FUTURE DIRECTIONS
for AUSTRALIA’S NATIONAL WORKPLACE RELATIONS TRIBUNAL

OUR PLAN FOR THE YEAR AHEAD

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INTRODUCTION AND OVERVIEW

Australia has had a national workplace relations tribunal for over a century. It is one of our key national institutions. Over time the Tribunal, currently known as Fair Work Australia, has undergone many changes in jurisdiction, name, functions and structure.

The Tribunal has endured by successfully adapting to changes in its legislative environment and because it provides an independent, competent and professional dispute resolution service.

But past performance does not guarantee future success. Even successful institutions have a tendency to decline unless they continue to innovate.

This document—‘Future Directions’—sets out the 25 new initiatives we intend to implement over the next 12 months. These initiatives are directed at improving our performance and the quality of the service we provide. The initiatives are grouped thematically:

- Promoting Fairness and Improving Access;
- Efficiency and Innovation;
- Accountability; and
- Productivity and Engaging with Industry.

Like any justice institution the Tribunal is accountable to the community it serves. As part of that accountability we will post updates on our website setting out our progress in implementing ‘Future Directions’.

This document is the product of consultation and discussions with Members, staff and key stakeholders. Meetings were held with Members in each state and a presentation was made to all Members and staff in August 2012. A draft list of initiatives was circulated to Members and staff for comment. I would like to take this opportunity to thank all of those who have contributed to ‘Future Directions’.

The implementation of the initiatives set out in this document will be a collective effort. It will require the commitment and support of Members and staff and our key stakeholders. I look forward to working with you to improve our performance and the quality of the service we provide.

Justice Iain Ross AO
President
Access to justice is a fundamental human right. Tribunals have an obligation to provide the community they serve with access to a fair hearing.

The provision of a fair hearing is at the very heart of the Tribunal’s obligations to the parties who appear before it. A fair hearing involves the opportunity to put your case—the right to be heard—and to have that case determined impartially and according to law. Members of the Tribunal are bound to act ‘judicially’ in the sense that they are obliged to provide procedural fairness and to determine matters impartially. The Fair Work Act 2009 (the Act) sets out some of the Tribunal’s obligations regarding the conduct of hearings. If the Tribunal holds a hearing in relation to a matter, the hearing must be held in public, except in the limited circumstances provided in s.593(3) of the Act. Further, the Tribunal must perform its functions and exercise its powers in a manner that:

- is fair and just;
- is quick, informal and avoids unnecessary technicalities; and
- is open and transparent (s.577).

Tribunal Members are responsible for ensuring that proceedings are fair and that parties are treated with courtesy and respect. An important element of the fair hearing obligation is the duty to provide appropriate assistance to parties, and in particular self represented parties. This means that in some circumstances a Member has an obligation to intervene, both for the benefit of a self represented party and more generally.

The assistance provided by a Member may, depending on the circumstances, include:

- explaining the relevant legislative provisions;
- identifying the issues which are central to the determination of the particular proceedings; and
- asking a party questions designed to elicit information in relation to the issues which are central to the determination of the particular proceedings.

A Member may also intervene, to an appropriate extent, by asking questions of witnesses.

However, the assistance to be provided to a self represented party is limited. It is plainly necessary to balance the interests of parties who represent themselves with the need to afford procedural fairness to other parties, and to ensure that hearings are conducted efficiently and costs are kept to a minimum.

All parties have the right to a fair hearing. Parties and their representatives also have obligations, both to the Tribunal and to each other.

It is proposed that these matters be dealt with in a practice note setting out the obligations of the Tribunal and those who appear before it.

IMPROVING ACCESS

The information and assistance provided by the Tribunal to parties, particularly self-represented parties is an important part of providing access to justice.

This issue has become increasingly important as the mix of matters dealt with by the Tribunal has changed over time. Individual dispute resolution (unfair dismissals and general protections matters) is a substantial part of the Tribunal’s work. In 2011–12 there were 16,330 such matters.

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applications, an increase of almost 10 per cent on the previous year. For many of these parties their case will be the first time they have had any contact with the Tribunal.

For those unfamiliar with the Tribunal’s processes and how a hearing is conducted, the experience can be daunting. The information and assistance provided can be a significant benefit to such parties.

We will improve the information we provide in relation to unfair dismissal applications and general protections matters to assist self represented employees and employers. Information will be made available in a variety of forms including booklets and multimedia. The material will incorporate checklists to assist parties in preparing for conferences and hearings in the Tribunal.

We will also produce a ‘virtual tour’ of the Tribunal and place it on our website. The ‘virtual tour’ will familiarise parties with the hearing environment and process, before they attend the Tribunal.

The Tribunal currently maintains an unfair dismissal benchbook, for use by Members. The benchbook summarises the key cases dealing with unfair dismissals. We propose to review the benchbook and then make it available online so that parties can access relevant decisions to assist them in presenting their case to the Tribunal.

We can also promote fairness and access to the Tribunal by ensuring that our forms and processes are accessible and expressed in plain language.

There are currently 71 application forms for specific matter types. We will review all of our current forms with a view to reducing their number and improving accessibility.

Access to justice can also be enhanced by facilitating access to pro bono legal services. The provision of appropriate and timely legal advice can assist a party in the presentation of their case to the Tribunal and can also promote efficiency by focussing the proceedings on the real issues in dispute. In some instances the provision of timely legal advice may lead a party to discontinue an application because there is another, more appropriate, avenue to redress their grievance.

The Tribunal is presently supporting a pilot program in Western Australia to assist self represented applicants who lodge a general protections application. The general protections provisions in Part 3-1 of the Act are intended to protect people from adverse treatment because they have workplace rights, are exercising freedom of association rights or are, or are not, engaging in industrial activity. They also provide protection to employees, and prospective employees, from workplace discrimination based on race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin. General protections claims are sometimes called adverse action claims.

If an application is made under Part 3-1, the Tribunal will generally convene a conference.

Under the WA pilot, general protections applications are referred to the Employment Law Centre of WA (the ELCWA) so that self represented applicants can receive advice on the merits of their proposed application and assistance with completing or amending the relevant application form. The ELCWA is funded to help clients who are vulnerable and who would otherwise not have access to legal assistance. Evaluations of similar pilots in other jurisdictions demonstrates that such programs can result in cost
savings in terms of the Tribunal’s time and resources and by avoiding the costs associated with running an unmeritorious case. Respondent employers are also saved the cost and inconvenience of having to respond to an unmeritorious claim. Initial outcomes from the WA pilot are positive. Of the 14 self represented applicants who have received advice from the ELCWA, six have lodged amended applications and five have discontinued their application in the Tribunal.

The WA pilot will be evaluated after 12 months and if successful we will extend the model to other states. We also intend to engage with the providers of pro bono legal services to generally extend the availability of legal advice to self represented parties.

Finally, the FWA website is the major point of communication between the Tribunal and the community. Over the next 12 months we will substantially upgrade our website and expand the information made available on it.

<table>
<thead>
<tr>
<th>PROMOTING FAIRNESS AND IMPROVING ACCESS</th>
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In the next 12 months we will:

- Introduce a new ‘Fair Hearing’ practice note setting out the obligations of Members, parties and their representatives in relation to the provision of a fair hearing.

- Provide better information in relation to unfair dismissal applications to assist self represented applicants and respondent employers. Information will be made available in a variety of forms including booklets and multi-media.

- Produce a ‘virtual tour’ of the Tribunal to be included on our website.

- Provide better information in relation to general protections applications to assist self represented parties (both applicants and employers).

- Make the Tribunal’s Unfair Dismissal Benchbook available online so that parties can access relevant decisions to assist them in presenting their case to the Tribunal.

- Develop further benchbooks and will make them available online.

- Review all of our current forms with a view to reducing their number and improving accessibility.

- Support a pilot program for the provision of independent legal advice to self represented applicants in general protections matters.

- Engage with providers of pro bono legal services to extend the availability of legal advice to self represented parties.

- Substantially upgrade its website and expand the information made available on it.
EFFICIENCY

An efficient dispute resolution service resolves disputes in a timely and appropriate way that minimises the costs incurred by the parties.

Section 581 of the Act provides that the President is responsible for ensuring that Fair Work Australia performs its functions and exercises its powers in a manner that:

(a) is efficient; and

(b) adequately serves the needs of employers and employees throughout Australia.

A key indicator of an efficient dispute resolution service is the determination of disputes in a timely way. Delays in dispute resolution undermine fairness—in many cases justice delayed is justice denied.

The Tribunal has a proven track record of dealing with applications relating to industrial action in a timely way, as shown by the table below from our 2011–2012 annual report.

But there are other areas of the Tribunal’s work where there is scope for improvement.

On 1 July 2012 the Tribunal introduced timeliness benchmarks for the delivery of reserved decisions and in relation to the time taken to determine applications for the approval of agreements.

The reserved decisions benchmark provides that 90% of all reserved decisions are to be handed down within eight weeks of the last hearing day (or receipt of the last written submission). All reserved decisions are to be handed down within 12 weeks.

In terms of applications to approve agreements there are three key benchmarks:

- 50% of all applications are to be finalised within three weeks;
- 90% of all applications are to be finalised within eight weeks; and
- 100% of all applications are to be finalised within 12 weeks.

Panel heads are responsible for the timeliness performance of the members in their panel.

The introduction of the timeliness benchmarks has seen a significant improvement in the Tribunal’s performance in these key areas.

INDUSTRIAL ACTION APPLICATIONS—PROTECTED ACTION BALLOT ORDERS AND ORDERS TO STOP ACTION, TIMELINESS, 2011–12

<table>
<thead>
<tr>
<th>Type of application 2011–12</th>
<th>Percentage of matters</th>
<th>50%</th>
<th>85%</th>
<th>90%</th>
</tr>
</thead>
<tbody>
<tr>
<td>s.418—Application for an order that industrial action by employees or employers stop etc.—lodgment to first hearing</td>
<td></td>
<td>1 day</td>
<td>2 days</td>
<td>3 days</td>
</tr>
<tr>
<td>s.437—Application for a protected action ballot order—lodgment to first hearing</td>
<td></td>
<td>3 days</td>
<td>6 days</td>
<td>7 days</td>
</tr>
<tr>
<td>s.437—Application for a protected action ballot order—lodgment to determination</td>
<td></td>
<td>4 days</td>
<td>6 days</td>
<td>7 days</td>
</tr>
</tbody>
</table>

(1) 50th percentile includes data for applications made under ss418, 419, 423, 424, 425, 437, 448, 459 and 472.
(2) 85th percentile is broken down by matter type.

The Tribunal should provide an efficient dispute resolution service in that the tribunal is affordable and resolves disputes in an appropriate and timely way.

- 90% of all applications are to be finalised within eight weeks; and
- 100% of all applications are to be finalised within 12 weeks.

Panel heads are responsible for the timeliness performance of the members in their panel.

The introduction of the timeliness benchmarks has seen a significant improvement in the Tribunal’s performance in these key areas.
As shown in Chart 1, in the period 1 July to 30 September 2012, 97.4% of all reserved decisions were handed down within 8 weeks, as against the performance benchmark of 90%. This can be compared with the 12 months ending 30 June 2012 during which only 72.2% of reserved decisions were handed down within the 8 week benchmark. In 2011–12 some 14% of reserved decisions were handed down more than 12 weeks after the final day of hearing or the last day of written submissions.

There has been a similar improvement in the time taken to deal with applications for the approval of agreements, as illustrated in Chart 2. In the period 1 July to 30 September 2012, 78.9% of all such applications were determined within three weeks of lodgement, as against the performance benchmark of 50%. This can be compared with the 12 months ending 30 June 2012 during which only 58% of agreement approval applications were dealt with within three weeks of lodgement.

We will publish the Tribunal’s performance against these benchmarks on our website in early November 2012. The information will then be updated on a monthly basis.

The timeliness benchmarks are intended to be challenging, to that extent they are aspirational. We expect that there will be individual instances where the Tribunal does not meet its own high standards, for a variety of reasons. But the setting of performance benchmarks and then publicly reporting the Tribunal’s performance are important accountability measures.

We also need to make the best use of available technologies in order to deliver a fair and efficient dispute resolution service. We can keep transaction costs down by expanding the capacity to lodge applications electronically. By the middle of 2013 all applications to the Tribunal will be able to be made online. We also propose to create a number of ‘smart forms’ to facilitate online lodgement in those areas where we receive the most applications. The ‘smart forms’ will take an applicant through the steps required to complete their application and will include a secure payment facility where a filing fee is payable. ‘Smart forms’ will streamline the process for lodging applications in unfair dismissal cases, general protections matters and applications to approve agreements. These three areas account for about two thirds of all Tribunal applications.
INNOVATION

Even successful institutions have a tendency to decline unless they continue to innovate. By piloting new ideas, evaluating the results and implementing what works we will improve our performance and position the Tribunal as a leader in judicial innovation.

New technology can be used to improve work processes, service delivery and access. We will be taking a number of initiatives in this area including:

• develop an application so that interested parties can access and search listings information by smartphone;
• reviewing the extent to which hearings and conferences have to be rescheduled due to a party failing to attend and trialling SMS alerts to improve attendance where required; and
• upgrading the Tribunal’s video conferencing facilities.

There are also areas where we can standardise our administrative processes to promote greater consistency. For example, there are currently a range of practices relating to the filing of submissions in appeals. We can take steps to standardise these processes. When an appeal is lodged the parties will be provided with a hearing date and a standard set of directions. A party may apply to vary the standard directions if the circumstances of their case requires a different approach.

The current standard procedures in unfair dismissal matters will also be revised to improve usability.

A NEW REGIONAL FOCUS

As previously mentioned, the President is responsible for ensuring that the Tribunal performs its functions and exercises its powers in a manner that adequately serves the needs of employers and employees throughout Australia. It is important that the Tribunal not become too Melbourne and Sydney-centric, to the detriment of other States and regional Australia.

At present the work of the Tribunal is centrally allocated, through the panel system. Applications lodged in Adelaide are referred to the relevant Panel Head and then allocated to a Member. In practice, most applications—particularly those dealing with agreement approvals, general protections and unfair dismissals—are dealt with by a Member who is based in the State where the application is lodged.

The current allocation method may not be the most efficient way of allocating certain applications.

We intend to pilot a regional allocation model in South Australia. Under the pilot Senior Deputy President O’Callaghan will oversee the allocation and management of certain applications lodged in Adelaide.

The pilot will cover applications to approve agreements (and related matters) and applications about general protections and unfair dismissals. Applications about bargaining and industrial disputation will continue to be allocated through the existing panel system.

If the pilot delivers a better service to employers and employees in South Australia then we will look to extend the model to other States.

EFFICIENCY AND INNOVATION

In the next 12 months we will:

• Introduce timeliness benchmarks for reserved decisions.
• Introduce timeliness benchmarks for the finalisation of applications to approve agreements.
• Enable all applications to be made on line, via the Tribunal’s website.
• Develop an application for smartphones to provide access to daily hearing list information.
• Trial SMS alerts for hearings and conferences, where required.
• Pilot the regional allocation of some types of applications to improve service delivery.
• Upgrade the Tribunal’s video conferencing facilities.
• Promote consistency by introducing a new practice note incorporating standard directions for appeals.
Public trust and confidence are central to the Tribunal’s effectiveness.

The Tribunal serves the community through the provision of an accessible, fair and efficient dispute resolution service. In delivering that service, it is accountable to the community.

Tribunal members are subject to a range of accountability measures:

• Hearings are generally held in public.
• Members are bound to provide parties with a fair hearing.
• Reasons for decisions must be given and published.
• Decisions are subject to appellate review.

In addition to these measures, the Tribunal has introduced a Member Conduct Guide.

The Guide does not purport to lay down a prescriptive set of rules to govern Member behaviour. The primary responsibility for deciding whether or not a particular activity or course of conduct is appropriate rests with the individual Member.

The Guide sets out three main objectives:

• to uphold public confidence in the Tribunal and in the administration of justice;
• to enhance public respect for the Tribunal; and
• to protect the reputation of individual Members and of the Tribunal as a whole.

Any course of conduct that has the potential to put these objectives at risk must be carefully considered and, as far as possible, avoided.

In the interests of transparency, we intend to publish quarterly updates detailing the progress made in implementing the initiatives set out in this document.

In the next 12 months we will also improve the extent of the information we provide to the community by regularly reporting the Tribunal’s performance on our website. We will report on the extent to which we are meeting performance benchmarks in relation to the timeliness of reserved decisions and the time taken to deal with applications to approve agreements.

We also propose to establish state based user groups to facilitate an exchange of views with those who regularly appear before the Tribunal.

INCREASING ACCOUNTABILITY

In the next 12 months we will:

• Introduce a Member Conduct Guide and make it publicly available on the website.
• Provide more information about the work of the Tribunal on the website.
• Publish updates detailing the progress made in implementing the initiatives set out in Future Directions.
• Establish ‘user groups’ to facilitate an exchange of views.
One of the key workplace relations issues facing Australian workplaces is declining productivity growth.

Australia’s productivity performance, however measured, has declined substantially since the late 1990s. One thing that economists agree on is that productivity growth is a good thing. Our productivity performance as a nation underpins our standard of living. As the Secretary to the Treasury, Martin Parkinson, has observed:

“...in the long run productivity growth—producing more from the same inputs—is the only sustainable way for future generations to enjoy higher living standards.”

It seems unlikely that legislative change will provide a solution to declining productivity growth. The legislative framework is important insofar as it determines the rights and responsibilities of employees, employers and their representatives. But just as legislation cannot, of itself, create cooperative workplace relations at an enterprise level, nor can legislation provide a quick fix to the problem of declining productivity growth.

While public policy settings and institutional support can facilitate productivity growth—as they affect the environment within which firms work—the key to improving productivity lies at the workplace level.

The recent Review of the Fair Work Act considered whether the productivity pattern of recent decades could be explained by the differences between the particular industrial relations legislative frameworks over the period and concluded that:

‘Differences between the legislative frameworks evidently do not explain the differences in productivity growth over those periods’.

While the precise causes of our declining productivity growth are the subject of ongoing debate, the real issue is what is to be done to redress the decline in productivity growth and what role can the Tribunal play in that process?

The Review Panel also gave consideration to what could be done to encourage more productive workplaces and concluded that there was scope to increase the emphasis on the encouragement of productivity in the operation of the institutions created by the Act—including by Fair Work Australia.

We intend to respond positively to the Review Panel’s recommendation.

One of the initiatives suggested by the Review Panel is ‘identifying best practice productivity enhancing provisions in agreements and making them more widely known to employers and unions’.

At present there is no capacity to electronically search the content of collective agreements approved by the Tribunal. The lack of such a capability inhibits the dissemination of information about what may be regarded as productivity enhancing provisions in agreements.

We propose to introduce the capacity to electronically search the content of collective agreements approved by the Tribunal, by the end of 2012.

Over the course of the next 12 months the Tribunal, in consultation with the major peak employer and union bodies, will develop a broad engagement strategy. Consistent with the Review Panel’s recommendation the object of the Tribunal’s engagement strategy will be to encourage more productive workplaces by promoting harmonious and cooperative workplace relations. The development of a more cooperative workplace culture that

facilitates change and fosters innovation will be at the heart of the Tribunal’s engagement strategy.

A number of Tribunal Members and staff will be participating in a pilot engagement strategy.

The engagement strategy will include the facilitation of discussions at an industry and enterprise level to highlight the challenges and opportunities facing each sector of our economy. Such discussions, should lead to a deeper understanding of our current productivity performance and the drivers for future growth.

Many factors impact on productivity and competitiveness, including the skills of our workforce, infrastructure, taxation, the general regulatory framework, workforce participation, and the capacity for enterprises to successfully innovate. Our engagement strategy can assist the industrial parties to find common ground in at least some of these areas. The extent of consensus is likely to be greater if these discussions are kept quite separate from any collective bargaining negotiations.

The Tribunal will work with other organisations, in particular the Fair Work Ombudsman and the Fair Work Building Industry Inspectorate, to minimise the potential for duplication of effort in giving effect to the Review Panel’s recommendation. Such cooperation will be directed at ensuring that the available resources are used effectively and so that the efforts of each organisation can be most effectively targeted.

**REVIEW PANEL RECOMMENDATION 1**

The Panel recommends that the role of the Fair Work institutions be extended to include the active encouragement of more productive workplaces. This activity may, for example, take the form of identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions, encouraging the development and adoption of model workplace productivity enhancing provisions in agreements, and disseminating information on workplace productivity enhancement through conferences and workshops. The Panel does not consider that amendments to the FW Act are required to implement this recommendation.
The pace and extent of industry engagement will vary from sector to sector and will depend on the level of interest and support of the industrial parties. While this approach is not a panacea for the challenges facing us, each national institution must play its part. It is vital that we meet these challenges if future generations are to enjoy higher living standards.

ACCI, Ai Group and the ACTU have committed to working collaboratively with the Tribunal in a consultative forum that will oversee the Tribunal’s engagement strategy.

PRODUCTIVITY AND ENGAGING WITH INDUSTRY

In the next 12 months we will:

- Introduce the capacity to search the content of collective agreements approved by the Tribunal through the FWA website, by the end of 2012.

- Develop a broad engagement strategy, in consultation with the major peak employer and union bodies.

- Work cooperatively with other organisations to minimise the potential for duplication of effort in implementing the Tribunal’s engagement strategy.
5. WHAT WE PLAN TO ACHIEVE

IN THE NEXT 12 MONTHS WE WILL:

PROMOTING FAIRNESS AND IMPROVING ACCESS

1. Introduce a new ‘Fair Hearing’ practice note setting out the obligations of Members, parties and their representatives in relation to the provision of a fair hearing.

2. Provide better information in relation to unfair dismissal applications to assist self represented applicants and respondent employers. Information will be made available in a variety of forms including booklets and multi-media.

3. Produce a ‘virtual tour’ of the Tribunal to be included on our website.

4. Provide better information in relation to general protections applications to assist self represented parties (both applicants and employers).

5. Make the Tribunal’s Unfair Dismissal Benchbook available online so that parties can access relevant decisions to assist them in presenting their case to the Tribunal.

6. Develop further benchbooks and will make them available online.

7. Review all of our current forms with a view to reducing their number and improving accessibility.

8. Support a pilot program for the provision of independent legal advice to self represented applicants in general protections matters.

9. Engage with providers of pro bono legal services to extend the availability of legal advice to self represented parties.

10. Substantially upgrade its website and expand the information made available on it.

EFFICIENCY AND INNOVATION

11. Introduce timeliness benchmarks for reserved decisions.

12. Introduce timeliness benchmarks for the finalisation of applications to approve agreements.

13. Enable all applications to be made on line, via the Tribunal’s website.

14. Develop an application for smartphones to provide access to daily hearing list information.

15. Trial SMS alerts for hearings and conferences, where required.

16. Pilot the regional allocation of some types of applications to improve service delivery.

17. Upgrade the Tribunal’s video conferencing facilities.

INCREASING ACCOUNTABILITY

19. Introduce a Member Conduct Guide and make it publicly available on the website.

20. Provide more information about the work of the Tribunal on the website.

21. Publish updates detailing the progress made in implementing the initiatives set out in Future Directions.

22. Establish ‘user groups’ to facilitate an exchange of views.

PRODUCTIVITY AND ENGAGING WITH INDUSTRY

23. Introduce the capacity to search the content of collective agreements approved by the Tribunal through the FWA website, by the end of 2012.

24. Develop a broad engagement strategy, in consultation with the major peak employer and union bodies.

25. Work cooperatively with other organisations to minimise the potential for duplication of effort in implementing the Tribunal’s engagement strategy.