

I. Introduction

1. This submission responds to the review commissioned by Australian Attorney-General, the Hon Nicola Roxon MP, of the operation of the *Freedom of Information Act 1982* (Cth) ('FOI Act') and the *Australian Information Commissioner Act 2010* (Cth). This submission focuses on the FOI Act, including the following aspects of the Terms of Reference set out by the Attorney-General on 29 October 2012:

(f) the role of fees and charges on FOI, taking into account the recommendations of the Information Commissioner's review of the current charging regime; and

(g) the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

2. This submission uses as a case study the FOI requests made by the tobacco industry in the last 18 months.

II. Tobacco Industry's Use of FOI Requests

3. Tobacco companies have made extensive use of the FOI Act, making numerous FOI requests to the federal Department of Health and Ageing ('DOHA') regarding plain tobacco packaging and other tobacco control measures. Some requests have been made directly to DOHA, while others have been transferred to DOHA from other departments.
4. The Secretary of DOHA, Ms Jane Halton, has given evidence on several occasions to the Senate Community Affairs Legislation Committee about tobacco-related FOI requests. In May 2012, she explained:

I am a very big supporter of freedom of information. I think it is very important in terms of transparency of government, accountability and so on. ... But to have the limited resources I have for public health activity explicitly tied up in what are deliberately orchestrated campaigns to divert us from what is a legitimate public health activity, frankly I find pretty offensive.¹

5. Ms Halton gave evidence in early 2012 that 64 tobacco-related FOI requests had been made to DOHA since plain packaging was announced in April 2010. In explaining the extent of these requests, she referred to a group of 17 requests lodged by a tobacco company in July and August 2010. These were reduced by negotiation to 10 requests covering an estimated 13,137 documents rather than the initial estimate of 81,791 documents. The requests were further divided into six tranches with the applicant's consent, but the request for the final tranche was later withdrawn. In the end, the processing took up to 18 months at a cost to the department of \$643,000, of which \$135,734.60 (21 per cent) was recoverable from the applicant.²

¹ Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 31 May 2012, 53.

² Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 15 February 2012, 174-175.

6. Ms Halton's evidence reveals at least two major concerns concerning FOI costs: (a) the costs that an agency can charge an applicant do not reflect the financial, human resource and other costs to the agency of locating, reviewing and disclosing documents; and (b) the costs involved with scoping and negotiating a request cannot currently form part of the charges imposed. Reforms to FOI fees and charges could appropriately address these concerns.

III. Reforming FOI Fees and Charges

7. The Information Commissioner's recent recommendations for reform of the FOI charging scheme include:
 - a. a tiered charging structure, with no charge payable for the first five hours of processing time, a flat fee of \$50 applicable to the next five hours, and a fee of \$30 per hour applicable for further time; and
 - b. a 40-hour cap on processing time, whereby an agency may decline to process a request that is estimated to take more than 40 hours to process.³
8. A tiered charging structure could assist in alleviating the financial burden on agencies in complying with FOI laws while ensuring that applicants bear an appropriate portion of the costs of processing their requests, increasing the incentive not to abuse the system.
9. A tiered charging structure could also be used to address the current disjuncture between the amounts charged to FOI applicants and the much higher costs incurred by agencies in processing requests. Specifically, rather than imposing a 40-hour cap on processing time (which may preclude access for genuine requests), we would recommend charging an amount for processing above 40 hours that reflects the costs to the agency of processing the request.
10. A waiver of or reduction in cost-based charges above 40-hours should be available if the applicant demonstrates financial hardship or that granting the request is in the public interest, based on provisions already contained in the FOI Act and elaborated in guidelines issued by the Australian Information Commissioner.⁴
11. The time taken to scope and negotiate a request should also be included as processing time, given how long and resource-intensive such negotiations may be.

³ Office of the Australian Information Commissioner, *Review of Charges under the Freedom of Information Act 1982 — Report to the Attorney-General* (2012) 6-7, 64-70.

⁴ Office of the Australian Information Commissioner, *Guidelines Issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (rev ed, 2012) [4.50], [4.55].