

9 December 2011

The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street  
Sydney NSW 2000

By email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Director

**Submission in relation to Inquiry into Opportunities to Consolidate Tribunals in NSW**

Thank you for the opportunity to provide a submission in relation to the Inquiry into Opportunities to Consolidate Tribunals in NSW.

The NSW Young Lawyers Civil Litigation Committee, Employment and Industrial Law Committee and Public Law and Government Committee are pleased to provide the enclosed submission. To provide a meaningful submission, we have only made comments on the specific areas of the inquiry in relation to which we considered we had some relevant experience or expertise.

NSW Young Lawyers is a division of the Law Society of New South Wales. Membership of the NSW Young Lawyers is free and automatic for all NSW lawyers under 36 years and/or in their first five years of practice, and law students. Membership of its committees is voluntary.

If you would like to discuss any of our comments, or have any questions, please contact Heidi Fairhall, President of NSW Young Lawyers, on 02 9258 6884, Elias Yamine on 02 8281 7961, Natasha Walls on 02 9228 9301, Greg Johnson on 02 9267 4322 or Brenda Tronson on 02 9232 1325.

Yours faithfully,

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Opportunities to consolidate tribunals in NSW:  
Inquiry by NSW Parliamentary Standing  
Committee on Law and Justice

**9 December 2011**

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## The Committees

Membership of NSW Young Lawyers is open to young lawyers, either under the age of 36 or in their first five years of practice, and to law students. This submission is made on behalf of the Civil Litigation Committee, the Employment and Industrial Relations Law Committee and the Public Law and Government Committee (together, the **Committees**).

The Civil Litigation Committee consists of members of NSW Young Lawyers who practice or have an interest in civil litigation.

The Employment and Industrial Relations Law Committee consists of members of NSW Young Lawyers who practice or have an interest in employment and industrial relations law.

The Public Law and Government Committee consists of members of NSW Young Lawyers who practice or have an interest in public law, and/or who work for government.

Inquiries may be directed to the President of NSW Young Lawyers, Heidi Fairhall, on 02 9258 6884, to the Chair of the Civil Litigation Committee, Elias Yamine, on 02 8281 7961, to the Chair of the Employment and Industrial Relations Law Committee, Natasha Walls, on 02 9228 9301 to the Chair of the Public Law and Government Committee, Greg Johnson, on 02 9267 4322.

## Issues addressed in this submission

The Committees have had the opportunity to read and consider the *Terms of Reference* for the NSW Parliamentary Standing Committee on Law and Justice's *Inquiry into Opportunities to Consolidate Tribunals in NSW* and the *Review of Tribunals in New South Wales – Issues Paper (the Issues Paper)*.

In the Committees' view, there is room for some consolidation. However, because of the level of specialisation of various tribunals within NSW, and the particular expertise and unique position of some (such as the Health Disciplinary Tribunals), caution should be exercised in any consolidation process.

In this submission, the Committees have considered the advantages and disadvantages of consolidation in relation to the following tribunals:

- the Administrative Decisions Tribunal (**ADT**);
- the Consumer, Trader and Tenancy Tribunal (**CTTT**);
- the Industrial Relations Commission (**IRC**); and
- the Health Disciplinary Tribunals (**HDTs**).

The Committees propose two alternative options for the consolidation of tribunals in NSW. In summary (and in no particular order of preference), the Committees recommend either:

1. some level of consolidation of the ADT and IRC, with the potential for inclusion of the CTTT at a later date; or
2. consolidation of all NSW tribunals discussed in this submission, with distinctly separate divisions mirroring the areas of specialisation of the existing tribunals.

The Committees understand that this proposal differs in some respects from the views of the various committees of the Law Society of New South Wales.

The Committees' submissions are set out in detail below.

## Introduction

This submission evaluates the proposal to consolidate tribunals in New South Wales through first assessing the proposal in general terms including consideration of the advantages and disadvantages of consolidation, the impact on appellate procedure and on self represented tribunal users. The submission then assesses the implications of consolidation for specific tribunals likely to be subsumed into the consolidated tribunal, in particular; the Industrial Relations Commission (**IRC**), the Consumer, Trader and Tenancy Tribunal (**CTTT**), the Administrative Decisions Tribunal (**ADT**) and the Health Disciplinary Tribunals (**HDTs**).

## Comparison of maintaining the current system and consolidation

There is a number of factors to take into account when considering whether to retain the separate entities that form the NSW state system of tribunals.

### Advantages of maintaining the current system

The primary advantage of keeping each tribunal as a discrete body with specialised powers and decision-making abilities is the level of expertise developed by staff, at both the decision-making and support levels. By focusing on specific aspects of law, staff are able to provide the most appropriate level of service to users, including a detailed knowledge of the law and processes. Staff also develop strong relationships with the parties who regularly appear, including legal representatives and, in some tribunals, departmental representatives, which can further assist with effective administration and case management.

Specialisation enables a tribunal to keep abreast of developments in its own field, without being subjected to excessive change or information. This helps with clear decision-making. The development of expertise helps a tribunal create and maintain an image of excellence.

However, other jurisdictions appear to have had success maintaining different divisions in order to best manage differing community needs from a consolidated tribunal.<sup>1</sup> This arrangement does allow some flexibility of procedure and of qualifications or background required of panellists. QCAT, for example, requires a judge be included on the panel in disciplinary matters for legal practitioners.

In addition, different treatment is required for particular cases, which may be more difficult in a consolidated tribunal. For example, some matters may require higher levels of security or confidentiality. Any proposal to list such matters with more standard matters would need to ensure the particular requirements are adequately met.

With any proposal that may involve staff cuts, there is likely to be disruption and dissatisfaction. This reaction may be seen as a disadvantage to changing the present system.

### Advantages of consolidation

A significant advantage of consolidating services could be a reduction in costs. This is particularly relevant where certain tribunals do not have a high workload and resources could be allocated to other areas, or in relation to tribunals which have higher workloads at particular times of the year. Sharing resources in these circumstances could reduce fixed costs.

A further major advantage of consolidation could be the implementation of a 'no wrong door' policy, which promotes a holistic and multi-faceted approach to assisting clients.<sup>2</sup>

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<sup>1</sup> Hon. Justice Kevin Bell, President's Review of the Victorian Civil and Administrative Tribunal (VCAT), (2009) 67.

<sup>2</sup> See for example the description of QLD Department of Community's No Wrong Door Policy at <http://www.communitydoor.org.au/howwrongdoor>, accessed on 12 November 2011.

Users might benefit from being able to access a variety of decision-making bodies in the one location, with the ability to deal with various issues through one interface. This could save vulnerable self-represented litigants considerable time, money and stress.

While staffing changes could be seen as a disadvantage to consolidation, it may increase the skill range of staff generally. This can help with motivation, morale and, ultimately, staff retention.

## **Consolidation of appellate process**

The variety of tribunals presently in operation in NSW stems from identified needs within the community. In previous issue papers, it has been noted that the consolidation of tribunals may potentially diminish the specialised responses that these tribunals are capable of. Consolidating only the appellate process would allow for continued operation of specialised tribunals.

At present, appeals from tribunals occur in a multifarious fashion. Appeals from the CTTT lie to the District Court for errors of law, or to the Supreme Court in cases where jurisdictional error is alleged. Appeals from matters heard in the original jurisdiction of the ADT can lie either to the Appeal Panel or directly to the Supreme Court, depending on the particular function exercised by the ADT in making the decision. Appeals from first instance decisions of the ADT may be made for errors of law or further review on the merits (where leave is granted). Appeals from the Appeal Panel lie to the Supreme Court for errors of law or jurisdictional error.

Whilst the Committees consider that appeals from first-instance decisions should generally be confined to issues of law, there is a role for appeals on the merits by leave – as is presently the case in the ADT and CTTT. There is substantial room, in the amalgamation of tribunals, to develop an approach to appeals that covers the majority of circumstances and enables appeal panel members to develop expertise in the management of appeals.

However, consolidation of the appellate process only might not result in the same level of procedural efficiency that could be gained by a more general consolidation. For practitioners operating in any of the tribunals, the utility of an additional appellate forum with potentially different procedural requirements, or pool of member panellists, is questionable.

## **Unrepresented litigants**

The Committees consider consolidation has the potential to improve access to justice for self-represented litigants and to assist legal practitioners appearing against such litigants, provided the consolidated tribunal is able to utilise practices similar to (or better than) those employed in Victoria and Queensland, as discussed below. The Committees submit that it would be easier to introduce useful measures to assist self-represented litigants (and practitioners appearing in opposition to self-represented litigants) through a consolidated tribunal rather than under the existing tribunal structure.

## **Effect on self-represented litigants**

Disputes involving self-represented litigants often take considerably longer than comparable cases where all parties are legally represented, and can result in additional legal fees incurred by an opposing party and greater strain on court and tribunal resources.

In Victoria, parties appearing before the Supreme Court have access to the Self Represented Litigants Co-ordinator. The role of this Co-ordinator is to ensure parties understand procedures, to assist in managing their cases and to provide them with referrals to pro bono or low cost legal assistance if required.

Such an arrangement might help mitigate the additional burden that self-represented litigants can place on courts and opposing parties. Comparable roles do not exist in all jurisdictions. The most common support provided to self-represented litigants appears to be by way of legal aid, or through not-for-profit organisations, such as community legal centres. However, both QCAT and Queensland courts have a limited self-representation

service available. This service is independently operated by the Queensland Public Interest Law Clearing House, but does receive some government funding.

In terms of legislative guidance, all proceedings in VCAT are subject to the Victorian Charter. In particular, VCAT must act in accordance with equality rights<sup>3</sup> and provide a right to a fair hearing.<sup>4</sup> It has been suggested that this approach does not provide sufficient protection to self-represented litigants.<sup>5</sup>

Any approach that does not offer a level of certainty does not provide sufficient guidance to practitioners in their dealings with self-represented parties. This has been contrasted to the approach taken by QCAT, which is more prescriptive in its approach to the role of panellists and practitioners in dealing with self-represented litigants.<sup>6</sup>

## Guidelines for practitioners and panel members

Case law on the role of a court in relation to a self-represented litigant suggests that, while there may be some leeway afforded to a self-represented party,<sup>7</sup> the rules of court must still be adhered to.<sup>8</sup> Both the NSW Law Society and the NSW Bar Association produce guidelines for their members, which detail how to appropriately deal with self-represented litigants and what to expect from a court where the opposing party is a self-represented litigant.

These guidelines help resolve issues such as uncertainty as to whether a party is 'legally represented', should they have had some assistance in preparing for their case and whether such assistance may prohibit a practitioner from contacting the other party directly.<sup>9</sup>

There is less express guidance currently available for members of a tribunal on how they should deal with self-represented litigants. Although one reason for some tribunals, such as the ADT and CTTT, is to provide a less formal route for self-represented litigants to access justice, in practice, it can be difficult for the opposing parties and the tribunal to accommodate the self-represented litigants. Legislative provisions, or set procedural rules would be of benefit to members of the panel, as well as to practitioners who operate within the tribunal as they would provide greater certainty of obligations and expected conduct by all parties involved in proceedings.

## Recommendations

The Committees recommend that funding be made available for self-represented litigants in any consolidated NSW tribunal have access to an officer similar to the Self Represented Litigants Co-ordinator in the Supreme Court of Victoria.

The Committees recommend that either the legislation or accompanying rules for any consolidated tribunal provide clear guidelines to panel members and legal practitioners who may operate within the tribunal, detailing what they can expect and what their responsibilities are in relation to self-represented litigants.

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<sup>3</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 8.

<sup>4</sup> *Ibid*, s 24(1).

<sup>5</sup> Hon Justice Kevin Bell, *President's Review of the Victorian Civil and Administrative Tribunal (VCAT)*, (2009) 75.

<sup>6</sup> Law Institute of Victoria Submission, *President's Review of the Victorian Civil and Administrative Tribunal (VCAT)*, (22 June 2009) 8.

<sup>7</sup> *Pickering v Chief Executive Officer of Centrelink* [2006] FCA 477; *Underdown v Secretary, Dept of Education, Employment and Workplace Relations* [2009] FCA 965 per McKerracher J.

<sup>8</sup> *SZFR v Minister for Immigration and Citizenship* [2009] FCA 8511 per Flick J.

<sup>9</sup> For example, see the NSW Solicitors Rules, r 31.

## Constitutional questions

The Committees submit that if there is to be substantial reform to the tribunal system in NSW, the Parliamentary Committee should take the opportunity to carefully consider the capacity of tribunals, especially the ADT, to consider Commonwealth constitutional questions.

It is beyond the scope of this submission to provide a detailed analysis and the Committees express no preference as to the result of any of the considerations below, but submit that, due to their importance and potential consequences, they should be taken into account as part of the present inquiry.

The ADT is not a 'court of a State' for the purposes of s 77(iii) of the Constitution.<sup>10</sup> Section 39(2) of the *Judiciary Act 1903* (Cth) only invests State courts with federal jurisdiction in relation to matters in ss 75 and 76 of the Constitution which includes any matter arising under the Constitution or involving its interpretation. This also means that State tribunals cannot exercise other aspects of federal jurisdiction.

The decision of *Attorney-General v 2UE Sydney Pty Ltd* (2006) 236 ALR 385 leaves State tribunals in no doubt about their inability to consider constitutional questions where it is submitted that a legislative provision is either invalid or should be read down. However, the Solicitor-General for NSW has expressed the view that a tribunal's power to consider any matter involving the interpretation of the Constitution will depend on how the tribunal's 'consideration' of a constitutional challenge is characterised, because any 'consideration' that could be characterised as federal judicial power would exceed the authority of a tribunal.<sup>11</sup>

In light of this issue, the Committees submit that the Inquiry should expressly consider the following:

- Section 118 of the *Administrative Decisions Tribunal Act 1977* (NSW) provides that the ADT may refer questions of law to the Supreme Court of NSW. It should be considered whether this provision or any proposed equivalent provision under new legislation should include a mandate that the tribunal must refer any question involving the 'consideration' of the Commonwealth Constitution to the Supreme Court.
- If there is to be a mandated referral of all questions involving constitutional consideration, should there be a mechanism so that the ADT or any proposed new body can refer the entirety of the proceedings to the Supreme Court?

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<sup>10</sup> *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77. Notwithstanding, even if the ADT is considered an executive body, there is no constitutional prohibition on an executive body exercising judicial power at the State level.

<sup>11</sup> M G Sexton SC SG, 'The capacity of tribunals to consider constitutional challenges to legislation' (2007) 30 *Australian Bar Review* 33, 44 to 45.

# Administrative Decisions Tribunal

## The current operation of the ADT

The ADT currently includes six Divisions, each of which is responsible for a particular area, and an Appeal Panel. Part-time or sessional members are appointed to each Division, who lend their particular expertise to the work of the relevant Division. Common forms are used where convenient, however where necessary, specialist forms may be used by a Division.

Accordingly, the ADT already provides a model for the operation of a multi-purpose tribunal with divisions to promote specialisation while retaining a single registry and central management structure.

## Membership of the ADT

In the 2009/2010 financial year, the ADT had two full-time judicial members: the President and the Deputy President.

The Committees submit that any amalgamation of other tribunals into the ADT would necessitate an increase in full time members. Whilst the 100 part-time and sessional members play an important role in ensuring that the ADT has a breadth of experience and specialisation to draw upon, some of the benefits of having a greater number of individuals dealing with tribunal matters on a regular basis would include:

- a greater number of individuals who specialise in the review of administrative decisions generally;
- greater consistency in the approach of the ADT in reviewing administrative decisions;
- the ability to “cross-pollinate” this approach through increased interaction between permanent full-time members and part-time/sessional members; and
- more opportunity for permanent members to specialise and take on leadership roles within their respective Divisions.

The Committees believe that if the ADT is to be given a greater role within the NSW Tribunal framework, it will be necessary to ensure that it receives an increase in full-time personnel to bolster its institutional strength and culture.

The Committees further submit that any new full time members should be either judges or legally qualified.

## Potential effects of consolidation

### Advantages

The Committees endorse the possible advantages to consolidation identified in the Issues Paper.

Additionally, the Committees submit that advantages that may flow from consolidation may include, but would not be limited to, those outlined below.

### Uniform practice and procedure

Consolidation of a number of tribunals into the ADT would facilitate the development of uniform practices and procedural rules across the different tribunal jurisdictions. This would be of substantial benefit to self-represented applicants and legal practitioners alike. Particular areas where uniformity could be established include:

- forms;
- consistency in the approach taken to the rules of evidence; and
- the level of procedural formality required.

Additionally, applicants and their legal representatives would benefit from the consolidation of legislation and rules which would regulate procedure, similar to the *Uniform Civil Procedure Rules 2005*.

### **Specialised appeals division**

By consolidating the original jurisdictions of various tribunals into the ADT, it would be possible (in many cases) to have a single appeal route to the Appeals Panel of the ADT. Consolidation of tribunals generally at the appellate level is discussed above.

### **Disadvantages**

The Committees endorse the possible disadvantages to consolidation identified in the Issues Paper.

Additionally, the Committees submit that consolidation may distract the ADT from its intended primary function: to provide an avenue for review of administrative decisions.

### **Distraction from review of administrative decisions**

The expansion of the original jurisdiction of the ADT would necessitate a diminished focus on the review of administrative decisions. In doing so, the Tribunal would be required to depart from its original purposes and risk a diminution in expertise in administrative merits review.

The Committees believe that there needs to be a body committed to, and with expertise in, merits review of administrative decisions within NSW.

# Consumer Trader and Tenancy Tribunal

## Current and forecast workload of the CTTT

There was a peak in applications to all divisions in 2007-2008 (64,748), which dropped significantly the following year (58,670).<sup>12</sup> There was a 1.2% increase in 2009-2010.<sup>13</sup> In 2009-2010, 73,822 hearings were held with 26 days being the average time between lodgement and hearing.<sup>14</sup> 63,068 applications were finalised with 75% of matters finalised prior to or at the first hearing and 64% of matters finalised within 35 days.<sup>15</sup> The applications made in the Tenancy Division made up over half the total applications for the 2009-2010 year (being 30,490 out of 59,403) and for all other years considered.<sup>16</sup> The next highest were Social Housing (13,135), General (6,676) and Home Building (3,451).<sup>17</sup>

It is worth noting that the finalisation statistics have worsened since 2005-2006. In the 2005-2006 year, there was only an average of 20 days from lodgement to hearing with 70% finalised within 35 days and 77% finalised prior to or at the first hearing.<sup>18</sup> There were approximately 4,000 fewer applications that year and there were more venues (95 down to 70+).<sup>19</sup> However, clearance times have steadily increased from 2005-2006 to 2009-2010, despite fluctuating application numbers.<sup>20</sup>

It is unclear why there has been a slippage in CTTT clearance rates, but they are still sufficiently fast to suggest the CTTT is an effective method of quickly resolving smaller and less complex disputes.

## Resolution of disputes by the CTTT

The Committees are of the view that the CTTT provides a fast, informal and flexible process for resolving consumer disputes. The mandatory dispute resolution requirements in the Home Building and Strata & Community Schemes Divisions are very effective. There are also requirements for conciliation following listing but prior to the hearing in the Tenancy, General, Home Building and Motor Vehicle Divisions.

The CTTT is especially suitable for self-represented litigants because of the inexpensive lodgement fees and the informal nature of the proceedings, such as the lack of court etiquette formalities and the fact that the Tribunal is not bound by the rules of evidence.

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<sup>12</sup> Consumer, Trader & Tenancy Tribunal, *Annual Report 2009-2010*, (2010) [http://www.cttt.nsw.gov.au/pdfs/About\\_us/Corporate\\_publications/Annual\\_reports/Annual\\_report\\_0910.pdf](http://www.cttt.nsw.gov.au/pdfs/About_us/Corporate_publications/Annual_reports/Annual_report_0910.pdf).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Consumer, Trader & Tenancy Tribunal, *Annual Report 2005-2006*, (2006) [http://www.cttt.nsw.gov.au/pdfs/About\\_us/Corporate\\_publications/Annual\\_reports/Annual\\_report\\_0506.pdf](http://www.cttt.nsw.gov.au/pdfs/About_us/Corporate_publications/Annual_reports/Annual_report_0506.pdf).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid; Consumer, Trader & Tenancy Tribunal, *Annual Report 2009-2010*, above n 12; Consumer, Trader & Tenancy Tribunal, *Annual Report 2008-2009* (2009) [http://www.cttt.nsw.gov.au/pdfs/About\\_us/Corporate\\_publications/Annual\\_reports/Annual\\_report\\_0809.pdf](http://www.cttt.nsw.gov.au/pdfs/About_us/Corporate_publications/Annual_reports/Annual_report_0809.pdf); Consumer, Trader & Tenancy Tribunal *Annual Report 2007-2008* (2008) [http://www.cttt.nsw.gov.au/pdfs/About\\_us/Corporate\\_publications/Annual\\_reports/Annual\\_report\\_0708.pdf](http://www.cttt.nsw.gov.au/pdfs/About_us/Corporate_publications/Annual_reports/Annual_report_0708.pdf); Consumer, Trader & Tenancy Tribunal, *Annual Report 2006-2007* (2007) [http://www.cttt.nsw.gov.au/pdfs/About\\_us/Corporate\\_publications/Annual\\_reports/Annual\\_report\\_0607.pdf](http://www.cttt.nsw.gov.au/pdfs/About_us/Corporate_publications/Annual_reports/Annual_report_0607.pdf).

## Home Building disputes in the CTTT

There is a downside to the generally informal nature of proceedings in relation to the Home Building Division, where the jurisdictional limit is very high (\$500,000).<sup>21</sup> The Home Building Act provides that the CTTT is to be chiefly responsible for building claims.<sup>22</sup> Due to the inexpensive nature of the CTTT and relative ease of self-representation, some very large claims have been determined by the CTTT. This can produce results that are not always satisfactory. This has resulted in this division having the highest rate of rehearings and appeals of all the divisions.<sup>23</sup>

The Committees submit that the Home Building Division of the CTTT should amend its procedures to require a higher degree of particularisation of claims over a threshold of, for example, \$100,000 up to the jurisdictional limit of \$500,000. It makes little sense that the initial requirements for a claim in relation to work done of the value of \$5,000 are the same as a claim in relation to work done of the value of \$450,000. The respondent often effectively bears the burden of particularising the claimant's claim in the process of responding to it.

Alternatively, a jurisdictional limit could be set on the hearing of such claims by the CTTT.

The Committees emphasise that the CTTT remains a cost-effective and efficient way of resolving many home building disputes, but some fine-tuning is required given the technically complex nature of some disputes and the large sums in dispute.

## Current jurisdiction and operation of the CTTT

The Committees submit that the jurisdiction of the CTTT is appropriate for its purpose, namely, a consumer dispute resolution forum that is an alternative to the court process. The monetary jurisdiction of \$30,000 is appropriate and fair.

The Committees submit that claims in excess of this amount should be subject to case management procedures mirroring those available in the District Court. Where appropriate, litigants in the CTTT should be able to transfer proceedings to the appropriate court by agreement if the dispute involves sufficiently complex questions of fact or law.

Equally, legal representation should be available at the CTTT, where appropriate.

The CTTT's procedures are similarly consistent with its objects and purpose, and the appeal rights available are appropriate. There is no information available to indicate instances of injustices or abuse of such appeal processes.

## Consolidation of the CTTT with other tribunals

As the Committees are of the view that the CTTT is general operating appropriately, there is no particular benefit to the consolidation of the CTTT with other tribunals. However, if consolidation can be achieved without losing some of the significant advantages of the CTTT, there is no particular barrier to consolidation.

Further, a collateral benefit of consolidation of the CTTT into a larger tribunal might be that case management principles and procedures are more readily introduced, applied and enforced.

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<sup>21</sup> *Home Building Act 1989* (NSW), s 48K.

<sup>22</sup> *Home Building Act 1989* (NSW), s 48L.

<sup>23</sup> See above, n 20.

# Industrial Relations Commission

## Workload of the IRC

At present, the IRC has jurisdiction in relation to local and NSW state government industrial matters, and its jurisdiction over transport appeals<sup>24</sup> and public sector appeals<sup>25</sup> has been consolidated. As a result, the current non-judicial workload of the IRC is expected to remain at 2010 levels.

Meanwhile, the workload of the Industrial Court is likely to be pared back when the *Work Health and Safety Act 2011* (NSW) comes into operation in 2012.<sup>26</sup>

## Advantages of consolidation for the IRC

The advent of WorkChoices<sup>27</sup> caused significant changes to the workload and operation of the IRC.

The number of IRC Commissioners has decreased from 12 to seven, with four of these Commissioners serving concurrently as Fair Work Australia tribunal members. In addition, there has been an overall decline in the use of IRC facilities and a decline in workload of the Industrial Court.

Further, there has been restriction of the IRC's unfair contracts jurisdiction by the *Independent Contractors Act 2006* (Cth),<sup>28</sup> and forecast further decline in workload due to workplace health and safety changes, raising questions as to the future utilisation of the IRC and its facilities.

Amalgamating the IRC within a consolidated tribunal would enable the use of currently underused courtrooms and registry facilities, resulting in potential cost savings for taxpayers.

## Potential pitfalls of consolidation

The IRC exercises a discrete and specialised jurisdiction. Its award-making and agreement-approval functions are not mere merits review of administrative decisions, but involve the creation of new rights and duties for industrial parties.

Procedurally, the IRC is also unique in that it is endowed with compulsory conciliation<sup>29</sup> and arbitral functions<sup>30</sup> that are unlike other tribunals. For example, in the exercise of the IRC's dispute resolution powers and its powers under the *Police Act 1990* (NSW), *Transport Appeals Act 1980* (NSW) and in regard to the discipline and promotion of public servants, the IRC is bound to conciliate such disputes in an endeavour to bring the parties to an amicable resolution.

The expertise of IRC Commissioners and their success in conciliating disputes yields efficiencies. This is demonstrated by the fact that, in 2010, 47.8% of unfair dismissal applications were finalised within two months of commencement, 64% of award

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<sup>24</sup> *Transport Appeals Act 1980* (NSW).

<sup>25</sup> *Industrial Relations Act 1996* (NSW), Pt 7 Ch 2.

<sup>26</sup> *Work Health and Safety Act 2011* (NSW), s 229B.

<sup>27</sup> A term commonly used to refer collectively to the following legislation: *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); *Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No 1)* (Cth) and *Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006 (No 1)* (Cth).

<sup>28</sup> *Independent Contractors Act 2006* (Cth), s 7.

<sup>29</sup> *Industrial Relations Act 1996* (NSW), s 348.

<sup>30</sup> *Industrial Relations Act 1996* (NSW), s 349.

applications were finalised within two months of commencement and 62.5% of enterprise agreements were finalised within one month of commencement.<sup>31</sup>

Consolidation of the IRC with other tribunals, or a transfer of its jurisdiction to another tribunal, will be disadvantageous if a separate list or division of that tribunal is not created to exercise the jurisdiction of the IRC. IRC members should be appointed to any such list or division of a multijurisdictional tribunal to enable them to bring to bear their industrial expertise in resolving industrial matters and to maintain consistency in the determination of legal rights and duties.

Unique procedural rules may need to be established for an IRC list established under a consolidated tribunal.

## Transfer of jurisdiction to the IRC

Similar cost savings might be achieved if the jurisdiction of the Anti-Discrimination Division of the ADT and/or HDTs is transferred to the IRC, or a rebadged 'Employment and Professional Services Tribunal'. As with the 2010 transfer of transport appeals and public service disciplinary and promotional jurisdictions to the IRC, this will likely see a substantial increase in the IRC's workload and greater use of any under-utilised facilities.

Transfer of transport and public service disciplinary and promotional matters to the IRC can be seen to be a transfer of a qualitatively similar jurisdiction to that historically exercised by the IRC, namely the conciliation and (if necessary) arbitration of disputes relating to employment matters. The industrial and employment law expertise the IRC has been able to bring to bear on these matters is evinced by the fact that 59.3% of transport disciplinary appeals and 84.6% of public sector disciplinary appeals were disposed of by the IRC during the conciliation process.<sup>32</sup> Transfer of the Equal Opportunity Division of the ADT to the IRC would see the IRC dealing with discrimination complaints arising in employment contexts. These are similar to the jurisdiction currently exercised by the IRC in the victimisation provisions of the *Industrial Relations Act 1996* (NSW), which proscribe discrimination on the basis of assertions by employees of industrial rights.

Transfer to the IRC of the functions of professional tribunals such as the Legal Services Tribunal and the HDTs was posed as being problematic in the Issues Paper, as it would potentially divert attention from the 'public protection' aspects of this jurisdiction. This is discussed in greater detail below. However, the Committees note that the IRC has experience and expertise in dealing with 'public interest' professional matters. In exercise of its jurisdiction under the Police Act, the IRC invariably takes into consideration the public interest in ensuring police officers are persons of integrity when considering whether terminations of employment are harsh, unjust or unreasonable and in considering whether reinstatement is an appropriate remedy.<sup>33</sup> The IRC must consider similar 'public interests' when adjudicating unfair dismissal applications made by teachers, to ensure that only 'appropriate' persons carry out such professions.<sup>34</sup> However, because of the specialised nature of the jurisdictions of the HDTs, some caution should be exercised in consolidation. This is discussed further below.

## Options for the Commission in Court Session

Any attempt to abolish the Commission in Court Session (known as the Industrial Court)<sup>35</sup> would result in Parliament needing to appoint the seven current Industrial Court judges to a court of equivalent status to the Industrial Court, namely the Supreme Court or Land and Environment Court. Furthermore, the Industrial Court retains jurisdiction in relation to

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<sup>31</sup> Industrial Relations Commission of New South Wales, *2010 Annual Report*, 54.

<sup>32</sup> Industrial Relations Commission of New South Wales, *2010 Annual Report*, 25-26.

<sup>33</sup> *Alexander v Commissioner of Police* [2009] NSWIRComm 3 (at [45]-[47]); *Van Huisstede v Commissioner of Police* [2000] NSWIRComm 97 (at [249]); *Parfrey v Commissioner of Police* [2010] NSWIRComm 19.

<sup>34</sup> *Bond v Department of Education of New South Wales* [2010] NSWIRComm 1006.

<sup>35</sup> *Industrial Relations Act 1996* (NSW), s 151A.

the enforcement of industrial instruments, superannuation appeals, unfair contracts, a more limited workplace health and safety jurisdiction and an appellate jurisdiction in respect of Industrial Magistrates' decisions

### **Maintenance of the Industrial Court**

The Court could be maintained in its current form and vested with appellate jurisdiction in relation to employment and industrial type matters heard by the consolidated tribunal or an IRC with an expanded jurisdiction. Currently, appeals from the IRC are dealt with by a Full Bench of the IRC. Such appeals could be dealt with by the Court, ensuring an increased workload and putting Industrial Court judges' expertise to good use. The Industrial Court could also be vested with appellate jurisdiction over anti-discrimination employment matters and professional discipline matters dealt with by any Super Tribunal or an IRC with expanded jurisdiction. Presently, appeals from professional tribunals generally lie to the Supreme Court. Such appeals could be heard by the Industrial Court.<sup>36</sup> The Committees note that this option would maintain current expediency in the resolution of disputes, rather than adding additional strain to the workload of the Supreme Court of NSW.

### **Creation of a new court**

A new court of equivalent status to the Supreme Court could be created to preside over any consolidated tribunal. This court could exercise the residual jurisdiction of the Industrial Court in relation to workplace health and safety, enforcement of industrial instruments, local and NSW state government industrial matters and police matters. Appeals from employment and industrial type matters and other matters dealt with by the consolidated tribunal could be brought to the court. Industrial Court judges could exercise their expertise in industrial and employment matters by presiding over appeals from any industrial and employment list. Furthermore, akin to the current constitution of the IRC and Industrial Court, members of the new court could receive dual appointments, allowing them to exercise the non-judicial powers of the consolidated tribunal, ensuring a sufficient workload and allowing them to bring their expertise to bear in non-judicial employment and industrial matters.

Given that any such court would be a 'court of a State' within s 77(iii) of the *Commonwealth Constitution*, and a potential repository of federal jurisdiction, the principle derived in *Kable*<sup>37</sup> limits the New South Wales legislature's ability to enact a law that impairs the characteristics of the new court in such a way that is incompatible with its role as a repository, or potential repository, of federal jurisdiction.

A recent decision of the Industrial Court<sup>38</sup> dealt with a challenge to the constitutional validity of amendments by the current government to the *Industrial Relations Act 1996* (NSW), which 'directed' the IRC to give effect to certain aspects of government policy when making awards. This decision clarified that the existence of judges of a State court who held concurrent commissions as members of a state 'tribunal' was not, in and of itself, something repugnant to the judicial process or contrary to the *Kable* principle.<sup>39</sup> The Industrial Court held that, as the Court and IRC were separate and distinct bodies, performing separate and distinct functions, any 'direction' to the IRC in exercise of its arbitral power was not a direction to the Court.<sup>40</sup>

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<sup>36</sup> See, for example, *Health Practitioner Regulation National Law* (NSW), s 162A.

<sup>37</sup> *Kable v Director of Public Prosecutions (NSW)*(1996) 189 CLR 15. See also *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319; *Wainohu v State of New South Wales* (2011) 278 ALR 1.

<sup>38</sup> *Public Service Association v Director of Public Employment* [2011] NSWIRComm 143.

<sup>39</sup> *Ibid* at [40]-[41].

<sup>40</sup> *Ibid* at [28].

# Health Disciplinary Tribunals

## Definitions

'Health Disciplinary Tribunal' (**HDT**) includes each of the following Tribunals established under section 165 of the *Health Practitioner Regulation National Law (NSW)* No 86a on 1 July 2010:

- Chiropractic Tribunal;
- Dental Tribunal;
- Medical Tribunal;
- Nursing and Midwifery Tribunal;
- Optometry Tribunal;
- Osteopathy Tribunal;
- Pharmacy Tribunal;
- Physiotherapy Tribunal;
- Podiatry Tribunal; and
- Psychology Tribunal.

## Workload of the various Health Disciplinary Tribunals

It is anticipated that three further HDTs will be created on 1 July 2012, to consider serious complaints against Medical Radiology Practitioners, Aboriginal and Torres Strait Islander Health Practitioners and practitioners of Chinese Medicine.

This will result in an increase in forecast total workloads across all HDTs. This increase will be mitigated to some extent by the fact each HDT is administered by the individual Council for the relevant health profession. All HDTs are chaired by Australian lawyers of seven years standing, with the exception of the Medical Tribunal which is chaired by a Judge of the Supreme Court or District Court.

## Access to Health Disciplinary Tribunals

HDTs are accessible through the Council for the relevant health profession. For example, the Dental Council will write to a dentist notifying them of a complaint made about their practice of dentistry which will be prosecuted in the Dental Tribunal.

The Health Care Complaints Commission (**the HCCC**) investigates and prosecutes serious complaints against health practitioners before each of the HDTs. The HCCC also contacts complainants and witnesses and provides information on the progress of matters and hearing dates and venues.

The newly created Health Professional Councils Authority (**HPCA**) assists the Councils with arrangements for HDTs, including providing a registry and hearing rooms.

There is little advantage to incorporating the HDTs into a consolidated tribunal on the grounds of access to justice. With the exception of appeal and review applications made to the relevant Council, all proceedings are initiated by the Council in conjunction with the HCCC. Members of the public do not need to access the HDTs as the jurisdiction is limited to regulatory matters, reviews and appeals.

## Duplication of expense

The HPCA is a newly created organisation which has already implemented changes to HDTs, resulting in economy of scale, consistency of process and procedure and providing a 'one stop shop.' Consequently inclusion of the HPCA in a consolidated tribunal structure will likely increase costs without added benefit, particularly in circumstances where there has already been considerable recent expense on HDT

rooms and new staff. It is anticipated that legal practitioners employed by the HPCA will assist greatly in consistency of decision making across all the HDTs.

## **Accountability**

Each Council has a degree of oversight and responsibility in respect of HDT decisions. If a decision is anomalous or flawed, this reflects poorly on the Council responsible for appointing and training its tribunal members and on the HCCC in its prosecution of the complaint. This degree of accountability is an important quality assurance, which may be lost if Councils lose the close relationship they have with the HDTs.

It should be noted that, despite this close relationship, the Chair and Deputy Chairs of each Tribunal, as well as the individual members, are independent of the Council, and this is reflected in the decisions made by the HDTs

## **Specialisation**

Each HDT is highly specialised. Hearing members are appointed for their knowledge of standards relating to a particular profession and also of health procedures.

## **The Medical Tribunal**

The Medical Tribunal shares the District Court registry, and usually a District Court judge will be appointed to sit with a lay member and two specialist members of the tribunal. There may be scope to appoint additional IRC judges to the Medical Tribunal. However, care must be taken to ensure such Judges have adequate training and knowledge to preside over such specialised tribunals and may need training to achieve this.

## **Advantages and disadvantages of consolidation**

### **Efficiencies generally**

Efficiencies brought about by economies of scale and shared resources arising out of the consolidation of HDTs both internally and within a broader administrative tribunal are ultimately administrative matters that are best assessed by accountants and managers with experience in such matters.

However, the Committees note the existing arrangements of the Medical Tribunal, where matters are being scheduled before judges of both the District Court and IRC. While there is nothing troubling about this practice in principle, there may be inefficiencies in having matters administered and prepared for in the District Court but then later heard in the IRC.

### **Benefits of consolidation**

#### **Engaged judicial members of the Tribunal**

Judicial members designated to sit on HDTs are more likely to be engaged and interested by expanding the number of health professions heard within a single tribunal and by permitting judicial members to sit across different non-health practitioner jurisdictions. In the Committees' experience, judicial members who consistently hear matters dealing with the same issues (for example, doctors who over-prescribe medication) appear to tire of the monotonous and repetitive nature of such cases. Maintaining an interested and engaged judiciary is critical to ensuring that procedural issues are attended to, which in turn ensures that practitioners are afforded every procedural protection.

#### **Competition**

Consolidation of the HDTs may assist in creating a better legal practitioner market for respondents by further improving the reporting of HDTs.

This problem of inaccessible prior determinations has already been significantly reduced due to the advent of the Australian Health Practitioner Regulation Agency and the consolidation of case law online (for example, the Medical Council of New South Wales

website), which is now mandated by s 167F of the *Health Practitioner Regulation National Law (NSW)*.

Nonetheless, there remains scope for further work in this area to be done to ensure that health practitioners and their legal advisers are able to ascertain the ramifications of particular misconduct by referring to an easily accessible collection of relevant decisions. A better-informed health profession is more likely to practice safely. A better-informed legal profession will be able to more efficiently advise and protect their clients, as well as advise the relevant HDT as to any appropriate protective orders.

In addition, consolidation of decisions under an administrative umbrella would permit the public greater access to decisions, thereby improving the transparency of health professional disciplinary decisions.

### **Procedural consistency**

The HDTs could benefit from better defined rules and procedure than currently exists. For instance, HDTs conduct proceedings as they see fit (s 167B(1)), which includes the power to amend a complaint on short notice, including on the first day of proceedings. While a similar power exists in other courts and tribunals, the context is often different. As the complainant before a HDT is always the HCCC, it should be held to a high standard in executing its prosecutorial functions, given the highly prejudicial ramifications for the health practitioners whose conduct is impugned. While the public interest in ensuring that complaints are heard and determined must be the overriding consideration, sloppiness on the part of the watchdog should not be permitted simply because the HDT “thinks fit”. The test should be set at a higher threshold. It may be easier to make this change in the context of a consolidated tribunal.

### **Disadvantages of consolidation**

There is a risk that the health professions will lose control of their capacity to instil expertise in the HDTs if the constitution of the HDTs is altered by consolidation with other tribunals.

Presently, the constitution of the HDTs is governed by the *Health Practitioner Regulation National Law (NSW)*, which requires the relevant health practitioner council to appoint two health practitioners and a lay person to the relevant HDT: s 165A(1)(b). To ensure that the health professions do not lose confidence in the process, this structure and procedure should be retained.

### **Current Level of Service**

There is a risk of eroding the current level of services provided to HDTs through consolidation. Each tribunal has established support and administration structures provided by the relevant regulatory Council. This includes:

- established fee structures and payment by Councils to tribunal hearing members;
- selection of a large pool of experienced hearing members from the relevant profession, including knowledge of strengths of each hearing member, areas of interest and experience;
- ongoing training for hearing members through quality assurance programs such as publishing updates on legislative changes and significant new cases and providing bi-annual or annual training events;
- establishment of a joint registry and shared location for Tribunal hearings for all HDTs, with the exception of the Medical Tribunal;
- legal support from a shared HPCA legal team for consistency in decision making by the HDTs; and
- the resourcing of the Medical Tribunal, which is already incorporated into the District Court.

Given the special nature of the HDTs, as well as the funding and service model currently in place, some consideration will be required as to how to ensure the continued quality of these tribunals if they are consolidated with other tribunals.

## Conclusion

Consistently with the Issues Paper, the Committees consider there are both advantages and disadvantages to consolidation of the current New South Wales tribunals. While the Committees acknowledge the potential for significant procedural efficiencies through the creation of a consolidated tribunal, the relatively high level of specialisation of many of the existing tribunals weighs against full consolidation.

### Advantages of consolidation

The current (and future predicted) underutilisation of the IRC constitutes an important consideration in favour of tribunal consolidation in order to ensure the maximum use of scarce and expensive tribunal resources. Equally, the Committees consider the further consolidation of existing tribunals may reduce the barriers to entry for the legal profession into what are often seen as specialist areas of practice. Increasing competition in the legal market for tribunal work would be likely to improve the standard of legal representation for all tribunal litigants and the availability of pro-bono support and free legal services for impecunious litigants. Accordingly, access to justice may be improved by consolidation of tribunals in New South Wales.

Consolidation may make case management principles and procedures easier to introduce, apply and enforce, by virtue of the scale and resources of the consolidated tribunal. The Committees submit that case management principles of a consolidated tribunal should follow the 'just, quick and cheap' overriding purpose provisions of section 56 of the *Civil Procedure Act 2005* (NSW).

### Disadvantages of consolidation

The Committees consider the ability of tribunal members to provide optimal decisions may be reduced by consolidation. There is considerable specialisation, and variation in powers and purposes, across the tribunals considered in this submission. For example, it seems that the expertise required for the efficient and just determination of a small consumer goods dispute between a customer and a manufacturer is substantially different to the expertise required for the efficient and just determination of a professional dental service prosecution by the HCCC.

### Recommendations

The Committees recommend the following alternative options:

1. Some level of consolidation of the IRC with the ADT, through:
  - a. shared use of tribunal resources (especially tribunal members); and/or
  - b. transfer of the anti-discrimination division of the ADT to the IRC; and/or
  - c. complete consolidation of the IRC and ADT.

It would be possible to consolidate the CTTT, or part of it, into such a structure at a later date.

There may also be room to further consolidate the HDTs to enable sharing of tribunal expertise and other resources and to improve the legal services market for HDTs.

2. Alternatively, consolidation of all the New South Wales tribunals discussed in the submission, maintaining strong separation within the consolidated tribunal of distinctly different divisions mirroring the existing tribunals. This separation would facilitate significant variations in practice and procedure between each division necessary for the maintenance of maximum efficiency and justice.

The Committees do not have a particular preference between options 1 and 2. Option 1 has the advantage of ease and lower cost of implementation at a legislative and practical level, with the potential flexibility for further consolidation at a later date, but it may prove only a temporary solution. Conversely, option 2 is likely to result in a more long-lasting NSW tribunal structure, but will involve considerably greater complexity and cost

(legislatively and practically) with a greater risk of dissatisfaction from at least some participants in the system.

The Committees further note legislators must consider the potential for consolidation to affect federal constitutional powers. The Committees therefore strongly recommend federal opinion be obtained for any State legislation with constitutional ramifications to protect against the possibility of time-consuming and costly constitutional challenges to future consolidated tribunal determinations.