 July 1994 the Acting Attorney-General provided terms of reference to the Australian Law Reform Commission ('ALRC') to conduct an inquiry jointly with the Administrative Review Council ('ARC') into the Freedom of Information Act 1982 (Cth) ('FOI Act'). Among the numerous matters to be reported upon was whether the FOI Act should be amended by extending its ambit to cover private sector bodies.

An issues paper[1] was prepared in September 1994 and circulated for general comment. After considering numerous submissions and conducting a series of public meetings, the ALRC/ARC review produced a discussion paper[2] in May 1995 seeking further comments and submissions by 14 July 1995.

In this paper, I propose to cover briefly:

(a) arguments against extending the FOI Act into the private sector;

(b) arguments in favour of such an extension;

(c) the current views of the ALRC/ARC review.

Arguments against

The main argument raised against the extension of the FOI Act into the private sector is that the democratic objectives of the FOI Act are not relevant to the private sector. It is argued that private sector bodies do not exercise the executive power of government. Further, they do not have a duty to act in the interests of the whole community. Rather, they have a duty to act in the best interests of their organisations. They are not accountable to the public but to their owners or shareholders.

To extend the FOI Act to the private sector would, so the argument goes, stifle or create sluggish decision-making. This would slow private sector decision-making and corporate activity resulting in loss of investment and greater unemployment.

A further argument is that current accountability mechanisms are adequate. That is, the existing regulatory mechanisms in the Trade Practices Act 1974 (Cth), the Corporations Law and other legislation is sufficient. Market forces and the ability of consumers to make the choice to not deal with particular bodies are enough to ensure appropriate behaviour by those bodies.

To the extent that the current mechanisms are thought to be inadequate, the private sector should be left to its own devices and the introduction of self-regulation. Self-regulation on an industry-by-industry basis would be better than extending the FOI Act. Self-regulation would be

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achieved through voluntary codes of conduct and, possibly, industry Ombudsmen.

It is also argued that the administration costs which would be incurred by extending the FOI Act to the private sector would be so exorbitant as to adversely affect employment and even the international competitiveness of private sector bodies.

Arguments for

Some people argue that the benefits of openness and accountability are themselves a sufficient reason for extension of the FOI Act into the private sector. My own view is that it is difficult to see the relevance in the private sector of *all* of the democratic objectives of the FOI Act. But that is not to say there should not be access to some types of information in the private sector. This is dealt with in more detail later.

It is argued that the ability of consumers to go elsewhere in the market place is not a satisfactory regulatory mechanism. As a regulator of the private sector, consumer choice is blunted by the fact that consumers do not have access to sufficient private sector information to determine whether individual firms and corporations are acting within ethical and legal parameters.

As part of the justification of an extension of the FOI Act into the private sector, it is argued that some private sector bodies can affect the national economy and also the living and working standards of millions of people. This may, however, only justify a partial extension based on the nature of the information contained in particular private sector industries or certain documents. For example public safety or environmental information could be justified as being accessible but not, say, commercially sensitive financial information.

To contradict the argument promoting self-regulation rather than extending the FOI Act, it is argued that self-regulation is inadequate. It is open to abuse and, given its voluntary nature, does not lend itself to uniform provision of information across the broad spectrum of private sector bodies. Extending the FOI Act would remove that potential for abuse and lack of uniformity.

In relation to costs, it is argued that although there would be some administrative costs associated with the extension of the FOI Act, these costs are unlikely to be exorbitant. The same fearful argument as to cost was raised when the FOI Act was first introduced into the public sector. Experience has shown that apart from a handful of major government agencies who deal with largely routine requests for information, few agencies have suffered high administration costs.

Personal information

The Discussion Paper makes it clear that one of the main arguments in favour of extending the FOI Act into the private sector is that, just as individuals have a right to obtain access to their own personal information held by public sector bodies, they should have the same right (based on privacy considerations) to have access to such information held by private sector bodies. This separate treatment of personal information as being in a unique position is not new.

In 1983 the ALRC noted that if individuals were given access to personal records, they should be able to have access to such records from both the public and private sectors, as there is no valid basis for differentiating between public and private record keepers.[3] Many other commentators have agreed (as reflected by the following two passages):

> However, we submit that there are no compelling reasons of principle for making a distinction between the public and private sectors when it comes to

> access to personal information. Nor, for that matter could it be said that there are real practical reasons in the way the two sectors deal with individuals which justify the distinction.[4]

> The current disparity between the information access rights of nominally 'public' and 'private' consumers is clearly resulting in inequities. 'Private' consumers will have no right of access to personal or other information held by the body which supplies an essential service to them, even though the 'public' competitor of that body may be subject to FOI. This is not [an] acceptable result in policy terms, as the fundamental nature of the service provided by bodies such as utilities ... is such that consumers require access to information not only about themselves, but also about policy initiatives which may affect the cost of accessibility of the service.[5]

As was submitted by the Administrative Law Section of the Law Institute of Victoria to the ALRC/ARC inquiry, there must be consistency of access between competing bodies whether they are in the public or private sectors. There does not appear to be any rational explanation or justification as to why, for example, documents can be obtained from Telstra but not from Optus and why documents can be obtained from Medicare Private but not HBA. The same applies in a number of other areas; private and public hospitals; private and public schools and universities; prisons (when privatised).

That argument appears to be even more valid when it is considered that on an increasing basis private sector bodies are taking over the activities formerly performed by the government and its agencies. In those circumstances, individuals have little control on how the vast amount of personal information available to private sector bodies about individuals can be used in making decisions affecting those individuals. This is particularly so given the technology available to store and process that information. Private sector bodies do have influence over key areas of people's lives (banking, telecommunications, medical services). In these circumstances, individuals arguably have a right to know what information is held about them and how it is used to make decisions about them.

ALRC/ARC recommendations

FOI

The ALRC/ARC review agrees that the democratic objectives of the FOI Act have little relevance to private sector bodies. Private sector bodies are not accountable to the public in the same way as public sector bodies and the FOI Act should not be extended to them on a general basis.[6]

The review does, however, recognise that private sector bodies should be held accountable to the public where existing private sector reporting and disclosure requirements are deficient. It proposes that, if, in a particular area of the private sector, there is a need for greater disclosure of information, the relevant legislation should be amended or new legislation introduced to require greater disclosure by that industry to the relevant regulatory agency. It considers further that if there is information that ought to be disclosed upon request directly to a member of the public, 'right to know' legislation specific to that industry or situation should be introduced rather than extending the FOI Act. This view reflects the current position in many overseas countries which was considered by the ALRC/ARC review.

In the area of outsourcing, where a government function is outsourced to a private sector body, the ALRC/ARC review proposes that FOI rights should be extended at the time of outsourcing. Where the outsourcing is permanent or continuing and provided for in legislation, that legislation could provide for the extension of FOI rights. This has already occurred in the employment area. Under the Employment Services (Consequential Amendments) Act 1994 (Cth), private

sector case managers contracted to manage long term unemployment are expressly made subject to the FOI Act. Where the outsourcing occurs on an individual contract or case-by-case basis, the extension of FOI rights should be included in the terms of the contract. This would, in my view, need to be reflected in legislation acknowledging that FOI rights (including rights of review) can be imposed by agreement.

Privacy

Although the ALRC/ARC review believes the FOI Act should not generally be extended to the private sector, it does believe that there is a need to protect individuals' privacy in the private sector as well as the public sector.[7] The method suggested to achieve this is by extending the Privacy Act 1984 (Cth) ('Privacy Act') to the private sector, to government business enterprise ('GBEs') and to any parts of the public sector not currently covered. This would be done by relying on the external affairs power in the Constitution and the fact that Australia is a signatory to the International Covenant on Civil and Political Rights, and, as an OECD member, is bound by the OECD Guidelines for the protection of privacy and transborder flows of personal data.

The Privacy Act contains eleven information privacy principles ('IPPs') prescribing standards for the collection, storage and security of data, access to personal records, use of personal information and disclosure of personal information to third parties by the public sector. The ALRC/ARC review proposes that private sector bodies should be required to comply with all eleven IPPs (although it does seek comment on whether only some of the IPPs should apply).[8]

The ALRC/ARC review suggests that the mechanics of the extension of the Privacy Act should be as follows:

- The Privacy Act should apply immediately, but enforcement would be limited. The Act would only be enforceable in a particular industry if and when the Privacy Commission issues a code for that industry (if thought desirable). The aim would be to give the industry bodies an opportunity to self-regulate if they wish.

- The Privacy Commissioner should be able to issue codes that set out how the IPPs are to be satisfied in a particular industry. He or she should consult with the industry when developing a code.

- The Privacy Commissioner should determine which industries need a code and when, but the Attorney-General should be able to direct the Privacy Commissioner to issue a code for a particular industry.

- The codes issued by the Privacy Commissioner should be disallowable instruments.

The ALRC/ARC suggest that if that model is adopted, the private medical and health industry should be addressed first and that the Attorney-General should direct the Privacy Commissioner to give that industry the highest priority as far as the development of a code is concerned.

The ALRC/ARC review proposes that the FOI Act, the Privacy Act and the Archives Act (Cth) should be combined into a single Act. Although the single Act would generally be applicable to government information, the single Act would also provide for rights of access to personal information and of amendment (subject to the issue of codes) in the private sector.

Endnotes

1 ALRC/ARC. Issues Paper No 12. *Freedom of Information* (1994).

2 ALRC/ARC, Discussion Paper No 59, *Freedom of Information* (1995) ('Discussion Paper').

3 ALRC, Report No 22, *Privacy* (1983), Vol 2, 103.

4 M Campbell and J Eyers, 'Freedom of Information - Where to Now?', Info One, 1st National Conference on Freedom of Information, Adelaide, 1993, 5.

5 T Moe and J Lye, 'Prospects for Review of FOI: Can the Commonwealth Regain the Initiative?' Fourth Annual AIAL Forum, Brisbane, 8 July 1994, p 8. See also M Batskos, 'State-owned enterprises - does administrative law apply?' (1994) 68 LIJ 839, 840-1.

6 Discussion Paper, 120-1.

7 Discussion Paper, 124.

8 Discussion paper, 125