

SUBMISSION BY FAIR WORK AUSTRALIA TO THE REVIEW OF THE FREEDOM OF INFORMATION ACT

1. This submission, which is jointly made by the President and General Manager of Fair Work Australia (“FWA”)¹, is made to the Review of the Freedom of Information Act (“FOI Act”) being conducted by Dr Allan Hawke AC, commissioned by the Attorney-General on 29 October 2012.

2. The submission is limited to term of reference 1(e), which provides

The appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act.

3. FWA notes that it is an agency which is subject to the operation of the FOI Act. FWA submits that the current application of the FOI Act is inappropriate, and that the FOI Act should apply to FWA only insofar as the documents requested are of an administrative nature. The submission sets out the reasoning for this position.

Background

4. FWA is the national workplace relations tribunal. It was established by the *Fair Work Act 2009* (“the FW Act”). The establishment of FWA by the FW Act was achieved by combining the functions of a number of bodies established under the former *Workplace Relations Act 1996* (“WR Act”), including the former:

- Australian Industrial Relations Commission (“AIRC”); and
- Australian Industrial Registry (“AIR”).

5. FWA is required to determine those matters which fall within its jurisdiction as determined by the FW Act. FWA is empowered to arbitrate between competing claims and upon creating a binding decision and to issue reasons

¹ On 1 January 2013 Fair Work Australia will be renamed the Fair Work Commission.

for its decisions. The arbitration power is also supplemented by the power to resolve disputes concerning the dismissal of workers within the Commonwealth system. The ability to make binding decisions on the parties, subject to the decision being within the jurisdiction of FWA, is described in this submission as the **adjudicative functions** of FWA.

The application of the FOI Act

6. Prior to the passage of the FW Act, the predecessor organisations to FWA were partially exempt from the operation of the *Freedom of Information Act 1982* (“the FOI Act”). Section 6 of the FOI Act provided (and indeed currently provides) that the AIRC and AIR were exempt from the operation of the FOI Act unless the documents requested were of an administrative nature (“the partial exemption”).
7. The partial exemption was included in the original version of the FOI Act in 1982. The original FOI Act provided the Australian Conciliation and Arbitration Commission (the predecessor to the AIRC), as well as the Industrial Registrar and Deputy Industrial Registrars with the partial exemption.
8. In 1988, the *Industrial Relations (Consequential Provisions) Act 1988* amended the FOI Act, replacing the reference to the Australian Conciliation and Arbitration Commission with the AIRC.
9. As part of the Work Choices legislative scheme, the *Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No. 1)* continued the partial exemption for the AIRC and the AIR but also included an exemption for the Australian Fair Pay Commission (AFPC). The AFPC was subsumed into FWA following the passage of the FW Act.
10. Upon the creation of FWA, the exemptions which had applied to the AIRC and AIR under the FOI Act appear to have been overlooked. Indeed, the FOI Act as it is currently drafted continues to provide exemptions to the AIRC, the AFPC and the AIR. However, none of these organisations existed following

the passage of the FW Act. As a consequence the partial exemption in relation to the adjudicative functions of FWA was removed.

11. This submission recommends that the partial exemption which previously applied in relation to the AIRC and AIR should be restored. Effectively, FWA would be subject to the operation of the FOI Act in relation to documents of an administrative nature. This submission sets out the difficulties associated with FWA being subject to the FOI Act with respect to its adjudicative functions, the objectives of the FOI Act and the rationales for the exclusion of the adjudicative functions of FWA from the operation of the FOI Act.

Consequences of FWA being subject to the FOI Act in respect of its adjudicative functions

12. There are some adverse consequences which arise as a consequence of FWA being subject to the operation of the FOI Act in respect of its adjudicative functions. The consequences are:
 - Increased risk of delays in the resolution of matters;
 - Restrictions in access to justice; and
 - Adverse impact on best practice decision-making.
13. The existence of the FOI Act has the potential to make some members of FWA act more formally and pursue more time-consuming mechanisms to resolve matters. There are occasions where members have the capacity to pursue different mechanisms to resolve matters, which would reduce the cost to parties. Such opportunities may not be taken due to a concern about third parties subsequently reviewing the actions of the member through FOI. The existence of the FOI Act in relation to the adjudicative process has the capacity to prevent innovative and flexible decision-making.
14. Secondly, FWA is unable to give an upfront assurance to persons seeking to use the jurisdiction that their personal information will not be disclosed to third parties. This has the capacity to dissuade members of the public from

commencing adverse action or unfair dismissal applications. Applicants who bring actions in their personal capacity should be entitled to believe that personal information will not be disclosed other than to the parties to the action except in limited circumstances, including for example where the matter proceeds to open hearing.

15. Finally, during proceedings member will often take notes and make comments on the nature and quality of evidence and submissions made by the parties. Such notes and comments are not authoritative and are made in the context of ensuring the decision is accurate as to the evidence and material before the member. However, the potential of FOI Act requests has caused some members to be extremely cautious about anything they put in writing. This does not lead to optimal decision-making.

FWA meets the objectives of the FOI Act with respect to its adjudicative functions

16. The FOI Act provides a right of access to information in the possession of government departments and agencies. The objective in providing this right is to ensure transparency in, and accountability for, the administrative actions of government. In the Australian Law Reform Commission Report 77, *Open Government: a review of the federal Freedom of Information Act 1982*² two slightly different sets of reasons were provided.

17. The first set of reasons were set out in the 1979 report by the Senate Standing Committee on Legal and Constitutional Affairs³ which identified three objectives of FOI legislation:

- to increase public scrutiny and accountability of government;

² Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77 1995.

³ Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978* AGPS Canberra 1979

- to increase the level of public participation in the processes of policy making and government; and
- to provide access to personal information.

18. The second set of reasons were referred to by the Law Reform Commission. These were set out in the first annual FOI report where it was suggested that the purpose of the FOI Act was:

- to improve the quality of agency decision making;
- to enable citizens to be kept informed of the functioning of the decision making process as it affects them and to know the criteria that will be applied in making these decisions; and
- to develop the quality of political democracy by giving all Australians the opportunity to participate fully in the political process.⁴

19. The common element to these reports suggests that the FOI Act is in place to improve the transparency and quality of decisions made, and to enable individuals to understand the decision-making by government agencies.

20. These objectives are not, however, absolute objectives. Instead they are objectives which are balanced within the FOI Act itself. Various agencies are exempt from the operation of the FOI Act for public policy reasons (for example national security and, relevantly, the administration of justice). Further conditional exemptions exist in relation to a range of factors including with respect to personal privacy.

21. Accordingly it must be recognised that the FOI Act is not intended to prevail at the expense of all alternative public policy objectives. There are limitations to the reach of the FOI Act and these limitations exist in the statute itself.

22. This does not mean, however, that agencies do not seek to improve their transparency and accountability. In the case of FWA, the objectives of the FOI

⁴ Attorney-General's Dept *FOI Annual Report 1982-83* AGPS Canberra 1983, p xi.

Act are achieved through other means in relation to the adjudicative functions of FWA. This is achieved through:

- (i) the decisions of FWA are required to be published and are open to challenge through appeal mechanisms; and
- (ii) the duty imposed upon FWA to act judicially.

Publication of decisions and the review of decisions

23. The FW Act provides FWA with the discretion whether it will provide written reasons for its decisions (section 601(2)). However, section 601(4) requires that FWA publish any decision made (subject to certain exclusions set out in subsection (5)). This ensures that decisions are given public exposure and must be “expressed in plain English and be easy to understand in structure and content” (section 601(3)).

24. Decisions of FWA may be subject to appeal to a Full Bench of FWA (through Full Bench appeals - see section 604, and section 613(1(a))), and in certain circumstances to the Federal Court of Australia.

25. The importance of having written decisions, as well as appeal rights provides members of the public with similar benefits to those sought through the FOI Act. Decisions are made transparently. Written reasons accompany the decision. The written reasons are published enabling other persons to follow the decision-making of FWA.

26. Furthermore, the ability to challenge decisions made by FWA, through the appeal process enables decisions to be reconsidered by a person other than who made the decision at first instance. The appeal process provides transparency and accountability for the tribunal.

27. Notwithstanding the importance of public decisions and the review of decisions available to parties, FWA itself has also moved to enhance its

transparency and accountability. FWA has set itself, under the guidance of the President, a range of objectives to meet over the next twelve months. These objectives are described in the recent publication *Future Directions*⁵ which include a large number of objectives which will increase the accountability of FWA and increase access to justice for all parties appearing before FWA.

28. *Future Directions* establishes a framework to encourage open justice for all persons coming into contact with FWA. Transparency and accountability will be enhanced by the achievement of the targets set out in the *Future Directions* report. This approach will assist FWA meet the objectives of the FOI Act in relation to its adjudicative processes.

29. The objectives of the FOI Act in relation to transparency and accountability are being met by FWA, including in relation to the adjudicative processes of FWA. Requests for documents which are within scope, and where no other exemption might apply, would lead to the release of documents which have the potential to mislead or confuse parties. Draft decisions, comments by FWA members in workbooks about the evidence led may distract from the reasoned decisions which are the authoritative record of FWA. Such distractions do not assist in either the administration of justice, nor do they increase the transparency of the adjudicative processes.

The obligation to act judicially

30. FWA in respect of its adjudicative functions is required to act judicially. This means that FWA is required to:

- provide procedural fairness to the parties in matters before it;
- determine the matters which came before it impartially;
- hold open hearings;

⁵ Fair Work Australia, *Future Directions for Australia's National Workplace Relations Tribunal*, AGPS 2012 - a full copy of the report is attached to this submission.

- publish reasons for decision.⁶

31. Furthermore, consistent with the situation of federal courts, members of FWA are appointed until they reach retirement age and not pursuant to fixed-term appointments. Additionally, members can only be removed from FWA by resolution of the Parliament (s642).

32. These factors demonstrate the similarity between FWA and the federal courts with respect to the way parties are treated in proceedings where FWA is exercising its adjudicative functions. FWA exhibits similar processes, and the members have a similar level of protection from removal from office as Judges in federal courts.

33. Relevantly, section 5 of the FOI Act exempts from the operation of the FOI Act documents in the possession of federal courts to the extent that the documents are not of an administrative nature. This is the same partial exemption which applied with respect to the AIRC and the AIR.

34. In the submission of FWA the operations of FWA are analogous with those of federal courts. FWA must treat parties to proceedings in the same way as federal courts treat parties. Members have the same level of independence. This suggests that the exemption which applies in relation to the adjudicative functions of federal courts should also apply to the adjudicative functions of FWA.

35. In this context we note that the Australian Law Reform Commission (ALRC) in its Report 77, *Open Government: a review of the federal Freedom of Information Act*⁷ commented that

⁶ See for example *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546 in relation to the predecessor tribunal. This principle has been affirmed with respect to FWA - see *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 per Buchanan J (with whom Marshall and Cowdroy JJ agreed). However, the AIRC was not a court and was prohibited from exercising the judicial power of the Commonwealth - see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77 1995.

It is appropriate that judicial documents are excluded from the Act.
(paragraph 11.7)

36. This comment is just as relevant to the decision-making or adjudicative process of FWA as it is to courts. The Senate Standing Committee into Legal and Constitutional Affairs in 1979, prior to the enactment of the FOI Act, noted that judicial documents ought be excluded from the operation of the Act. The inclusion of such documents within an FOI scheme may have the potential to be seen as interfering with the “independence of the judiciary and the proper administration of justice.”

37. A failure to operate judicially may lead to the decisions of FWA being challenged upon appeal. However, the disclosure of documents which precede the final written decision of a tribunal might, including in circumstances where parties may include the Crown, raise concerns about the independence of FWA. The better view must be that Courts and Tribunals should be accountable for the adjudicative functions through proper processes, including appeals as set out by the relevant Statutes. It should not be the case that parties seek review of decisions through other means such as FOI applications.

Conclusion

38. FWA submits that the FOI Act should not apply with respect to documents which are created with respect to the adjudicative functions of FWA. FWA does not submit that all documents of FWA be excluded from the operation of the FOI Act. Instead it suggests that the appropriate balance was that which operated prior to the establishment of FWA.

39. Documents which are of an administrative nature ought be subject to the proper application of the FOI Act, while documents which go the functioning of a tribunal as a tribunal should be exempt from FOI requests.