

Standing Committee on Law and Justice

Opportunities to consolidate tribunals in NSW

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Terms of reference

That the Committee inquire into and report on opportunities to consolidate tribunals in NSW, and in particular:

1. have regard to the 2002 Report of the Committee on the Ombudsman and Police Integrity Commission into the Administrative Decisions Tribunal and arrangements that are in place in other jurisdictions, such as the Victorian Civil and Administrative Tribunal;
2. In conducting its inquiry, consider the following specific issues:
 - (a) opportunities to reform, consolidate, or transfer functions between tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters, having regard to:
 - i. the current and forecast workload for the Industrial Relations Commission (including the Commission in Court Session) as a result of recent changes such as National OHS legislation and the Commonwealth Fair Work Act);
 - ii. the current and forecast workload of other tribunals (such as the Administrative Decisions Tribunal and health disciplinary tribunals);
 - iii. opportunities to make tribunals quicker, cheaper and more effective
 - (b) options that would be available in relation to the Industrial Relations Commission in Court Session, should the commissions arbitral functions be consolidated with or transferred to other bodies;
 - (c) the jurisdiction and operation of the Consumer Trader and Tenancy Tribunal, with particular regard to:
 - i. its effectiveness in providing a fast, informal, flexible process for resolving consumer disputes;
 - ii. the appropriateness of matters within its jurisdiction, having regard to the quantum and type of claim and the CTTT's procedures;
 - iii. the rights of appeal available from CTTT decisions.
 - (d) any consequential changes which might arise.
3. That the Committee report by Thursday 22 March 2012.¹

These terms of reference were referred to the Committee by the Minister for Finance and Services, the Attorney-General and the Minister for Fair Trading.

¹ *LC Minutes* (21/10/2011) 548, Item 8; *LC Minutes* (16/02/2012) 701, Item 17.

Committee membership

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The Hon Peter Primrose MLC	Australian Labor Party	<i>(Deputy Chair)</i>
The Hon Scot MacDonald MLC	Liberal Party	
The Hon Sarah Mitchell MLC	The Nationals	
The Hon Shaoquett Moselmane MLC	Australian Labor Party	
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Table of contents

	Chair's foreword	x
	Executive summary	xi
	Summary of recommendations	xv
	Glossary	xvii
Chapter 1	Introduction	1
	Establishment and conduct of the Inquiry	1
	Terms of reference	1
	Submissions	1
	Hearings	2
	Roundtable discussion	2
	Site visits	2
	Committee's approach to the terms of reference	3
	Structure of report	3
Chapter 2	Tribunals in New South Wales	5
	What is a tribunal and why do we have them?	5
	Tribunals in New South Wales	7
	History of consolidating tribunals in Australia	8
	Tribunals in other Australian jurisdictions	9
	Victorian Civil and Administrative Tribunal	9
	Western Australian State Administrative Tribunal	9
	Australian Capital Territory Civil and Administrative Tribunal	10
	Queensland Civil and Administrative Tribunal	11
	Other Australian jurisdictions	12
	United Kingdom	12
	Key tribunals in New South Wales	12
	Industrial Relations Commission	13
	Administrative Decisions Tribunal	13
	Consumer, Trader and Tenancy Tribunal	14
	Workers Compensation Commission	14
	Health disciplinary tribunals	15
	Guardianship Tribunal	16
	Mental Health Review Tribunal	16
	Committee comment	17

Chapter 3	Options for consolidation	19
	Options in the Ministerial Issues Paper	19
	Option 1 – Employment and Professional Services Commission	19
	Option 2A – NSW Administrative and Employment Tribunal	20
	Option 2B – Employment and Professional Discipline Division in a NEAT	20
	Option 3 – Create a NSW Civil and Administrative Tribunal	20
	Stakeholder comments on options and alternative proposals	22
	Option 1	22
	Options 2A and 2B	24
	Option 3	24
	Alternative options for consolidation	25
	Support for consolidation generally	26
	Committee comment	28
Chapter 4	Access to justice	31
	Access to justice	31
	A one-stop shop	31
	Community awareness and access	33
	Procedural fairness	35
	Expertise of tribunal members	35
	Consistency of procedure	37
	Committee comment	38
	Appeals	40
	Committee comment	41
	Potential efficiencies and adequacy of resources	42
	Potential efficiencies	42
	Infrastructure and ensuring regional access	44
	A tribunal services unit	44
	Adequacy of resources for any consolidated tribunal	45
	Committee comment	45
Chapter 5	Consumer, Trader and Tenancy Tribunal	47
	Role and workload of the Consumer, Trader and Tenancy Tribunal	47
	Tribunal structure and membership	47
	Workload	47
	Issues raised concerning the CTTT	48
	Timeliness	48
	Quality of decision making	53
	Appropriateness of matters within the CTTT jurisdiction	57
	Rights of appeal for CTTT decisions	59

Chapter 6	Industrial Relations Commission	65
	Role of the IRC	65
	Workload changes	65
	Stakeholder comments on workload changes	67
	The Industrial Court of the IRC	68
	Stakeholder comments on options in the Ministerial Issues Paper	69
	Approach taken in other Australian jurisdictions	71
	Committee comment	72
Chapter 7	Issues raised in evidence	73
	Guardianship Tribunal	73
	Principles underpinning the tribunal	73
	Three member panels	74
	Hearing preparation process	75
	International attention	75
	Approach taken in other Australian jurisdictions	75
	VCAT and the Victorian Law Reform Commission inquiry	76
	Mental Health Review Tribunal	78
	Approach taken in other Australian jurisdictions	79
	Other tribunals	79
	Committee comment	79
Appendix 1	Submissions	81
Appendix 2	Witnesses	84
Appendix 3	Report of Committee visit to the NSW Consumer, Trader and Tenancy Tribunal	87
Appendix 4	Report of Committee visit to the Victorian Civil and Administrative Tribunal and the Law Institute of Victoria	88
Appendix 5	Minutes	90
Appendix 6	Dissenting statement	110

Tables

Table 1	CTTT Target time from Lodgement to First Hearing and Lodgement to Finalisation	50
Table 2	CTTT Application lodgement to finalisation 2010 – 2011	51
Table 3	Jurisdictional limits comparison – VCAT, QCAT and CTTT	57

Chair's foreword

In considering opportunities to consolidate tribunals in New South Wales, we have been guided by an overwhelming consensus from stakeholders about the importance of ensuring access to justice for tribunal users. This along with lessons that have been illustrated in other Australian jurisdictions that have consolidated tribunals, have formed the foundations of our recommendations.

We have recommended that a consolidation of tribunals should be pursued by the NSW Government as it will indeed improve access to justice for the people of New South Wales and provide a 'one stop shop' for minor disputes and review of administrative decisions. This view is strongly supported by the experiences of other Australian jurisdictions which have found that access to justice has improved as a result of tribunal consolidation, especially for people in regional and rural areas.

Although the Committee has not received sufficient evidence to determine the most preferable method for consolidation, we are confident that the expert panel we have recommended will be well-equipped to do so.

We have made this recommendation in the knowledge that the task is immense and involves multiple complexities. The process of developing an effective consolidated tribunal involves matters of law and policy that are highly technical and involve a wide variety of legal subject matter. We are especially grateful to the individual tribunals that made submissions to this Inquiry for the effort they went to in order to explain to the Committee their jurisdiction, priorities and client base. The expert panel should use this valuable evidence to inform its work.

This report also makes recommendations to ensure that access to any consolidated tribunal and procedural fairness are a key focus for the NSW Government. These recommendations include increasing community awareness and online access, creating an internal appeals mechanism, consolidating all existing facilities and establishing specialist divisions to ensure that expertise in existing tribunals is maintained in a new consolidated model.

It is hoped that with this approach, the most appropriate outcome will be found that will benefit the people of New South Wales, ensuring access to justice and that the tribunal system continues to offer a low cost and timely recourse for a variety of civil disputes and other matters.

On behalf of the Committee, I would like to acknowledge the time and considerable effort that inquiry participants invested in this Inquiry, through submissions and hearings and additional information, especially over the holiday season.

I express my thanks to my colleagues for their thoughtful contributions to this Inquiry. Our role has benefited greatly from both our individual perspectives and our cooperative approach. I also thank the staff of the Committee secretariat for their ongoing professional support.



Hon David Clarke MLC
Committee Chair

Executive summary

This Inquiry has required the Committee to consider proposals for significant changes in the administrative justice system of New South Wales – options for consolidating tribunals.

Tribunals form an integral part of the New South Wales justice system. They offer a low cost and timely recourse for a variety of civil disputes. There are a number of decision making bodies within New South Wales that are considered tribunals.

Stakeholders described the current tribunal system as complex and bewildering. Potentially, some level of consolidation may reduce this complexity and we have recommended that the NSW Government pursue this approach. The idea of consolidating tribunals is not new to New South Wales. The Administrative Decisions Tribunal (ADT) and the Consumer Trader and Tenancy Tribunal (CTTT) are the result of consolidating tribunals and more recently, two employment related tribunals were merged into the Industrial Relations Commission (IRC) in 2010. Other Australian jurisdictions including Victoria, Western Australia, the Australian Capital Territory and Queensland all have ‘super’ tribunals.

Options for consolidation

The Committee was provided with three options for consolidation that were presented in the Ministerial Issues Paper that was provided to the Committee with the terms of reference.

Option 1 proposes renaming the IRC the ‘Employment and Professional Services Commission’ and expanding its jurisdiction to include the Equal Opportunity Division of the ADT and the health professional tribunals. There was general qualified support for this option as a more acceptable choice than the other options. Some stakeholders were against the IRC being changed in any way. A number of others were of the view that other jurisdictions could be effectively incorporated into the IRC.

Option 2A proposes adding to the ADT’s jurisdiction and renaming it the NSW Administrative and Employment Tribunal (NEAT). All the functions of the IRC would also transfer to the ADT, in effect closing the IRC. All the functions of the Industrial Court would transfer to the Supreme Court. Option 2B is the same as Option 2A but would create a single Employment and Professional Discipline Division within the new NEAT. Few stakeholders favoured these options over Option 1.

Option 3 involves creating a comprehensive NSW Civil and Administrative Tribunal called NCAT which would consolidate the CTTT, the ADT, Guardianship Tribunal, Mental Health Review Tribunal, health professional tribunals and employment functions of the IRC.

There was some support for Option 3, however, some stakeholders did raise concerns about the potential impacts of this level of consolidation. In particular, these stakeholders were concerned that the consolidation of the tribunals mentioned in this option could create a tribunal so large that some issues would be swamped by claims in the current jurisdiction of the CTTT which could also lead to increased cost and delay. Other concerns included that consolidation on a large scale might lead to a loss of specialist expertise in the various areas of law that each of the current tribunals cover.

On the other hand, those in support of Option 3 pointed to possible improvements to access to justice and efficiencies from the creation of a ‘one stop shop’.

The Committee was also presented with alternatives to those options contained in the Issues Paper, which we believe are due consideration by the NSW Government. We appreciate the time and effort stakeholders have made in providing comments on the options available.

Access to justice

Inquiry participants told the Committee that whether or not the Government decides to consolidate tribunals, it needs to ensure that any reforms improve access to justice for all tribunal users. The Committee strongly supports this notion and believes that access to justice is the overarching principle in this Inquiry.

We do believe that a consolidation of tribunals will improve access to justice for the people of New South Wales and provide a ‘one stop shop’ for minor disputes and review of administrative decisions. This view is strongly supported by the experiences in other Australian jurisdictions which have found that access to justice has improved as a result of tribunal consolidation, especially for people in regional and rural areas. Accordingly, we have recommended that the NSW Government pursue the establishment of a new tribunal that consolidates existing tribunals where it is appropriate and promotes access to justice.

Although the Committee has not received sufficient evidence to determine the most preferable method for consolidation, we are confident that our recommendation for an expert panel consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders would be well-equipped to do so. We have recommended that this panel be established to pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, and prepare a detailed plan for the implementation of consolidation, including which tribunals should be consolidated. We believe it would be appropriate that the panel’s Chair be a nominee of the Attorney General.

We have made this recommendation in the knowledge that the task is immense and involves multiple complexities. The process of developing an effective consolidated tribunal involves matters of law and policy that are highly technical and involve a wide variety of legal subject matter. We are especially grateful to the individual tribunals that made submissions to this Inquiry for the effort and depth they went to in order to explain to the Committee their jurisdiction, priorities and client base. The expert panel should use this valuable evidence to inform its work.

Key issues raised by stakeholders and also highlighted by other jurisdictions was that the consolidation of tribunals must ensure improved access to justice in conjunction with improved efficiencies and that an effective consolidated tribunal must be established with adequate resources. As such, the Committee has recommended that these factors, along with ensuring equitable access to all citizens, are paramount in the work of the expert panel in determining the method and implementation of a consolidated tribunal in New South Wales.

The Committee is also mindful that access to justice involves ensuring community awareness of a consolidated tribunal and its role, especially in the context of a consolidated tribunal that would handle a range of different jurisdictions. Therefore we have recommended that the NSW Government publish comprehensive, easy to understand documents explaining the processes and procedures in the consolidated tribunal, including in culturally and linguistically diverse languages, so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

In addition, the provision of online services for tribunal users is an important factor in ensuring access to justice, especially for those tribunal users located regionally. Therefore, the Committee has also recommended that the NSW Government examine the possibility of providing more comprehensive and accessible online services for a consolidated tribunal.

The Committee acknowledges that procedural fairness is important. This was echoed in the concerns of some stakeholders who believed that the consolidation of a particular tribunal may lead to the loss of its specialist expertise. They believed that procedural fairness was also about ensuring the tribunal member that hears a particular matter has suitable expertise in that area to make a fair and just decision. This was of a particular concern for those inquiry participants focussed on industrial relations, guardianship and mental health matters.

While the Committee acknowledges these concerns, we are of the view that sufficient mechanisms exist to avoid such a loss of expertise through the use of specialist lists and divisions within a tribunal and ongoing professional development for tribunal members. These have been utilised successfully in other jurisdictions and we have recommended that this approach be taken in a consolidated tribunal in New South Wales.

In addition, to ensure tribunal members gain the relevant training and experience to work across divisions, we have recommended that tribunal members be given the opportunity to diversify their skills in various areas of law, through training and rotation among various jurisdictions within a consolidated tribunal.

Another concern to a number of stakeholders was the need for an internal appeals process in a consolidated tribunal, again to ensure access to justice. Stakeholders did caution that there is a need to carefully consider how an internal appeals process could be accessed, to avoid an overwhelming number of appeal requests that can potentially drain a tribunal's resources. There was some suggestion that a monetary threshold could be put in place. However, while a monetary threshold may be suitable in most civil claims, this would not be applicable in other areas of law, such as human rights matters.

The Committee acknowledges that limiting appeals to only the courts can create a barrier to the availability of appeals for some people due to the cost, delay and formality of court processes. Ensuring access to justice is also about ensuring an accessible appeal mechanism. In the Committee's view it is important that the establishment of a new consolidated tribunal incorporates in its structure a mechanism for internal appeal. Learning from other jurisdictions we recognise that it is important to set this up at the outset and to ensure that it is sufficiently resourced.

We also note the importance of setting thresholds for accessing an appeals process, as is demonstrated in other jurisdictions, and therefore we recommend that an easy, timely and cost effective internal merit appeals mechanism, with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave, be established within any consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

The Committee heard that the existing access to some tribunals in New South Wales on a regional basis is important and should be captured in any plans for a consolidated tribunal. This is particularly the case for the existing tribunal infrastructure of the CTTT and the IRC which has the potential to be utilised for a consolidated tribunal.

People in regional and rural New South Wales will be better served by a tribunal system that has the resources and capacity to operate and resolve disputes locally. Accordingly, the Committee

recommended that the NSW Government consolidate facilities (such as office space, registries, court and tribunal rooms) between tribunals and establish ‘one stop shops’, where appropriate, which will enable users in metropolitan and regional centres to have access to tribunal services through single points of contact. This will allow for the full utilisation of the facilities which already exist and the broadening of their use to the general public – thus further enhancing the public’s access to justice.

We have also made recommendations that relate to the provision of reasons for tribunal decisions, consolidating back-end services under one government department and developing user friendly forms and practices wherever possible.

Specific tribunals

The Committee was also specifically asked to review the operation of the CTTT. Overall, we believe that the CTTT is providing an effective avenue to have consumer disputes resolved in a relatively timely and effective manner. However, we acknowledge that there are some areas where improvements can be made by the tribunal including timeliness of finalising matters in certain divisions. We have made recommendations for the need to investigate ways to more accurately measure the quality of decision making in the tribunal and that consideration should be given to an internal appeals process. These issues should also be considered by the expert panel.

The Committee believes that the key factors that make particular tribunals effective, such as the Guardianship Tribunal, the Mental Health Review Tribunal, the IRC and the CTTT can be captured and drawn upon in any new consolidated tribunal. We believe it is important to have separate divisions within the consolidated tribunal which can focus on particular areas of law and draw on and implement specialist features of the existing tribunals. To ensure these issues are considered by the expert panel we have asked that it should consider stakeholder comments in relation to evidence on the specific tribunals received by the Committee. We have also recommended that the panel give consideration to the nature of the jurisdiction of existing tribunals and whether it is appropriate that their functions be exercised within a broader tribunal.

The Committee is keen to ensure that the issues raised by stakeholders regarding potential negative impacts of consolidation are not only minimised but avoided. To this end, we have recommended that the NSW Government review the effectiveness of the new consolidated tribunal model three years after the enabling legislation has come into effect.

It is hoped that with this approach the consolidation of tribunals will benefit people in their contact with the administrative justice system of New South Wales.

Summary of recommendations

Recommendation 1

29

That the NSW Government pursue the establishment of a new tribunal that consolidates existing tribunals, where it is appropriate and promotes access to justice. This does not preclude the possibility of further consolidation of existing jurisdictions within tribunals already in existence.

Recommendation 2

30

That the NSW Government appoint an expert panel consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders to pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, including preparation of a detailed plan on the method for consolidation and implementation.

Recommendation 3

30

That the expert panel consider the Committee's recommendations in this report, as well as the following issues raised during the inquiry:

- Consolidation of tribunals must ensure improved access to justice in conjunction with improved efficiencies, particularly in regional areas
- There must be equitable access to justice for all citizens
- Adequate resources must be allocated
- Lessons from other jurisdictions are considered
- The nature of the jurisdiction of existing tribunals and whether it is appropriate that their functions be exercised within a broader tribunal.

Recommendation 4

30

That the NSW Government review the effectiveness of a new consolidated tribunal model, its processes, procedures and service delivery, three years after the enabling legislation has come into effect.

Recommendation 5

35

That the NSW Government publish comprehensive, easy to understand documents explaining the processes and procedures in the consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal, including material directed to culturally and linguistically diverse communities.

Recommendation 6

35

That the NSW Government examines the possibility of providing more comprehensive and accessible online services such as online filing and fully accessible online court files for a consolidated tribunal.

Recommendation 7

38

That specialised lists or divisions be created within a consolidated tribunal to capture the skill and expertise of tribunal members and the flexibility of procedures that reflect the range of jurisdictions in any consolidated tribunal.

Recommendation 8

39

That tribunal members be given the opportunity to diversify their skills in various areas of law, through training and rotation among various jurisdictions within a consolidated tribunal.

- Recommendation 9** **39**
That any consolidated tribunal have a simple, user friendly standard set of forms that are able to be completed online.
- Recommendation 10** **39**
That any consolidated tribunal have user friendly practices and procedures.
- Recommendation 11** **39**
That any persons affected by an administrative tribunal decision be provided with reasons for that decision, to a quality and extent consistent with the issue in dispute.
- Recommendation 12** **41**
That an easy, timely and cost effective internal merit appeals mechanism, with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave, be established within any consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.
- Recommendation 13** **46**
That the NSW Government consolidate, wherever appropriate, facilities (including office space, registries, court and tribunal rooms) between tribunals and establish ‘one-stop-shops’ in metropolitan and regional centres to have access to tribunal services through single points of contact.
- Recommendation 14** **46**
That the NSW Government consolidate back-end services across tribunals under one government department, eliminating any undue duplication.
- Recommendation 15** **57**
That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal, the tribunal investigate ways to more accurately measure the quality of decision making in the tribunal.
- Recommendation 16** **63**
That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal, the NSW Government and the Consumer, Trader and Tenancy Tribunal consider establishing an internal appeals panel in the tribunal with an appropriate threshold.

Glossary

ACAT	Australian Capital Territory Civil and Administrative Tribunal
ADT	Administrative Decisions Tribunal
COAT	Council of Australasian Tribunals
CTTT	Consumer, Trader and Tenancy Tribunal
IRC	Industrial Relations Commission NSW
MHRT	Mental Health Review Tribunal
NCOSS	Council of Social Services of NSW
PIDT	Local Government Pecuniary Interest and Disciplinary Tribunal
QCAT	Queensland Civil and Administrative Tribunal
SOORT	Statutory and Other Offices Remuneration Tribunal
VCAT	Victorian Civil and Administrative Tribunal
VCT	Victims Compensation Tribunal
VLRC	Victorian Law Reform Commission
VTT	Vocational Training Tribunal
WA SAT	Western Australian Civil and Administrative Tribunal
WCC	Workers Compensation Commission

Chapter 1 Introduction

This chapter provides an overview of the establishment and conduct of the inquiry. The Committee's approach to its terms of reference are also set out. The chapter concludes with an outline of the structure of the report.

Establishment and conduct of the Inquiry

Terms of reference

- 1.1 The Inquiry's terms of reference were referred to the Committee by the Minister for Finance and Services, the Hon Greg Pearce MLC, NSW Attorney General, the Hon Greg Smith MP, and the Minister for Fair Trading, the Hon Anthony Roberts MP, on 14 October 2011. The terms of reference are reproduced on page iv.
- 1.2 Specifically, the terms of reference required the Committee to consider opportunities to reform, consolidate, or transfer functions between tribunals to increase efficiency and effectiveness. The terms of reference required the Committee to have regard for the recommendations made by the NSW Parliament Committee on the Ombudsman and Police Integrity Commission in 2002 on the merger of tribunals.²
- 1.3 In conjunction with the terms of reference, a Ministerial Issues Paper was provided to the Committee to give some background and context to the Inquiry. It also sets out options for consolidating tribunals in New South Wales for the Committee to consider. The Issues Paper is available on the Committee's website www.parliament.nsw.gov.au/lawandjustice.

Submissions

- 1.4 The Committee invited submissions through advertisements in *The Sydney Morning Herald*, *The Daily Telegraph* and *The Land* and by writing to a large number of relevant stakeholders. The closing date for submissions was 2 December 2011.
- 1.5 The Committee received 89 submissions and 8 supplementary submissions from a range of stakeholders including several tribunals, such as the Administrative Decisions Tribunal of NSW (ADT), the Consumer, Trader and Tenancy Tribunal (CTTT) and the Mental Health Review Tribunal (MHRT).
- 1.6 Submissions were also received from the legal sector including the NSW Bar Association, the Law Society of NSW, the NSW Society of Labor Lawyers and non government organisations such as the Council of Social Services of NSW and the Public Interest Advocacy Centre. Numerous employee associations including Unions NSW, NSW Nurses Association, Australian Workers Union, and the Public Sector Association also made submissions.

² NSW Parliament, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the jurisdiction and operation of the Administrative Decisions Tribunal*, November 2002, pp 56 – 58.

In addition, a number of individuals who have had varying experiences with tribunals in New South Wales, made submissions.

- 1.7 A list of submissions can be found in Appendix 1.

Hearings

- 1.8 The Committee held three public hearings during the course of its Inquiry. The hearings were held at Parliament House on 15 and 16 December 2011 and 23 January 2012.
- 1.9 The Committee received evidence from a number of stakeholders including tribunals such as the ADT, the CTTT, the Workers Compensation Commission, the MHRT, the Guardianship Tribunal and the NSW Nursing and Midwifery Tribunal.
- 1.10 Along with legal organisations, such as the NSW Bar Association and the NSW Law Society, representations from users of the tribunal system in New South Wales were made by the Redfern Legal Centre, the Tenants Union of NSW, the Motor Traders Association, the Affiliated Residential Park Residents Association and the Retirement Village Residents Association. Employee associations including Unions NSW and the Public Sector Association also gave evidence.
- 1.11 A full list of witnesses is provided at Appendix 2.

Roundtable discussion

- 1.12 A roundtable discussion was held on 18 November 2011, where members of the Committee met with Justice John Chaney, President of the Western Australia State Administrative Tribunal, and Ms Linda Crebbin, President of the Australian Capital Territory Civil and Administrative Tribunal. The discussion focused on the process of consolidation of tribunals in their relevant jurisdictions. The transcript is available on the Committee's website.

Site visits

- 1.13 The Committee undertook two site visits. On 19 January 2012, the Committee visited the CTTT to view the proceedings of that tribunal. The Committee met with key personnel from the tribunal, including Ms Kay Ransome, Chairperson and Mr Garry Wilson, Deputy Chairperson, and observed hearings on a range of matters.
- 1.14 On 24 January 2012, the Committee visited the Victorian Civil and Administrative Tribunal (VCAT) to gain an understanding of how a large super tribunal operates in another jurisdiction. The Committee met with Justice Iain Ross, President, and Mr Andrew Tenni, Chief Executive Officer of VCAT, along with other senior members of the tribunal. The Committee also observed proceedings of the tribunal. In addition, the Committee briefly visited with the Law Institute of Victoria to discuss the strengths and weaknesses of VCAT and its implementation from a practitioner perspective.
- 1.15 Site visit reports can be found at Appendix 3 and 4.

Committee's approach to the terms of reference

- 1.16** This report presents stakeholder views on consolidating tribunals generally and in response to the options outlined in the Issues Paper. The report also highlights lessons that New South Wales can learn from other jurisdictions that have consolidated tribunals. The report does not provide an exhaustive and definitive list of which tribunals in New South Wales should or should not be consolidated, nor does it set out a detailed implementation plan for any consolidation that may occur.
- 1.17** The Committee sought the views of inquiry participants on what overarching principles should guide the Committee in its analysis and in the Government's future work on consolidating tribunals. An overwhelming number of participants indicated that ensuring access to justice for tribunal users was a more important goal than delivering cost efficiencies³, with which the Committee agrees.

Structure of report

- 1.18** This report is comprised of six chapters. Chapter 1 provides an overview of the conduct of the Inquiry and the Committee's approach to the terms of reference.
- 1.19** Chapter 2 outlines the current tribunal system in New South Wales and in other jurisdictions in Australia. It also provides a brief history of consolidating tribunals in Australia. A number of key tribunals currently operating in New South Wales are also outlined.
- 1.20** In Chapter 3, potential models for consolidating tribunals are considered. In particular, the options set out in the Ministerial Issues Paper are outlined and stakeholder views on these options are canvassed. Some inquiry participants also provided alternative proposals for consolidation and these are presented in this chapter. Benefits of considering consolidation of tribunals generally are also considered.
- 1.21** Chapter 4 considers the overarching principles for reform in the area of administrative justice in New South Wales. The key principle of ensuring access to justice for all tribunal users through a consolidated tribunal is explored. Other key principles, including the need for adequate resourcing and an internal appeals process are highlighted.
- 1.22** Chapter 5 examines the role and operation of the CTTT. Stakeholder's views are presented on whether this tribunal is providing a fast, informal and flexible process for resolving consumer disputes. Also the issue of improving the current complex appeals processes for CTTT decisions is discussed.
- 1.23** Chapter 6 outlines a number of issues stakeholders raised in relation to the IRC. Issues such as the changing workload of the Commission along with its key role in the Fair Work Australia domain are discussed.

³ Submission 14, Council of Social Services NSW (NCOSS), p 1; Submission 12, Affiliated Residential Park Residents Association Inc, p 1; Submission 67, Hon Paul Lynch MP, p 3; Ms Alison Peters, Executive Officer, NCOSS, Evidence, 15 December 2011, p 28; Ms Jane Needham, Junior Vice President, NSW Bar Association, Evidence, 16 December 2011, p 12.

- 1.24** Chapter 7 highlights a number of issues inquiry participants raised in evidence regarding the current strengths of the Guardianship Tribunal and also the importance of the Mental Health Review Tribunal.

Chapter 2 Tribunals in New South Wales

This chapter comments on the role of tribunals in the justice system. The current tribunal system in New South Wales and in other jurisdictions in Australia is outlined. A brief description of the key tribunals operating in New South Wales is also provided.

What is a tribunal and why do we have them?

2.1 While there is no statutory definition of the term ‘tribunal’, in Australia the term is used to describe a wide range of boards and institutions fulfilling one or more of the following three functions:

- reviewing administrative decisions or the executive decisions of government
- making original administrative decisions and/or
- resolving disputes in areas including consumer trading, tenancy and similar matters.⁴

2.2 One way to define a tribunal is to distinguish it from a court. The Council of Australasian Tribunals (COAT) describes a tribunal as:

...any Commonwealth, State, Territory or New Zealand body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court.⁵

2.3 Simply calling yourself a tribunal is not sufficient, according to Judge Kevin O’Connor, President of the Administrative Decisions Tribunal (ADT) in *N v Director General of the Attorney General’s Department*:

It is possible of course that a body might be called a ‘Tribunal’ but on closer examination of its statutory framework and mode of operation be found not to be a tribunal in the sense in which the term is normally used; and conversely, a body might not have the name ‘Tribunal’ or ‘Court’ but be found on closer examination to be capable of being so described. For instance, bodies with names such as ‘Board’ or ‘Commission’ often are given quasi-judicial functions; and would for the purposes of the FOI Act, constitute a ‘court’ or ‘tribunal’.⁶

⁴ Carnwarth *et al* ‘An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom’ in Creyke R (ed), *Tribunals in the Common Law World*, Sydney, Federation Press, 2008, p 2.

⁵ Council of Australasian Tribunals (COAT), accessed 14 February 2012, <www.coat.gov.au/sites/default/files/files/COAT_constitution%20_23_november_2011.pdf>, *Constitution of the Council of Australasian Tribunals*. The COAT facilitates liaison and discussion between the heads of tribunals in Australia and New Zealand.

⁶ *N v Director General of the Attorney General’s Department* [2002] NSWADT 33 at 15.

- 2.4** Judge O'Connor identified some key features of a tribunal, which he described as analogous to a court but with less formality and which may have special procedures and members that may differ in qualifications and expertise from judges. In his view a tribunal must also:
- be impartial and detached from the ordinary processes of executive government
 - have a defined jurisdiction
 - receive claims or applications
 - determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof
 - use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law
 - make a final order that is binding.⁷
- 2.5** Ms Kay Ransome, Chairperson of the Consumer, Trader and Tenancy Tribunal (CTTT) highlighted important characteristics of tribunals, which she described as:
- an alternative or adjunct to the courts
 - intended to be low cost, both to parties and the State
 - deliver justice in a timely way
 - accessible, and have a simple application processes that do not require legal representation
 - provide some form of assistance to help people through their processes
 - have informal processes and do not apply the rules of evidence.⁸
- 2.6** Tribunals generally operate as a quicker, cheaper alternative to courts in relation to a range of civil matters (tribunals in Australia do not have criminal jurisdiction). According to Judge O'Connor, tribunals have been established in Australia to address concerns about the 'cost, expense, formality and technicality of the court system.'⁹
- 2.7** Further to this, Judge O'Connor explained that the statutes creating tribunals usually require them to be just, quick, efficient and cheap without regard to technicalities and legal forms. They may determine their own procedures and typically are not bound by the rules of evidence.¹⁰
- 2.8** Judge O'Connor contrasted this with the court system where they apply the rules of evidence, make final orders that are enforced by a court officer, and in civil disputes the loser pays the winner's costs as assessed.¹¹

⁷ *N v Director General of the Attorney General's Department* [2002] NSWADT 33 at 15.

⁸ Ms Kay Ransome, Chairperson, Consumer, Trader and Tenancy Tribunal, Evidence, 15 December 2011, p 41.

⁹ Answers to supplementary questions, 15 December 2011, Judge Kevin O'Connor, President, Administrative Decisions Tribunal, Question 1, p 3.

¹⁰ Answers to supplementary questions, 15 December 2011, Judge O'Connor, Question 1, p 3.

¹¹ Answers to supplementary questions, 15 December 2011, Judge O'Connor, Question 1, p 4.

2.9 As described by the NSW Bar Association, the tribunals operating in New South Wales exercise a range of distinct functions, which should be considered in any proposals to consolidate them. The range of functions include:

- administrative review of original decisions (ADT)
- adjudication of individual private rights in respect of commercial matters (CTTI), equal opportunity (ADT), industrial rights (IRC)¹²
- exercise of original jurisdiction in respect of disciplinary matters (ADT, Medical Council and other health professional tribunals)
- conciliation and arbitration of collective industrial rights (IRC).¹³

Tribunals in New South Wales

2.10 Currently, there is a range of tribunals operating in New South Wales. The larger or more commonly know, tribunals include the CTTI, ADT and the Industrial Relations Commission (IRC). There is also a number of other tribunals, including the:

- Workers Compensation Commission
- Guardianship Tribunal
- Mental Health Review Tribunal
- Local Government Remuneration Tribunal
- Statutory and Other Offices Remuneration Tribunal
- Parliamentary Remuneration Tribunal
- Victims Compensation Tribunal
- Anti-Discrimination Board
- Local Government Pecuniary Interest Tribunal
- Vocational Training Tribunal
- Local Land Boards.¹⁴

2.11 There are also specific health professional disciplinary tribunals functioning in New South Wales including the:

- Medical Tribunal
- Nursing and Midwifery Tribunal
- Chiropractors Tribunal

¹² The adjudication of private rights could also include matters heard by the Guardianship Tribunal and the Mental Health Review Tribunal.

¹³ Submission 40, NSW Bar Association, para 3.

¹⁴ This list is drawn primarily from the Ministerial Issues Paper (pp 2 and 6), and from submissions made by the relevant tribunals or their administrative bodies.

- Dental Tribunal
- Optometry Tribunal
- Osteopathy Tribunal
- Pharmacy Tribunal
- Physiotherapy Tribunal
- Podiatry Tribunal
- Psychology Tribunal.¹⁵

2.12 There is a brief outline of some of the key tribunals operating in New South Wales at the end of this chapter.

History of consolidating tribunals in Australia

2.13 Over the past few decades, various jurisdictions in Australia have been grappling with whether and to what extent they should consolidate their tribunals. The Australian Government pioneered the ‘super tribunal’ in 1976, by creating the Administrative Appeals Tribunal where the majority of review rights against government agency decisions are exercised.¹⁶

2.14 Jurisdictions such as Victoria, Western Australia, the Australian Capital Territory and most recently Queensland have established variations on the concept of the consolidated tribunal – attempting to group together matters that could be dealt with under one large consolidated tribunal. These tribunals are outlined later in this chapter.

2.15 The idea of consolidating tribunals is not new to New South Wales. The ADT advised the Committee that its establishment in 1998 was considered at the time to be the first stage of a plan that would lead to a super tribunal.¹⁷ In 2002, the NSW Parliament’s Committee on the Office of the Ombudsman and the Police Integrity Commission conducted a review of the operation and jurisdiction of the ADT and recommended that the tribunal’s jurisdiction required further consolidation.¹⁸ However, this did not eventuate.

2.16 Similarly, the creation of the CTTT in 2002 was another step along the road to consolidation, bringing together separate residential and fair trading tribunals in New South Wales.¹⁹ More recently, the Government and Related Employee Appeal Tribunal and the Transport Appeals Board were merged into the IRC in 2010.²⁰

¹⁵ Ministerial Issues Paper, p 6.

¹⁶ Carnwarth *et al* ‘An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom’ in Creyke R (ed), *Tribunals in the Common Law World*, Sydney, Federation Press, 2008, p 1.

¹⁷ Submission 38, Administrative Decisions Tribunal, p 1.

¹⁸ NSW Parliament Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal*, p iii.

¹⁹ Submission 43, Consumer, Trader and Tenancy Tribunal, p 15.

²⁰ Ministerial Issues Paper, p3

Tribunals in other Australian jurisdictions

2.17 Most other Australian jurisdictions have established some sort of super tribunal. However, the matters which are covered by each jurisdiction's tribunal differ, as do appeal processes and leadership structure.

Victorian Civil and Administrative Tribunal

2.18 After releasing a consultation paper entitled *Tribunals in the Department of Justice: A Principled Approach* in 1996, and then engaging in community consultation, the Victorian Government undertook to consolidate tribunals. The Victorian Civil and Administrative Tribunal (VCAT) commenced operation in July 1998, under the *Victorian Civil and Administrative Tribunal Act 1998*, after more than a year of planning.²¹

2.19 The establishment of VCAT consolidated 15 boards and tribunals in Victoria. The jurisdiction of the tribunal includes (but is not limited to) guardianship, discrimination, residential tenancies, consumer matters, legal services, domestic building, review of administrative decisions, and the review of mental health decisions.²²

2.20 The tribunal is headed by a Supreme Court Judge, Justice Iain Ross. In 2010-2011 VCAT finalised over 86,000 matters.²³

2.21 After ten years of operation a review of VCAT was undertaken by the then president of VCAT, Justice Kevin Bell, at the request of the Attorney General. The review focussed on access, operational and jurisdictional issues. The review found that the tribunal had generally succeeded in its mission, but that some change was needed. Justice Bell made 78 recommendations about the operation of the tribunal. Key themes in the review included improving access to justice for people outside of Melbourne and improving quality and consistency of tribunal decision making, including establishing an internal appeals tribunal.²⁴

2.22 The Committee visited VCAT to observe a super tribunal in operation and met with the President, Justice Iain Ross and the Chief Executive Officer, Andrew Tenni, to discuss the Victorian experience of tribunal consolidation. The full site visit report can be found at Appendix 4.

Western Australian State Administrative Tribunal

2.23 In 1999 the Western Australia Law Reform Commission published its *Review into the Criminal and Civil Justice System in Western Australia*.²⁵ The Review had taken two years to complete and

²¹ Victorian Civil and Administrative Tribunal (VCAT), *Annual Report. Inaugural 1998-1999* (1999) p 8.

²² VCAT, *Annual Report 2010-2011* p 2.

²³ VCAT, *Annual Report 2010-2011* p 5.

²⁴ Hon Justice Kevin Bell, *One VCAT: President's Review of VCAT*, 2009, p 1.

²⁵ Western Australia Civil and Administrative Tribunal Taskforce, *Taskforce Report on the Establishment of a State Administrative Tribunal*, May 2002, p iii.

made 447 recommendations, 26 of which related to the establishment of a Western Australian civil and administrative tribunal.²⁶

- 2.24** In March 2001, the Western Australian Attorney-General established a Taskforce to develop a model civil and administrative review tribunal. The Taskforce comprised senior legal professionals, reported in May 2002 and provided a framework for the establishment of the State Administrative Tribunal (SAT).²⁷
- 2.25** The SAT commenced operation in 2005 under the *State Administrative Tribunal Act 2004 (WA)*. The tribunal has a broad jurisdiction over a range of matters including guardianship, discrimination, review of mental health decisions and child protection decisions, vocational regulation, building disputes, planning review and strata title disputes.²⁸
- 2.26** The tribunal is headed by a Supreme Court Judge, Justice John Cheney. In 2010-2011 SAT finalised over 6,300 matters.²⁹
- 2.27** The Western Australian Legislative Council Standing Committee on Legislation conducted an Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal. It reported in May 2009 and made 60 recommendations which mostly related to improving the operation of the SAT through the clarification of ambiguities, the removal of redundant provisions and improving efficiencies. The Committee found that overall ‘the SAT is meeting its objectives and achieving its self-imposed benchmarks’.³⁰

Australian Capital Territory Civil and Administrative Tribunal

- 2.28** In 2007, the Australian Capital Territory (ACT) Department of Justice and Community Safety (as it was then) released a discussion paper entitled *Options for Reform of the Structure of ACT Tribunals*. The discussion paper outlined a number of options for reform and sought stakeholders’ views.³¹
- 2.29** Unlike Western Australia and Queensland, the ACT Government did not establish an external panel to develop recommendations for reform and instead conducted an in-house evaluation of what should be done. As a result, the ACT Civil and Administrative Tribunal (ACAT)

²⁶ Western Australia Law Reform Commission, *Review into the Criminal and Civil Justice System in Western Australia*, Report 92, 1999, pp 388 – 391.

²⁷ Western Australia Legislative Council, Standing Committee on Legislation, *Inquiry Into the Jurisdiction and Operation of the State Administrative Tribunal*, Report 14, May 2009, p 1.

²⁸ Justice John Chaney, President, Western Australia State Administrative Tribunal, Evidence, 18 November 2011, pp 1-2 and Western Australia State Administrative Tribunal (WA SAT), *Annual Report 2010-2011*, pp 9 - 17.

²⁹ WA SAT, *Annual Report 2010-2011* p 8.

³⁰ Western Australia Legislative Council, Standing Committee on Legislation, Report 14, May 2009, p i.

³¹ ACT Department of Justice and Community Safety, *Options for Reform of the Structure of ACT Tribunals*, 2007.

commenced operation on 2 February 2009 under the *ACT Civil and Administrative Tribunal Act 2008*.³²

- 2.30** The ACAT has jurisdiction over a range of matters including guardianship, mental health, residential tenancy, liquor licensing, disciplinary matters for health and legal practitioners, review of administrative decisions, discrimination and small civil disputes.³³
- 2.31** The tribunal is not headed by a judicial member. The current President is Ms Linda Crebbin.³⁴ In 2010-2011 ACAT finalised over 8,000 matters.³⁵

Queensland Civil and Administrative Tribunal

- 2.32** In March 2008, in its report entitled *The Accessibility of Administrative Justice*, the Legal, Constitution and Administrative Review Committee of the Queensland Legislative Assembly recommended the establishment of a general administrative tribunal. The Committee report had taken over two years to complete, although it was interrupted by the state election and prorogation.³⁶ Following the release of the report, the government appointed an expert panel to provide advice on creating this new tribunal.³⁷
- 2.33** The Act establishing the Queensland Civil and Administrative Tribunal (QCAT) implemented the recommendations of the expert panel. QCAT commenced operation on 1 December 2009 under the *Queensland Civil and Administrative Tribunal Act 2009*.³⁸
- 2.34** The establishment of QCAT amalgamated 18 tribunals with jurisdiction over hundreds of matters, including guardianship, building disputes, anti-discrimination, consumer and trader disputes, debt disputes, child protection matters, minor civil disputes, occupational regulation, residential tenancy disputes and the review of administrative decisions.³⁹
- 2.35** The tribunal is headed by a Supreme Court Judge, Justice Alan Wilson.⁴⁰ In the year 2010-2011 QCAT finalised over 27,000 matters.⁴¹
- 2.36** A review of QCAT is planned for 2012, in accordance with the section 240 of the *Queensland Civil and Administrative Tribunal Act 2009*.⁴²

³² Ms Linda Crebbin, President, ACT Civil and Administrative Tribunal, Evidence, 18 November 2011, p 3.

³³ Ms Crebbin, Evidence, 18 November 2011, p 2.

³⁴ Ms Crebbin, Evidence, 18 November 2011, p 6

³⁵ ACT Civil and Administrative Tribunal, *Annual Report 2010-2011*, p 256.

³⁶ Queensland Legislative Assembly, Legal, Constitution and Administrative Review Committee, *The Accessibility of Administrative Justice*, March 2008.

³⁷ *Qld LA Debates* (19/5/2009) 351.

³⁸ *Qld LA Debates* (19/5/2009) 351.

³⁹ Justice Alan Wilson, President, Queensland Civil and Administrative Tribunal (QCAT), Evidence, 23 January 2012, p 53 and *Queensland Civil and Administrative Tribunal Act 2009*, s 240.

⁴⁰ QCAT, accessed 1 February, 2012, <www.qcat.qld.gov.au/about-qcat/organisational-structure>

⁴¹ QCAT, *Annual Report 2010-2011*, p 12.

⁴² Justice Wilson, Evidence, 23 January 2012, p 53

Other Australian jurisdictions

- 2.37** South Australia, Tasmania and the Northern Territory do not have consolidated tribunals. These jurisdictions each have a number of separate specialist tribunals.
- 2.38** However, in August 2011, the South Australian Government appointed a steering committee to explore the feasibility and desirability of establishing a generalist one stop shop tribunal for the state.⁴³ No further information has been released publicly.

United Kingdom

- 2.39** A few inquiry participants suggested that the Committee consider the approach taken in the United Kingdom (UK), a consolidated tribunal registry system as opposed to one large consolidated tribunal. Before consolidation, there were over 70 different tribunals in England and Wales, handling almost one million cases a year.⁴⁴ The need to reform the tribunals system was initially recommended in a 2001 report entitled *Tribunals for Users – One system One Service*, which recommended a single tribunal system to be administered by a new agency.⁴⁵
- 2.40** As a result, the UK Tribunal Service was implemented. It has a two tiered system. The First-tier Tribunal hears social entitlement, war pensions, general regulatory, tax, immigration and asylum matters. The Upper Tribunal primarily, but not exclusively, reviews and decides appeals arising from the First-tier Tribunal.⁴⁶ However, the UK Tribunal Service was later merged with Her Majesty's Courts to become Her Majesty's Courts and Tribunals Service.⁴⁷
- 2.41** Some stakeholders suggested that the UK experience of consolidating the registry system of tribunals involved a different and much larger setting to that in New South Wales.⁴⁸

Key tribunals in New South Wales

- 2.42** This section will briefly outline some of the key tribunals operating in New South Wales including the IRC, ADT, CTTT, health disciplinary tribunals, Workers Compensation Commission, Guardianship Tribunal and the Mental Health Review Tribunal.

⁴³ The Hon Tony Piccolo MP, Member for Light, South Australia, Media Release, *Piccolo leads people's court inquiry*, 29 August 2011.

⁴⁴ Carnwarth *et al* 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Creyke R (ed), *Tribunals in the Common Law World*, Sydney, Federation Press, 2008, pp 1-26, p 19.

⁴⁵ Carnwarth *et al* 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Creyke R (ed), *Tribunals in the Common Law World*, Sydney, Federation Press, 2008, pp 1-26, p 21.

⁴⁶ UK Tribunal Service, accessed 30 January 2012, <webarchive.nationalarchives.gov.uk/20110207135458/http://www.tribunals.gov.uk/Tribunals/About/about.htm>

⁴⁷ Her Majesty's Courts and Tribunals Service, *Business Plan 2011-2015*, p 4.

⁴⁸ Ms Ransome, Evidence, 15 December 2011, p 47.

Industrial Relations Commission

- 2.43** The IRC was established by the *Industrial Relations Act 1996*. The Commission has conciliation and arbitration functions to resolve industrial disputes and it also decides claims of unfair dismissal. It sets conditions of employment including in relation to wages, salaries, industrial awards and industrial agreements.⁴⁹
- 2.44** The IRC is essentially made up of a court and a tribunal. When the IRC sits as the Industrial Court it is a superior court of record with equivalent status to the NSW Supreme Court. Judicial officers have a range of responsibilities including hearing disputes and making awards. When sitting as the Commission the IRC performs conciliation and arbitration functions. In its non-judicial capacity the members deal mostly with public sector and transport promotion and disciplinary appeals as well as, to a lesser extent, unfair dismissal claims and industrial disputes, including contract of carriage matters. Commission decisions can be appealed to the Industrial Court.⁵⁰
- 2.45** The IRC is presently comprised of seven judges, six commissioners and two non-judicial Deputy Presidents. A number of the judges of the Industrial Court are also appointed to other tribunals.⁵¹
- 2.46** In 2011, there were 3,460 filings in the IRC and the Commission anticipates a slight decrease in total filings in 2012 to 3,245 and in 2013 to 3,010. The average case load in per full time equivalent (FTE) tribunal member in 2011 was 245 cases. The IRC calculates that this will increase to 304 and 388 cases in 2012 and 2013 respectively. The predicted increase in caseload is partly due to an anticipated decrease in the number of FTE members, which is expected to decrease from 14.5 in 2011 to 11 in 2012 and 8 in 2013.⁵²

Administrative Decisions Tribunal

- 2.47** The primary function of the ADT is to review decisions made by public administrators, including decisions that relate to licensing people to undertake a particular occupation and decisions about freedom of information requests.⁵³
- 2.48** The ADT exercises both original jurisdiction and review jurisdiction. This means that for some matters, it can be the first court or tribunal that hears a particular case, and for others, it might review a decision that has already been made. In its original jurisdiction, the ADT has

⁴⁹ Correspondence from Justice Roger Boland, President, Industrial Relations Commission to Chair 17 January 2012.

⁵⁰ Correspondence from Justice Roger Boland, President, Industrial Relations Commission to Chair 17 January 2012.

⁵¹ Correspondence from Justice Roger Boland, President, Industrial Relations Commission to Chair 17 January 2012.

⁵² Correspondence from Justice Roger Boland, President, Industrial Relations Commission to Chair 17 January 2012. More information on the IRC is in Chapter 6.

⁵³ Administrative Decisions Tribunal, 'Welcome to the Administrative Decisions Tribunal', accessed 10 February 2012 <<http://www.lawlink.nsw.gov.au/adt>>

six Divisions: General, Community Services, Revenue, Legal Services, Equal Opportunity and Retail Leases. Each Division of the ADT specialises in reviewing different types of decisions.⁵⁴

- 2.49 In the 2010-11 financial year, the ADT had 934 filings, including 864 first instance matters and 70 appeal matters.⁵⁵

Consumer, Trader and Tenancy Tribunal

- 2.50 Established in 2002, the CTTT is an independent, specialist dispute resolution forum for consumer, trader and tenancy matters. It took over the roles previously held by the Residential and Fair Trading Tribunals.⁵⁶

- 2.51 The powers, functions and procedures of the tribunal are set out in the *Consumer, Trader and Tenancy Tribunal Act 2001* and the *Consumer, Trader and Tenancy Regulation 2009*.

- 2.52 There are 15 pieces of legislation that give the CTTT jurisdiction to resolve disputes. Primarily, they involve disputes about the supply of goods and services and issues relating to residential and other property. Accordingly, the CTTT has nine divisions to deal with the varying disputes, being Tenancy, Social Housing, Home Building, General, Residential Parks, Strata and Community Schemes, Motor Vehicles, Commercial, and Retirement Villages.⁵⁷

- 2.53 The CTTT receives approximately 60,000 applications a year.⁵⁸

Workers Compensation Commission

- 2.54 The Workers Compensation Commission (WCC) is an independent statutory tribunal that resolves disputes between injured employees and their employers over workers compensation claims. It has been in operation since January 2002, having replaced the former Workers' Compensation Court.⁵⁹

- 2.55 The WCC consists of a President, two Deputy Presidents, two Acting Deputy Presidents, the Registrar, three fulltime senior arbitrators, 15 fulltime equivalent arbitrators, and 18 sessional arbitrators. The members of the WCC are appointed by the NSW Attorney General.⁶⁰ There are also 140 Approved Medical Specialists appointed to the Commission who are experienced medical professionals from a range of specialisations.⁶¹

- 2.56 The WCC hears approximately 12,000 cases per year and has a budget of just under \$30 million. In 2010, 11,592 matters were filed, with the bulk of these being applications to resolve

⁵⁴ Administrative Decisions Tribunal, 'About Us', accessed 13 January 2012, <http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_aboutus>.

⁵⁵ Submission 38, Administrative Decisions Tribunal, p 1.

⁵⁶ Submission 43, Consumer, Trader and Tenancy Tribunal (CTTT), p 15.

⁵⁷ Submission 43, p 15. More information regarding the CTTT can be found in Chapter 5.

⁵⁸ Submission 43, p 4.

⁵⁹ Submission 13, Workers Compensation Commission, p 4.

⁶⁰ Submission 13, p 25.

⁶¹ Submission 13, p 27.

a dispute (8,921) and the remainder being mediations, expedited assessments, workplace injury management disputes, registration for assessment of costs, commutations and redemptions, medical appeals and arbitral appeals.⁶²

Health disciplinary tribunals

- 2.57** The role of professional disciplinary jurisdictions is to conduct inquiries into serious complaints referred to them about the conduct or impairment of people in their professional capacity.⁶³
- 2.58** There are ten health professional disciplinary tribunals in New South Wales. Nine of these are housed at one location and share administrative staff and the tenth, the Medical Tribunal, is located within the NSW District Court.⁶⁴ Each tribunal relates to a specialist health profession as listed earlier in this chapter.
- 2.59** The work of each tribunal is underpinned by a corresponding Council. Each Council deals with complaints regarding the conduct of registered health professionals.⁶⁵ These functions are undertaken in conjunction with the Health Care Complaints Commission. Each health professional council is also supported by the work of the Health Professional Councils Authority.⁶⁶
- 2.60** The most serious complaints about individual conduct will often end up being referred to the relevant health professional tribunal for resolution. The fundamental role of health professional tribunals is to protect the public, and in so doing to maintain proper professional standards and ‘to protect the good standing and reputation of the various health professions.’⁶⁷
- 2.61** Each tribunal is made up of four members.⁶⁸ The Medical Tribunal is the only health professional tribunal that requires a judge of the District or Supreme Court⁶⁹ to undertake the role of Chairperson or Deputy Chairperson of that tribunal.⁷⁰

⁶² Submission 13, p 28.

⁶³ Submission 83, NSW Pharmacy Tribunal, p 2.

⁶⁴ Submission 42, Health Professionals Councils Authority, p 2.

⁶⁵ *Health Practitioner Regulation National Law* s 41B.

⁶⁶ Australian Health Practitioner Regulation Agency, accessed 7 February 2012, <http://www.ahpra.gov.au/~link.aspx?_id=90FBC359ACDF41C89B428CD5CE6F8751&_z=z>; Submission 42, Health Professional Councils Authority, p 1. The *Health Practitioner Regulation (Adoption of National Law) Act 2009* gave effect in NSW to the National Registration Scheme for practitioners. On 1 July 2010, the *Health Practitioner Regulation National Law (New South Wales) No 86a* commenced and introduced the nationally consistent regulation of the ten health professions mentioned above.

⁶⁷ Submission 83, p 2; Submission 42, p 3, Submission 73, Australian Medical Association (NSW), p 3.

⁶⁸ Submission 54, Mr Nick O’Neill, President of the Nursing and Midwifery Tribunal, p 4.

⁶⁹ Or a judge of the same standing as a judge of the Supreme Court: *Health Practitioner Regulation National Law*, s 165B(10).

⁷⁰ *Health Practitioner Regulation National Law*, s 165B(10).

2.62 In recent years there has been a steady increase in the number of complaints received by the Councils in relation to health professionals.⁷¹ Consequentially, the health professional tribunals have experienced an increase in the number of matters filed.⁷² The Committee was not given a breakdown of the volume of matters filed for each health professional tribunal, however, the Nursing and Midwifery Tribunal submitted that it is the ‘busiest’ and in 2011, 35 matters were commenced in its jurisdiction.⁷³

Guardianship Tribunal

2.63 The NSW Guardianship Tribunal is a specialist tribunal for people with disabilities.⁷⁴ The tribunal determines the appointment of guardians and financial managers for people who are incapable of making their own decisions regarding, in particular, their health care, finances and living arrangements.⁷⁵

2.64 About 50 per cent of all applications to the Guardianship Tribunal are for people with dementia, 11 per cent concern people who have intellectual disability and 9 per cent relate to people with mental illness. The remaining applications are for people with a range of disabilities that might affect their capacity to make decisions. These include people with brain injury or eating disorders, or people who have had strokes.⁷⁶

2.65 Proceedings are not adversarial and legal representation is permissible only when leave has been sought and granted. The tribunal is required by its establishing legislation to ensure that hearings are as informal as possible with limited legal technicality as the case permits.⁷⁷

2.66 In 2010-11 the tribunal received 6,336 new applications, conducted 5,727 hearings concerning 5,651 people with decision making disabilities and finalized 8,963 matters.⁷⁸

Mental Health Review Tribunal

2.67 The Mental Health Review Tribunal (MHRT) is a quasi-judicial body constituted under the *Mental Health Act 2007* and also operates under the *Mental Health (Forensic Provisions) Act 1990*. The legislation empowers the tribunal to consider matters related to the treatment and care of people with mental illness. The role of the MHRT includes the conduct of inquiries, to make and amend orders, and to hear some appeals.⁷⁹

⁷¹ Submission 42, p 4.

⁷² Submission 42, p 4.

⁷³ Submission 54, pp 5-6.

⁷⁴ Established by the *Guardianship Act 1987*.

⁷⁵ Mr Malcolm Schyvens, President, Guardianship Tribunal, Evidence 23 January 2012, p 2; Answers to questions on notice taken during evidence 23 January 2012, Mr Malcolm Schyvens, President, Guardianship Tribunal, Question 1, p 1.

⁷⁶ Mr Schyvens, Evidence 23 January 2012, p 2.

⁷⁷ *Guardianship Act 1987*, s 55(1).

⁷⁸ Guardianship Tribunal, *Annual Report 2010/11* (2011) p 40.

⁷⁹ Submission 52, Mental Health Review Tribunal, p 6.

- 2.68** Under the *Mental Health Act 2007*, the tribunal considers cases of involuntary and long-term voluntary psychiatric patients, and applications for certain kinds of treatments such as electroconvulsive therapy and surgery.⁸⁰
- 2.69** Under the *Mental Health (Forensic Provisions) Act 1990*, the MHRT considers the treatment, care and detention of forensic and correctional patients.⁸¹
- 2.70** Further legislative amendments occurred in 2009 with the effect of referring all ‘mental health inquiries’ to the MHRT. The MHRT is now required to undertake assessments of people who have been determined by at least two medical officers to be mentally ill.⁸²
- 2.71** For those patients who are living in the community, the MHRT makes community treatment orders. These stipulate the terms of a person’s treatment including their medication, counselling and other services in accordance with a tailored treatment plan.⁸³
- 2.72** In 2010-11, the MHRT conducted more than 13,283 hearings made up of 12,413 civil reviews and 870 forensic reviews.⁸⁴

Committee comment

- 2.73** The Committee believes that tribunals are an integral part of the New South Wales justice system that offer a low cost and timely recourse for a variety of civil disputes. There are a number of decision making bodies within New South Wales that could quite easily sit within this broad tribunal definition.
- 2.74** In determining which tribunals to consider as part of this Inquiry, the Committee has been guided by the terms of reference, which specifically refer to the IRC, CITT, health professional tribunals and the ADT. The Committee has also been guided by the Ministerial Issues Paper, which proposes the Guardianship Tribunal, the MHRT, Vocational Education Tribunal and Local Government Pecuniary Interests Tribunal and the WCC to be considered for consolidation.⁸⁵ The Committee has also received evidence relating to the Local Lands Boards and the Victims of Crime Tribunal. Although some of these tribunals are not considered in detail in this report, the Committee urges the NSW Government and expert panel recommended by the Committee (see Recommendation 2) to give consideration to all the evidence relating to specific tribunals received by the Committee as part of its Inquiry.
- 2.75** The Committee acknowledges that the NSW Government’s move towards consolidating tribunals in New South Wales is consistent with the move in many Australian jurisdictions towards consolidating civil and administrative tribunals, albeit with each jurisdiction tailoring

⁸⁰ Submission 52, p 6.

⁸¹ Submission 52, p 8; and Mental Health Review Tribunal, accessed 28 January 2012 <<http://www.mhrt.nsw.gov.au/tribunal/index.htm>>.

⁸² *Mental Health Act 2007*, s 27.

⁸³ Mental Health Review Tribunal, *Annual Report 2010-11*, p 8.

⁸⁴ Submission 52, p 6.

⁸⁵ Ministerial Issues Paper, p 10

the functions of its consolidated tribunal to particular matter types, appeal processes and membership to suit its needs.

Chapter 3 Options for consolidation

This chapter will outline the possible models for consolidating tribunals in New South Wales. The options provided in the Ministerial Issues Paper will be presented and stakeholder comments on these options canvassed. Alternative options put forward by inquiry participants will also be discussed as well as stakeholder views on consolidation generally.

Options in the Ministerial Issues Paper

3.1 The Committee was presented with a Ministerial Issues Paper (hereafter referred to as the Issues Paper) to provide background and assist in identifying some of the options for consolidating tribunals in New South Wales. The Issues Paper also outlined some advantages and disadvantages of each of the options.

Option 1 – Employment and Professional Services Commission

3.2 This option involves establishing an Employment and Professional Services Commission by renaming the Industrial Relations Commission (IRC) and transferring functions from:

- the Administrative Decisions Tribunal (ADT), including the Anti-Discrimination Division and professional discipline functions in relation to lawyers; and
- health professional disciplinary tribunals, including the medical tribunal.⁸⁶

3.3 This option focuses on the operation and future efficiency of the IRC, without looking at broader opportunities to consolidate other tribunals in New South Wales.⁸⁷

3.4 Advantages of this approach, as set out in the Issues Paper, include:

- greater flexibility in the allocation of workloads and resources across the different jurisdictions;
- the capacity to take advantage of economies of scale, efficiencies and cross-fertilisation through training programs
- capacity to draw on ‘best of breed’ practices across the different jurisdictions
- members are able to broaden experience
- retention of a single employment jurisdiction
- a single jurisdiction is established for all matters which affect an individual’s livelihood.⁸⁸

3.5 The Issues Paper lists the disadvantages of this option as:

- the judicial members of the Commission are likely to remain under-utilised, as most of the transferred functions are of a quasi-judicial nature;

⁸⁶ Ministerial Issues Paper, pp 7-8.

⁸⁷ Ministerial Issues Paper, p 8.

⁸⁸ Ministerial Issues Paper, p 8.

- the health professional disciplinary matters, although affecting a person's livelihood, have a focus on public protection which could be lost if it is solely viewed as an employment issue.⁸⁹

Option 2A – NSW Administrative and Employment Tribunal

3.6 This option involves renaming the ADT the NSW Administrative and Employment Tribunal (NEAT) and:

- creating an Employment Division within the NEAT, headed by a former judge of the IRC and consisting of the IRC Commissioners, to exercise the arbitral and conciliation functions establishing an employment list within the Supreme Court, and appointing the remaining judicial members of the IRC to the Court, who would undertake work in that jurisdiction (including hearing appeals from the Employment Division of the NEAT);
- retaining a separate Professional Discipline Division within the new NEAT.⁹⁰

3.7 The Issues Paper indicated that this option would have similar advantages and disadvantages to Option 1, except that:

- as appointees of the Supreme Court, the judicial members of the IRC would have the capacity to undertake other work allocated by the Chief Justice
- the risks associated with consolidating the employment functions with professional disciplinary functions would be less likely to materialise.⁹¹

Option 2B – Employment and Professional Discipline Division in a NEAT

3.8 This option is a modification of Option 2A. It involves renaming the ADT to the NEAT and creating an Employment and Professional Discipline Division which consolidates the employment functions of the IRC with the professional discipline functions of the ADT and the health professional disciplinary tribunals.⁹²

3.9 The Issues Paper stated that the advantages and disadvantages would be the same as for Option 2A, except that this option risks losing the focus on public protection by consolidating employment and disciplinary functions.⁹³

Option 3 – Create a NSW Civil and Administrative Tribunal

3.10 This option involves creating a comprehensive Civil and Administrative Tribunal for New South Wales called NCAT which consolidates either Option 2A or 2B with the addition of other tribunals including the:

⁸⁹ Ministerial Issues Paper, p 8.

⁹⁰ Ministerial Issues Paper, p 8.

⁹¹ Ministerial Issues Paper, p 9.

⁹² Ministerial Issues Paper, p 9.

⁹³ Ministerial Issues Paper, p 9.

- Consumer, Trader and Tenancy Tribunal (CTTT)
- Guardianship Tribunal
- Mental Health Review Tribunal (MHRT)
- health professional disciplinary tribunals
- Vocational Training Tribunal
- Local Government and Pecuniary Interests Tribunal.⁹⁴

3.11 The Issues Paper advised that this option would seek to build on the original intention of the ADT to be the single point of all administrative decision making reviews. Further, the Issues Paper proposed ‘it would achieve the synergies which have been achieved in other jurisdictions by having all civil and administrative tribunals located within the one jurisdiction’.⁹⁵

3.12 Specific advantages listed in the Issues Paper for this option include:

- greater flexibility in the allocation of workloads and resources across the different jurisdictions
- the ability to achieve savings by co-locating entities, and to offer ‘one-stop shop’ tribunal services, including a single point of contact, consistent with the Government’s Simpler Services Plan
- consolidation of like functions within divisions within the new tribunal
- consolidation of expertise in tribunal administration and management, including the capacity to take advantage of economies of scale, including through accommodation, and more efficient member utilisation
- cross-fertilisation through training programs
- capacity to draw on ‘best of breed’ practices across the different jurisdictions
- members are able to broaden experience.⁹⁶

3.13 The Issues Paper suggested that the establishment of an NCAT could be staged for example, and Employment Division could be established, followed by a Protective Division (including the MHRT and Guardianship Tribunal), followed by a Commercial and Consumer Division.⁹⁷

3.14 The disadvantages of this option identified in the Issues Paper include:

- the risk of losing a specialised response to an identified community need. This can, to some extent, be offset by having specialised divisions within the NCAT

⁹⁴ Ministerial Issues Paper, p 9.

⁹⁵ Ministerial Issues Paper, p 9.

⁹⁶ Ministerial Issues Paper, p 10.

⁹⁷ Ministerial Issues Paper, p 10.

- some jurisdictions have a reputation for being flexible and innovative, and this could be lost if more traditional, inflexible cultures dominate. Equally, if a culture within one tribunal dominates, this could impact on the quality of decision-making
- start up-costs could be high, although this can be offset by staging the implementation and integration.⁹⁸

Stakeholder comments on options and alternative proposals

3.15 The Committee received a variety of views on the merits of each option for consolidation and many stakeholders suggested the amendment of various options or indeed made alternative proposals.

Option 1

3.16 Overall there was general qualified support for Option 1 as a more acceptable choice than the other options.⁹⁹ Some stakeholders were against the IRC being changed in any way.¹⁰⁰ A number of others were of the view that other jurisdictions could be effectively incorporated into the IRC. For example, the NSW Nurses' Association emphasised that the retention of the IRC would ensure the retention of a 'strong, independent and effective tribunal' for industrial relations matters.¹⁰¹

3.17 In the context of the recent decline in the volume of work for the IRC, some stakeholders felt that Option 1 would better utilise existing IRC resources including the knowledge of judges and the physical infrastructure.¹⁰² This is discussed further in Chapter 6. The successful integration of other jurisdictions into the IRC including the Transport Appeals Board was considered by some to be illustrative of the capacity of the IRC to cope with new jurisdictions.¹⁰³

⁹⁸ Ministerial Issues Paper, p 10.

⁹⁹ Submission 37, NSW Society of Labor Lawyers, pp v, vii, 18-20; Submission 40, NSW Bar Association p 8; Submission 46, NSW Nurses Association, p 4; Submission 55, p 7; Submission 68, Local Government and Shires Association, p 7; Submission 74, Industrial Relations Society, Newcastle Branch, p 3; Submission 78, Unions NSW, p 12; Mr Noel Martin, Industrial Officer, United Services Union, Evidence, 23 January 2012, p 72; Mr Ingmar Taylor, barrister, Industrial Law Section, NSW Bar Association, Evidence, 16 December 2011, p 16.

¹⁰⁰ Submission 64, United Services Union, p 6; Submission 78, pp 3-4; Answers to questions on notice taken during evidence 16 December 2011, Mr Wayne Forno, State Secretary, Transport Workers Union, Question 2, p 1; Mr Martin, Evidence, 23 January 2012, p 72.

¹⁰¹ Submission 46, p 4.

¹⁰² Submission 46, p 4.

¹⁰³ Submission 15, Public Service Association, p 4; Submission 37, p 18; Mr Phillip Boncardo, Treasurer, NSW Society of Labor Lawyers, Evidence, 16 December 2011, p 21; Mr Ben Kruse, Convener, Employment Law Committee, NSW Society of Labor Lawyers, Evidence, 16 December 2011, p 23; Correspondence from Justice Boland to Chair, 17 January 2012, attachment p 26.

- 3.18** As outlined in Chapter 6, the IRC is an ‘eligible State court’ for the purposes of the *Fair Work Act 2009* (Cth).¹⁰⁴ This means that parties to an employment contract can nominate the IRC as a dispute resolution provider. Some stakeholders were concerned that any new tribunal created according to Option 1 should also be an eligible State court for the same purpose.
- 3.19** Support for Option 1 was not universal. Judge Kevin O’Connor, President, ADT, found this to be the least attractive of the three options, in part because the caseload of the new tribunal would still be relatively small. In Judge O’Connor’s view this option would miss the opportunity for greater ‘synergies’ to be achieved as they might be in a larger tribunal.¹⁰⁵
- 3.20** Another view put forward by Justice R Boland, President, IRC, was that Option 1 is unlikely to result in the judges of the Industrial Court being fully utilised. On the contrary, the proposed amalgamation under this option would increase the workload of the Commissioners ‘who are already working at full capacity’.¹⁰⁶

Anti-discrimination matters

- 3.21** An aspect of Option 1 is the transfer of anti-discrimination matters from the Equal Opportunity Division of the ADT to the IRC. There were mixed views about whether the IRC would be the most appropriate forum to hear non-employment related anti-discrimination matters. Concerns were expressed at the idea of splitting the anti-discrimination to transfer employment matters to the IRC and leave all other anti-discrimination matters within the ADT.
- 3.22** Several stakeholders were broadly in favour of the transfer of anti-discrimination matters to the IRC.¹⁰⁷ The IRC already has experience in dealing with such matters in that it is already required to take into account principles contained in the *Anti-Discrimination Act 1977* although it cannot make determinations.¹⁰⁸
- 3.23** On the other hand, the ADT was concerned that the transfer of discrimination matters to the IRC would lose the ‘history of achievement in stating, applying and developing anti-discrimination law in NSW.’¹⁰⁹ The equal opportunity jurisdiction in New South Wales could be diminished by being absorbed into an institution that focuses on employment issues when the majority of discrimination complaints fall outside the employment context.¹¹⁰ In this regard, the ADT stressed that it is important to ensure that all forms of unlawful

¹⁰⁴ Submission 46, p 5; Ms Alisha Wilde, Senior Industrial Officer, Unions NSW, Evidence, 15 December 2011, p 2.

¹⁰⁵ Submission 38, Administrative Decisions Tribunal, p 10.

¹⁰⁶ Correspondence from Justice Boland to Chair, 17 January 2012, attachment p 26.

¹⁰⁷ Submission 78, pp 10-11; Submission 67, The Honourable Paul Lynch MP, p 3; Submission 68, p 6; Mr Boncardo, Evidence, 16 December 2011, p 21.

¹⁰⁸ Submission 10, Industrial Relations Society of NSW, p 3; Submission 15, p 5; Mr Dennis Ravlich, Executive Director, Australian Salaried Medical Officers’ Federation, Evidence, 15 December 2011, p 6.

¹⁰⁹ Submission 38, p 11.

¹¹⁰ Submission 38, p 11; Ms Jane Needham, Junior Vice President, NSW Bar Association, Evidence, 16 December 2011, p 15; Judge Kevin O’Connor, President, Administrative Decisions Tribunal, Evidence, 15 December 2011, p 12.

discrimination are discouraged and suggested that the wholesale shift of discrimination matters to the IRC might dilute that focus.¹¹¹

Options 2A and 2B

- 3.24** Options 2A and 2B were not as widely supported as Option 1 nor as widely opposed as Option 3. Mr Richard Perrignon, judicial member of the ADT, expressed his support for Option 2A. He put forward the view that the addition of the IRC Commissioners to the staff of the ADT would be valuable and an ‘effective public utilisation of their expertise’.¹¹²
- 3.25** The ADT was especially supportive of Option 2A over Option 1 or Option 2B. Judge O’Connor perceived Option 2A to be closer to that envisioned in the 2002 Report on the Administrative Decisions Tribunal¹¹³ and generally more favourable than Option 1 because of this. In his view, the transfer of the professional disciplinary and employment matters into a ‘more diverse legal environment’ is desirable and the personnel from the IRC could be utilised in the new tribunal.¹¹⁴ The Australian Lawyers Alliance, on the other hand, supported Option 2B as preferable over the others presented in the Issues Paper.¹¹⁵
- 3.26** Others were opposed to both Options 2A and 2B. Health professional bodies in particular were opposed to any option that would amalgamate health professional matters with industrial relations matters.¹¹⁶ The Australian Medical Association (AMA), for example, foresaw a risk that if the IRC and health professional disciplinary tribunals were merged with a variety of other tribunals then it would be difficult for particular expertise to be developed.¹¹⁷ Similarly, the Health Care Complaints Commission cautioned that its support for the consolidation of tribunals was predicated on the specialist structure of health professional tribunals being maintained.¹¹⁸

Option 3

- 3.27** There was some support for Option 3 of the Issues Paper, however, stakeholders did raise concerns about the potential impacts of this level of consolidation. In particular, stakeholders were concerned that the consolidation of the tribunals mentioned in Option 3 could create a tribunal so large that some issues would be swamped by claims in the current jurisdiction of the CTTT which could also lead to increased cost and delay. Other concerns included that consolidation on a large scale might lead to a loss of specialist expertise.

¹¹¹ Submission 38, p 11; Submission 41, Mr Richard Perrignon, pp 9-11.

¹¹² Submission 41, p 16.

¹¹³ NSW Parliament, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal*, November 2002.

¹¹⁴ Submission 38, pp 12-13.

¹¹⁵ Submission 89, Australian Lawyers’ Alliance, pp 1-2.

¹¹⁶ Submission 46, p 4.

¹¹⁷ Submission 73, Australian Medical Association (NSW), p 3.

¹¹⁸ Submission 63, Health Care Complaints Commission, p 1.

- 3.28** Mr Mark Morey, Deputy Assistant Secretary, Unions NSW, explained that while Unions NSW has no objection to Option 3 as a concept, it is concerned about the ability and expertise of such a tribunal to deal with that range of issues ably and with expertise.¹¹⁹
- 3.29** On the other hand, those in support of Option 3 pointed to possible improvements to access to justice and efficiencies from the creation of a ‘one stop shop’. Judge O’Connor, for example, perceived Option 3 to deliver the most benefit to the people of New South Wales.¹²⁰ He commented that the amalgamation of tribunals would bring ‘greater practical accessibility to people with genuine grievances’.¹²¹
- 3.30** Option 3 is also the only option that specifically refers to the consolidation of the MHRT. Ms Jane Needham, Junior Vice President from the NSW Bar Association, could see no reason why ‘properly managed and adequately funded, those functions should not be part of a division of what we would call NCAT.’¹²² The consolidation of the MHRT and the Guardianship Tribunal is discussed further in Chapter 7.

Alternative options for consolidation

- 3.31** Some inquiry participants presented alternatives to those contained in the Issues Paper for the consolidation of tribunals. In this regard a few inquiry participants suggested that the jurisdiction of the IRC could be expanded to include common law employment contract matters, which are currently heard in the Supreme or District Courts.¹²³
- 3.32** Another option suggested by the Law Society of NSW Young Lawyers was the establishment of a new court of equivalent status to the Supreme Court to preside over any consolidated tribunal. The new court could exercise the residual jurisdiction of the Industrial Court in relation to workplace health and safety, enforcement of industrial instruments, local and NSW Government industrial matters and police matters.¹²⁴
- 3.33** The NSW Bar Association suggested that an option providing a better outcome than Option 3 would be the creation of an NCAT, which excluded the bulk of the CTTT’s jurisdiction. The Association proposed that the CTTT’s Home Building jurisdiction would better sit within the NCAT, the Administrative Decisions Tribunal, or within another appropriate venue within the court system of New South Wales. Accordingly, they suggested that only the home building jurisdiction be transferred out of the CTTT, and the remainder of the CTTT’s consumer and tenancy work stays where it is.¹²⁵
- 3.34** Some stakeholders suggested that the Committee consider the United Kingdom approach of consolidating the registry service of tribunals for New South Wales.¹²⁶ However, others were

¹¹⁹ Mr Mark Morey, Deputy Assistant Secretary, Unions NSW, Evidence, 15 December 2011, p 6.

¹²⁰ Submission 38, p 13.

¹²¹ Judge O’Connor, Evidence, 15 January 2012, p 18.

¹²² Ms Needham, Evidence, 16 December 2011, p 13.

¹²³ Submission 15, p 7; Mr Boncardo, Evidence, 16 December 2011, p 21.

¹²⁴ Submission 82, NSW Young Lawyers, Law Society of NSW, p 14.

¹²⁵ Submission 40, para 37.

¹²⁶ Submission 40, paras 8-10; Judge O’Connor, Evidence, 15 December 2011, p 9.

of the view that the United Kingdom experience of consolidating registries may not work in New South Wales due to the disparate nature of the tribunals in this state. Ms Kay Ransome, Chairperson of the CTTT, commented:

The tribunals that were brought into that structure were all like tribunals. They were all administrative decision-making tribunals. They all dealt with appeals from government decision-makers. They were not the disparate range of tribunals that we have in New South Wales or indeed that ended up in VCAT, QCAT, et cetera. It is a slightly different creature.¹²⁷

Support for consolidation generally

3.35 While most inquiry participants expressed reservations about the method and implementation for the consolidation of particular tribunals, they also saw benefits in consolidation of tribunals in one form or another. As outlined above, the overarching concern of most stakeholders was that the distinct characteristics of the particular tribunal they were involved with should not be lost.

3.36 Judge O'Connor commented that every tribunal can claim it has something special about its procedures that should be retained in a consolidated tribunal. The amalgamation of NSW tribunals could well be advantageous but the method for consolidation should be carefully considered to ensure that this is so and that the public benefits:

[E]very tribunal can make a claim that it has something distinctive to offer, some need for special and separate procedures, and some need therefore to be left separate. The real challenge is to work out how there can be broad-based integration of services and resources while identifying and retaining the distinctive characteristics of the incoming tribunals so as to benefit the public. I really think that is the core of this exercise.¹²⁸

3.37 Mr Colin Freer, Solicitor of the Tenants Union of NSW, expressed the view that an amalgamated tribunal provides an opportunity for members to move across jurisdictions and bring a fresh approach.

We think an amalgamated tribunal... may allow for both the concentration of expertise on the one hand and some movement across jurisdictions by some members and the application of fresh thinking and new approaches, which as we have also observed in the submission is something that will probably be lacking when there are very tight criteria for legal representation in the tribunal.¹²⁹

3.38 The NSW Chapter of the Australian Institute of Administrative Law (AIAL) suggested that the unification and consolidation of the existing tribunal system should be a Government priority. In its view the existing tribunal system dealing with merits review of administrative decisions is 'piecemeal' and 'characterised by a proliferation of tribunals'. This fragmented

¹²⁷ Ms Kay Ransome, Chairperson, Consumer, Trader and Tenancy Tribunal, Evidence, 15 December 2011, p 47.

¹²⁸ Judge O'Connor, Evidence, 15 December 2011, p 9.

¹²⁹ Mr Colin Freer, Solicitor, Tenants Union of NSW, Evidence, 15 December 2011, pp 58-59.

system, in the view of the AIAL, has compromised access to merits review for New South Wales citizens and needs substantial improvement.¹³⁰

- 3.39** The NSW Bar Association was also supportive of consolidation.¹³¹ Ms Needham told the Committee that the consolidation of tribunals presented an opportunity to improve efficiencies and coherence and to streamline processes enabling people to access the tribunal system.¹³²
- 3.40** Support for consolidation was also expressed by key stakeholders of smaller tribunals. Victims Services of the Department of Attorney General and Justice, for example, suggested that a consolidated tribunal could well undertake the functions undertaken by the Victims Compensation Commission and recommended that the Government incorporate it into a consolidated tribunal.¹³³ Mr Philip Boyce, Chairperson of the Local Land Boards, was also in favour of amalgamation. He saw benefit in the the Local Land Boards operating as a division of a new super tribunal or as part of the ADT. In Mr Boyce's view the Boards 'would be well supported by being part of the [ADT] or a super tribunal which could provide, certainly, the backroom support that we lack at the moment.'¹³⁴
- 3.41** Other stakeholders saw advantages in the expansion of the jurisdiction of the IRC to incorporate the work of other tribunals.¹³⁵ The Motor Traders' Association (MTA) saw that there would be benefits 'to both Government and the public' in this method.¹³⁶
- 3.42** While advocating a cautious approach, Mr Peter Dodd, solicitor with the Public Interest Advocacy Centre, expressed the view that there is 'a public interest in establishing inefficiencies in terms of tribunals in New South Wales, in particular if these efficiencies lead to greater access for disadvantaged groups and people in rural and remote areas.'¹³⁷
- 3.43** The experiences of other Australian jurisdictions provide sound examples of the potential benefits of tribunal consolidation. The Committee was told by the respective Presidents of the ACT and Western Australian super tribunals that neither were aware of any adverse impacts of consolidation beyond the initial challenges of setting up and commencing operation.¹³⁸ Ms Linda Crebbin informed the Committee that the ACT experience has shown that the new super tribunal is faster and simpler for users of tribunals.¹³⁹ Justice John Chaney added that in

¹³⁰ Submission 22, NSW Chapter of the Australian Institute of Administrative Law, pp 1-2.

¹³¹ Submission 40, p 11.

¹³² Ms Needham, Evidence, 16 December 2012, p 12.

¹³³ Submission 26, Victims Services, NSW Department of Attorney General and Justice, pp 1-2.

¹³⁴ Mr Philip Boyce, Chairperson, Local Land Boards, Evidence, 23 January 2012, p 68; Submission 30, Local Land Boards, p 9.

¹³⁵ Submission 28, Motor Traders' Association NSW, pp 3-4; Submission 37, p vii;

¹³⁶ Submission 28, pp 3-4

¹³⁷ Mr Peter Dodd, solicitor, Public Interest Advocacy Centre, Evidence, 23 January 2012, p 23.

¹³⁸ Justice John Chaney, President, Western Australia State Administrative Tribunal, Evidence, 18 November 2011, p 7; Ms Linda Crebbin, President, ACT Civil and Administrative Tribunal, Evidence, 18 November 2011, p 7.

¹³⁹ Ms Crebbin, Evidence, 18 November 2011, p 9.

Western Australia, the State Administrative Tribunal is cheaper for consumers, more efficient, and that overall ‘the value to the public is money well spent’.¹⁴⁰

- 3.44** A number of stakeholders expressed in principle support for the consolidation of tribunals subject to certain concerns being addressed. These concerns broadly related to access to justice, procedural fairness and the risk of a loss of specialisation. These issues are outlined in Chapter 4. Another concern was that certain matters might swamp any new tribunal, effectively drowning out other matters from receiving adequate attention.

The potential dominance of consumer, trader and tenancy matters

- 3.45** An issue raised by some inquiry participants was that if the CTTT was consolidated into a super tribunal that it would dominate the culture and procedures of the super tribunal.¹⁴¹ For example, the NSW Bar Association indicated that the CTTT should not be subsumed into any new tribunal because ‘it will overwhelm any new tribunal in an administrative and fairness/justice sense and from a resources perspective’.¹⁴²
- 3.46** The Issues Paper also acknowledged that there could be a risk in consolidating the CTTT with other tribunals. It noted that the CTTT deals with about 60,000 matters per year, whereas collectively the other tribunals deal with only a fraction of this. Therefore, there is some risk that in consolidating tribunals, the CTTT will predominate in any new arrangements. The Issues Paper suggested that a variant of Option 3 would be to leave out the CTTT, ‘however, there may be some need to consider refining the matters within the CTTT’s jurisdiction, if this option were pursued’.¹⁴³
- 3.47** However, other super tribunals, such as the Victorian Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal, and the Western Australian State Administrative Tribunal and the ACT Civil and Administrative Tribunal have appeared to successfully accommodate and address the issues of ‘swamping’ through thorough planning and implementation and a staged process of consolidation.

Committee comment

- 3.48** The Committee appreciates the time and effort stakeholders have gone to in commenting on the options set out in the Issues Paper and in presenting alternative options for consideration. Many of the submissions comprehensively addressed the terms of reference and sought to elaborate on complex areas of law for the benefit of the Committee.
- 3.49** It is also acknowledged that the majority of stakeholders who gave evidence to the Committee had particular experience in just one or two of the many tribunals that are under consideration and as such often had a particular interest in seeing that tribunal retained in its current form. Few stakeholders provided comments on consolidation as a whole, which is understandable

¹⁴⁰ Justice Chaney, Evidence, 18 November 2011, p 9.

¹⁴¹ Mr Joe Cantazariti, Law Society of NSW, Evidence, 16 December 2011, pp 8-9; Submission 40, para 37.

¹⁴² Submission 40, para 37.

¹⁴³ Ministerial Issues Paper, p 10.

given that few stakeholders would have experience across the breadth of tribunals currently in operation in New South Wales.

- 3.50** The Committee believes that the consolidation of tribunals will improve access to justice for the people of New South Wales and provide a ‘one stop shop’ for minor disputes and review of administrative decisions. This view is strongly supported by the experiences of other Australian jurisdictions which have found that access to justice has improved as a result of tribunal consolidation, especially for people in regional and rural areas. Accordingly, the Committee recommends that the NSW Government pursue consolidation of tribunals where it is appropriate and promotes access to justice.
- 3.51** Although the Committee has not received sufficient evidence to determine the most preferable method for consolidation, we are confident that an expert panel consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders would be well-equipped to do so. We recommend that such a panel is established to pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, and prepare a detailed plan for the implementation of consolidation, including which tribunals should be consolidated. It would appear appropriate that the panel’s Chair be a nominee of the Attorney General.
- 3.52** We make this recommendation in the knowledge that the task is immense and involves multiple complexities. The process of developing an effective consolidated tribunal involves matters of law and policy that are highly technical and involve a wide variety of legal subject matter. We are especially grateful to the individual tribunals that made submissions to this inquiry for the effort and depth they went to in order to explain to the Committee their jurisdiction, priorities and client base. The expert panel, if established, should use this valuable evidence to inform its work.
- 3.53** The Committee understands that, as in other Australian jurisdictions, it may be a determination of the expert panel that not every tribunal is appropriate for consolidation. This is a determination that will need to be made by the expert panel in careful consultation with stakeholders and after detailed consideration. We are not recommending that all tribunals in New South Wales should be consolidated but in broad terms we see merit in some amalgamation of tribunals, particularly in terms of improving access to justice. It should also be noted that this does not preclude the possibility of further consolidation of existing jurisdictions within tribunals already in existence.

Recommendation 1

That the NSW Government pursue the establishment of a new tribunal that consolidates existing tribunals, where it is appropriate and promotes access to justice. This does not preclude the possibility of further consolidation of existing jurisdictions within tribunals already in existence.

Recommendation 2

That the NSW Government appoint an expert panel consisting of senior legal professionals, senior members of existing tribunals, relevant government officials and other stakeholders to pursue the consolidation, formulation and appropriate structure of a consolidated tribunal, including preparation of a detailed plan on the method for consolidation and implementation.

3.54 An effective super tribunal must be established with adequate resources and with access to justice as the overarching focus of its structure and operation. Lessons from other jurisdictions have shown that proper planning from the outset to ensure improved access to justice and efficiencies as well as the adequate allocation of resources is especially important. As such, the Committee recommends that these factors are paramount in the work of the expert panel or working group in determining the method and implementation of a super tribunal in New South Wales.

3.55 The Committee is keen to ensure that the issues raised by stakeholders regarding potential negative impacts are not only minimised but also avoided. To this end, the Committee recommends that the NSW Government review the effectiveness of the new consolidated tribunal model three years after the enabling legislation has come into effect.

Recommendation 3

That the expert panel consider the Committee's recommendations in this report, as well as the following issues raised during the inquiry:

- Consolidation of tribunals must ensure improved access to justice in conjunction with improved efficiencies, particularly in regional areas
 - There must be equitable access to justice for all citizens
 - Adequate resources must be allocated
 - Lessons from other jurisdictions are considered
 - The nature of the jurisdiction of existing tribunals and whether it is appropriate that their functions be exercised within a broader tribunal.
-

Recommendation 4

That the NSW Government review the effectiveness of a new consolidated tribunal model, its processes, procedures and service delivery, three years after the enabling legislation has come into effect.

Chapter 4 Access to justice

This chapter discusses the importance of access to justice in the context of tribunal consolidation in New South Wales. The issues of community awareness, procedural fairness, access for regional and rural tribunal users and the need for an internal appeals process are also canvassed. Stakeholders views on the potential efficiencies of a consolidated tribunal and the need to ensure adequate resources are also presented.

Access to justice

- 4.1** Inquiry participants told the Committee that whether or not the Government decides to consolidate tribunals, it needs to ensure that any reforms improve access to justice for all tribunal users. The Committee strongly supports this notion and believes that access to justice is the overarching principle in this Inquiry.
- 4.2** Access to justice in relation to tribunal services can be considered on a number of levels. Firstly, there is the physical access to information and tribunal proceedings, including ensuring simple forms (accessible in other languages), low fees and proceedings that are accessible to people with disabilities and those living in rural and regional areas. Access to justice also involves the dissemination of information to ensure that there is widespread community awareness of the avenues available for dispute resolution and review of administrative decisions.¹⁴⁴
- 4.3** Procedural fairness is also important. This includes, for example, ensuring the tribunal member that hears a particular matter has suitable expertise in that area to make a fair and just decision. This was of a particular concern for those inquiry participants focussed on industrial relations, guardianship and mental health matters.¹⁴⁵ In addition, a further avenue for appeal on tribunal decisions, without accessing a potentially costly court system, could also be seen as ensuring access to justice.¹⁴⁶

A one-stop shop

- 4.4** One argument in favour of consolidating tribunals is that the creation of a single point of contact for people may improve their access to justice.¹⁴⁷ The NSW Bar Association commented that the current disparate tribunal system in New South Wales ‘creates confusion and can operate to deny persons access to justice, for example, by commencing proceedings in

¹⁴⁴ Ms Natalie Ross, Senior Solicitor, Redfern Legal Centre, Evidence 16 December 2011, p 47; Ms Alison Peters, Director, Council of Social Services of NSW (NCOSS), Evidence, 15 December 2011, p 28 and p 29

¹⁴⁵ For example: Submission 32, Transport Workers Union, pp 2-3; Submission 84, Law Society of NSW, p 3.

¹⁴⁶ Submission 77, Redfern Legal Centre, para 5.2; Mr Carl Freer, Solicitor, ‘Tenants’ Union of NSW, Evidence, 15 December 2011, p 61.

¹⁴⁷ Submission 82, Law Society of NSW Young Lawyers, p 5; Submission 38, Administrative Decisions Tribunal, p 3; Submission 15, Public Sector Association, p 7 (but only in relation to consolidating all employment related matters into the IRC).

the wrong tribunal and thereby missing limitation periods, or by seeking inappropriate orders in the correct tribunal.¹⁴⁸

4.5 Some stakeholders believed that a consolidated super tribunal would improve access to justice by providing a “one stop shop” for users,¹⁴⁹ while others believed consolidation may have a detrimental impact on access to justice by limiting access, particularly in rural areas.

4.6 Judge Alan Wilson, President of the Queensland Civil and Administrative Tribunal (QCAT), advised that they believe a super tribunal can offer improved access to justice based on the idea of a one stop shop:

Our experience confirms that if you tell Queenslanders that any kind of dispute within a wide range of jurisdictions can all come to one place, they will use it ...the advantages of a single point of contact. We have, of course, many tribunals that live somewhere in the inner city of Brisbane and open their offices sometimes on Tuesday afternoon and that were very hard to find and file documents in. There is no doubt that the combination of a single point of entry and wide publication of its creation enhances the accessibility of all of those jurisdictions.¹⁵⁰

4.7 Similarly, the Law Society of NSW Young Lawyers suggested that an advantage of consolidation is the concept of a ‘no wrong door’ policy, which promotes a holistic and multifaceted approach to assisting clients:

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.¹⁵¹

4.8 The Redfern Legal Centre indicated that a consolidated tribunal could improve access to justice through the potential for more resources that would be available for better registry services. These would include more bilingual staff, more staff to prepare resources for users of the tribunal, more IT support, a more extensive website, and more assistance for self represented parties.¹⁵²

4.9 Conversely, some inquiry participants suggested that the consolidation of tribunals may reduce access to justice, especially for people who live in rural or regional areas. The Council of Social Services of NSW (NCOSS) indicated that the 2009 review of the Victorian Civil and Administrative Tribunal (VCAT) found that the tribunal needed to improve its access for people outside of the Melbourne area and that therefore, a consolidated tribunal does not always lead directly to improved access to justice for all people.¹⁵³ This view was also held by the Affiliated Residential Park Residents Association.¹⁵⁴

¹⁴⁸ Submission 40, NSW Bar Association, para 5.

¹⁴⁹ Submission 38, p 3.

¹⁵⁰ Justice Alan Wilson, President, Queensland Civil and Administrative Tribunal (QCAT), Evidence, 23 January 2012, p 57.

¹⁵¹ Submission 82, pp 4-5.

¹⁵² Answers to supplementary questions, 16 December 2011, Ms Natalie Ross, Senior Solicitor, Redfern Legal Centre, Question 3, p 2.

¹⁵³ Submission 14, NCOSS, p 1.

¹⁵⁴ Submission 12, Affiliated Residential Park Residents Association Inc, pp 3-4.

- 4.10** In response to concerns relating to access for regional and rural people, Judge Kevin O'Connor, President of the Administrative Decisions Tribunal (ADT), said there is a need to be mindful and plan for rural and regional access in implementing any consolidated tribunal:

... it seems to me that is a key element of the establishment of a New South Wales super tribunal. It is one of the criticisms that was made of the VCAT rollout and was addressed by Justice Bell in the review of 2010. New South Wales is a huge State geographically with major population centres distributed right across the State ... I think that is a critical issue and that is one of the things you would have to address in a planning and implementation process.¹⁵⁵

Community awareness and access

- 4.11** To ensure access to justice, it is essential that the community is aware of a tribunal's existence and its role. Ms Alison Peters, Director of NCOSS, advised that there are people who do not currently access tribunals and may not know that there is an avenue for recourse on disputes or decisions:

... one of the other measures needs to be about people who currently do not access tribunals. For a large number of people who are disadvantaged or vulnerable in some way, they may just accept decisions that are poor in nature and lead to perverse outcomes without ever coming to this sort of system. We see access as not just about the outcomes of those who actually come before a tribunal or who might seek recourse through a tribunal but also about ensuring that people are aware that they have some capacity to challenge decisions in some way and support to do so.¹⁵⁶

- 4.12** In addition to knowing of a consolidated tribunal's existence it is important that people are aware of its jurisdiction – what matters the tribunal can and cannot make decisions about. The ADT noted that a challenge in the creation of a new consolidated tribunal is to overcome the loss of brand identity or name recognition. Judge O'Connor commented that 'I would suspect more people in NSW in 1998 had heard of an Equal Opportunity Tribunal than have ever heard of the Equal Opportunity Divisions of the ADT'.¹⁵⁷
- 4.13** The ADT, like NCOSS, recommended the need for promoting community awareness of the range of matters that a new super tribunal can address, especially during its initial establishment.¹⁵⁸
- 4.14** In addition to community awareness, the Committee heard that the provision of online services is important for access for regional and rural tribunal users as well as for the continuing innovation of a tribunal.

¹⁵⁵ Judge Kevin O'Connor, President, Administrative Decisions Tribunal, Evidence, 15 December 2011, p 16.

¹⁵⁶ Ms Peters, Evidence, 15 December 2011, p 29.

¹⁵⁷ Submission 38, p 4.

¹⁵⁸ Submission 38, p 4.

- 4.15** The Consumer, Trader and Tenancy Tribunal (CTTT) advised that it currently provides a number of online services that improve accessibility, including for regional tribunal users and also tribunal members. These services include:
- *CTTT Online* - a 24 hour online service that enables the electronic lodgement of applications in most Divisions; most matters are automatically listed and a notice of hearing dispatched by return email. Parties can also track progress of the application online at any time.
 - *InCourt* - a system that enables CTTT Members to produce tribunal orders by typing them directly into the case management system at the conclusion of the hearing so that orders can be made available to parties on the hearing day or shortly thereafter. CTTT Members in regional areas have laptops that can wirelessly access *InCourt* from most locations within NSW.
 - *eConnect* – allows case-related correspondence, notices of hearing and orders to be sent to parties via email rather than post
 - *Electronic document lodgement* - a new service which will allow digital copies of documents to be lodged by parties and viewed in the hearing room.
 - *Video conferencing* - during 2011 a video conferencing capability was established with the aim of increasing access for regional parties and to provide CTTT Members and staff with another means of communication.¹⁵⁹
- 4.16** The CTTT indicated that should a consolidated tribunal be established, it would not want to see the flexibility and innovation that is embodied in the CTTT's operations lost or diminished in an amalgamated structure.¹⁶⁰
- 4.17** The provision of and access to tribunal services online has been demonstrated in other jurisdictions with super tribunals. VCAT has an online lodgement facility, which is available for 90 per cent of all applications.¹⁶¹ On a similar note, the Western Australian State Administrative Tribunal provides an 'eLodgment' service that enables members of the legal profession and Government departments to lodge documents and pay tribunal application fees online.¹⁶²

Committee comment

- 4.18** The Committee supports the comments made by inquiry participants and strongly believes that the consolidation of tribunals has the potential to increase access to justice for tribunal users in New South Wales.
- 4.19** The Committee is also mindful that there is a need to ensure community awareness of tribunals and their role, especially in the context of a consolidated tribunal which will handle a range of different jurisdictions. To this end, the Committee recommends that the NSW

¹⁵⁹ Submission 43, Consumer, Trader and Tenancy Tribunal, p 7.

¹⁶⁰ Submission 43, p 12.

¹⁶¹ Victorian Civil and Administrative Tribunal (VCAT), *Transforming VCAT: Three Year Strategic Plan 2010/11 – 2012/13, Report Card*, December 2011, p 4.

¹⁶² Western Australia State Administrative Tribunal website, accessed 9 March 2012, <www.sat.justice.wa.gov.au/E/elodgment.aspx?uid=2728-2509-3592-7156>

Government publish comprehensive, easy to understand documents explaining the processes and procedures in the consolidated tribunal, including for culturally and linguistically diverse communities, so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

- 4.20** The provision of online services for tribunal users is an important factor in ensuring access to justice. This type of access can also benefit tribunal users located regionally. Therefore, the Committee recommends that the NSW Government examines the possibility of providing more comprehensive and accessible online services such as online filing and fully accessible online court files for a consolidated tribunal.

Recommendation 5

That the NSW Government publish comprehensive, easy to understand documents explaining the processes and procedures in the consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal, including material directed to culturally and linguistically diverse communities.

Recommendation 6

That the NSW Government examines the possibility of providing more comprehensive and accessible online services such as online filing and fully accessible online court files for a consolidated tribunal.

Procedural fairness

- 4.21** Procedural fairness includes, for example, ensuring the tribunal member that hears a particular matter has suitable expertise in that area to make a fair and just decision. This was of a particular concern for some inquiry participants. In addition, a further avenue for appeal on tribunal decisions, without accessing a potentially costly court system, was also seen as ensuring access to justice and procedural fairness.

Expertise of tribunal members

- 4.22** The need for expertise in a tribunal has been highlighted by stakeholders as an important consideration in consolidating tribunals. This was emphasised in relation to industrial relations disputes, guardianship matters, mental health review matters, particular matters in the jurisdiction of the CTTT and also in relation to professional disciplinary matters.
- 4.23** For example, a number of inquiry participants were concerned that the consolidation of the CTTT into a super tribunal would potentially lead to the loss of tribunal members with specialised skills. The Property Law Committee of the Law Society of NSW emphasised that

consolidation of CTTT functions into a larger tribunal must not be achieved at the expense of the specialised skills required of decision-makers in the area of strata title matters.¹⁶³

4.24 The Law Society of NSW advised that retaining specialisation in structure and in decision makers is a key factor in ensuring access to justice for the community:

... the retention and further buttressing of expertise and specialisation in structure and decision-makers will also contribute to the Government's ability to provide cost effective and streamlined processes. These are ultimately the factors which impact on whether a member of the community is able to have meaningful access to justice.¹⁶⁴

4.25 The Law Society of NSW Young Lawyers summarised the issue of specialisation as follows:

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... 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.¹⁶⁵

4.26 Inquiry participants emphasised the skill and knowledge of the Industrial Relations Commission's members.¹⁶⁶ Unions NSW for example stated that the specialist knowledge of the judges, non-judicial members and commissioners of the IRC is 'an invaluable resource that should not be diluted or removed from the New South Wales judicial system.'¹⁶⁷

4.27 Several stakeholders were of the view that consolidation of the IRC could limit access to justice by taking away an individuals' capacity to receive the expert guidance of experienced industrial relations judge through conciliation without the formality and expense of a hearing.¹⁶⁸ Mr Oshie Fagir, a Legal Officer with the Transport Workers Union, emphasised the procedural efficiencies gained from having the arbitral and judicial industrial relations functions as part of the same institution.¹⁶⁹

¹⁶³ Submission 84, p 6.

¹⁶⁴ Answers to questions taken on notice, 16 December 2011, Mr Joe Cantazariti, Law Society of NSW, Question 5, p 5.

¹⁶⁵ Submission 82, p 4.

¹⁶⁶ Submission 32, p 2; Submission 46, NSW Nurses Association, p 4; Submission 64, Utilities Services Union, p 6; Submission 67, Hon Paul Lynch MP, p 3; Submission 68, Local Government and Shires Association, p 3; Submission 74, Industrial Relations Society Newcastle Branch, pp 2-3; Submission 78, Unions NSW, pp 3-4; Answers to questions on notice taken during evidence 16 December 2011, Mr Wayne Forno, State Secretary, Transport Workers Union NSW, Question 2, p 1.

¹⁶⁷ Submission 78, p 4.

¹⁶⁸ Submission 46, p 5; Mr John Cahill, General Secretary, Public Service Association, Evidence, 16 December 2011, p 29; Mr Phillip Boncardo, Treasurer, NSW Society of Labor Lawyers, Evidence, 16 December 2011, pp 25-26; Dr Paul McDermott, President, NSW Society of Labor Lawyers, Evidence, 16 December 2011, p 26.

¹⁶⁹ Mr Oshie Fagir, Legal Officer, Transport Workers Union NSW, Evidence, 16 December 2011, p 43.

4.28 Similarly, the Redfern Legal Centre contended that consolidation may or may not improve access to justice if the tribunal member lacks expertise in the area of the matter being heard. For example, the Centre advised:

... having tribunal members with a specialised knowledge of an area is extremely important for a just outcome, particularly where parties are frequently unrepresented. If consolidation led to a loss of specialisation this would not improve access to justice.¹⁷⁰

4.29 The Law Society's Elder Law and Succession Committee noted that the approach of the NSW Guardianship Tribunal is unique in Australia and 'lends a great deal of expertise and quality to the decision-making'.¹⁷¹ The Australian Lawyers Alliance expressed reservations about the creation of a protective division of a super tribunal incorporating the Guardianship Tribunal and the Mental Health Review Tribunal under Option 3 in the Ministerial Issues Paper. In its view 'consideration...needs to be given to the specific roles and functions of these two tribunals before they are amalgamated'.¹⁷²

4.30 Other stakeholders, including the ADT, the NSW Young Lawyers and NCOSS advised that divisions and lists within a consolidated tribunal would support existing specialisations and pointed out that this is the approach taken in super tribunals in Victoria, Queensland, Western Australia and the Australian Capital Territory.¹⁷³

4.31 Divisions are divided into particular areas of law, for example, civil, administrative, human rights and disciplinary. These divisions commonly then have a number of lists under them that provide for more specialisation in particular areas, for example, in VCAT and the Queensland Civil and Administrative Tribunal (QCAT) the human rights division has four lists under it and one of these deals with guardianship matters.¹⁷⁴

Consistency of procedure

4.32 The number of tribunals in New South Wales has meant that procedurally each tribunal operates differently. For example, procedures and handling of guardianship matters differ greatly from a consumer dispute matter. Inquiry participants were keen to ensure that under a consolidated tribunal different matters were handled appropriately.

4.33 Ms Jane Needham, Junior Vice President, NSW Bar Association, was of the view that consolidation of tribunals presents an opportunity to move towards 'streamlining...the processes which people need to undertake to have their voices heard.' In her view consolidation of tribunals would 'not be a change for change's sake but in order to improve inefficiencies and coherence, always...with a view to access to justice'.¹⁷⁵

¹⁷⁰ Answers to supplementary questions, 16 December 2011, Ms Ross, Question 3, p 2.

¹⁷¹ Submission 84, p 5.

¹⁷² Submission 89, Australian Lawyers Alliance, p 2.

¹⁷³ Submission 38, p 4, Submission 82, p 4 and Ms Peters, Evidence, 15 December 2011, p 33.

¹⁷⁴ Submission 38, p 4, VCAT, *Annual Report 2010-2011*, p 42 and the Queensland Civil and Administrative Tribunal (QCAT), *Annual Report 2009-2010*, p 22.

¹⁷⁵ Ms Jane Needham, Junior Vice President, NSW Bar Association, Evidence, 16 December 2011, p 12.

- 4.34** In this regard, Ms Needham advocated an adaptation of uniform procedures that were adopted by courts that could be appropriately adapted for tribunals:

At the moment, as I understand it, the Administrative Decisions Tribunal's registry computer system is standalone, as is the CTTT's, as is the Guardianship Tribunal's and the like. They all use different forms. The experience of the association in the implementation of the UCPR—the Civil Procedure Act and the Uniform Civil Procedure Rules—is such that adoption or adaptation of those procedures and forms would work well at a tribunal level.¹⁷⁶

- 4.35** The ADT indicated that the area of establishing common practice can be challenging in a consolidated tribunal:

There will be areas where a high degree of common practice and identity can be reached, for example in website presentation, document presentation and in the primary data collection fields and primary case management data. But after that there will necessarily be a good deal of variation in the more specific information that is required at the intake stage and in how particular classes of case are conducted thereafter.¹⁷⁷

Committee comment

- 4.36** The Committee acknowledges the concerns of some stakeholders that the consolidation of a particular tribunal may lead to the loss of specialist expertise. While the Committee acknowledges these concerns, we are of the view that sufficient mechanisms exist to avoid such a loss of expertise such as the use of specialist lists and divisions within a tribunal and ongoing professional development for tribunal members. We therefore recommend that specialised lists or divisions be created within a consolidated tribunal to capture the skill and expertise of tribunal members and the flexibility of procedures that reflect the range of jurisdictions in any consolidated tribunal.
- 4.37** In addition, to ensure tribunal members gain the relevant training and experience to work across divisions, we recommend that tribunal members be given the opportunity to diversify their skills in various areas of law, through training and rotation among various jurisdictions within a consolidated tribunal.

Recommendation 7

That specialised lists or divisions be created within a consolidated tribunal to capture the skill and expertise of tribunal members and the flexibility of procedures that reflect the range of jurisdictions in any consolidated tribunal.

¹⁷⁶ Ms Needham, Evidence, 16 December 2011, p 12.

¹⁷⁷ Answers to supplementary questions, 15 December 2011, Judge Kevin O'Connor, President, Administrative Decisions Tribunal, Additional Matters No. 2, p 9.

Recommendation 8

That tribunal members be given the opportunity to diversify their skills in various areas of law, through training and rotation among various jurisdictions within a consolidated tribunal.

- 4.38** We see benefit in streamlining forms and procedures to simplify tribunal processes for tribunal users. The Committee recognises that there may need to be slight procedural variations to accommodate different types of matters. This might mean that some divisions or lists, while retaining overall procedural unity with the consolidated tribunal in general terms, employ slightly different internal procedures for different matters.
- 4.39** Easy to use and access forms are an important component of access to justice and the Committee believes this should be considered as part of the process of any consolidated tribunal. Also, following on from earlier recommendations for specialised lists within a consolidated tribunal, the Committee recognises that procedures and practices may need to vary according to the different types of matters, however, this does not limit any consolidated tribunal from developing user friendly practices and procedures with an aim to improving access to justice.
- 4.40** The Committee therefore recommends that any consolidated tribunal should have a simple user friendly standard set of forms are able to be completed online and that the practices and procedures also be user friendly.
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Recommendation 9

That any consolidated tribunal have a simple, user friendly standard set of forms that are able to be completed online.

Recommendation 10

That any consolidated tribunal have user friendly practices and procedures.

- 4.41** The Committee acknowledges that the quality of any decision making is enhanced by requiring those making decisions to justify them with reasons. This was particularly a matter of concern in relation to busy jurisdictions such as the CTTT. Reasons for decisions are also essential if appeal rights are to be granted, therefore we recommend that any persons affected by an administrative tribunal decision be provided with reasons for that decision, to a quality and extent consistent with the issue in dispute.
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Recommendation 11

That any persons affected by an administrative tribunal decision be provided with reasons for that decision, to a quality and extent consistent with the issue in dispute.

Appeals

- 4.42** Of key concern to a number of stakeholders is the need for an internal appeals process in any consolidated tribunal to ensure access to justice. The Redfern Legal Centre recommended that a consolidated tribunal should have an appeal panel as it ‘would provide a genuine option for appeals, while remaining less costly and less formal than an appeal to a higher court’.¹⁷⁸ In particular, the Centre suggested:
- ... there be an unfettered right of appeal to the appeal panel on a question of law, and a right to appeal with leave on a question of fact (merits review), or a mixture of fact and law. This is how the Appeal Panel in the Administrative Decisions Tribunal currently operates.¹⁷⁹
- 4.43** Stakeholders did caution that there is a need to carefully consider how an internal appeals process could be accessed, to avoid an overwhelming number of appeal requests that can potentially drain a tribunal’s resources. There was some suggestion that a monetary threshold could be put in place. However, while a monetary threshold may be suitable in most civil claims, this would not be applicable in other areas of law, such as human rights matters.¹⁸⁰
- 4.44** In its submission, the ADT stated that ‘the prevailing view today... is that super tribunals should include an internal appeal tier’.¹⁸¹ The submission noted that both ACT Civil and Administrative Tribunal and QCAT had internal avenues for appeal and that the ten year review of VCAT conducted by Justice Bell recommended an internal appeal mechanism should be established within VCAT.¹⁸²
- 4.45** On its site visit to VCAT, the Committee heard from members of that tribunal that any internal appeal mechanism should be established and provided for in terms of resources at the time the super tribunal is created rather than after.¹⁸³

QCAT internal appeal process – an example

- 4.46** In QCAT decisions about minor civil disputes can be appealed to the Internal Appeal Tribunal. In most cases leave must be sought and granted to appeal the decision. The decision can be appealed on a question of law, a question of fact or a mix of both. Although, appeals about the amount of costs awarded as well as decisions made by judicial members must be heard by the Queensland Court of Appeal. When an appeal is heard by the Internal Appeal Tribunal a new hearing will take place which will consider afresh the original information and evidence presented.¹⁸⁴

¹⁷⁸ Answers to questions taken on notice during evidence 16 December 2011, Ms Natalie Ross, Senior Solicitor, Redfern Legal Centre, Question 1, p 1.

¹⁷⁹ Answers to questions taken on notice during evidence 16 December 2011, Ms Ross, Question 1, p 1.

¹⁸⁰ Judge O’Connor, Evidence, 15 December 2011, p 15 and Report of the Committee visit to VCAT and the Law Institute of Victoria, see Appendix 4.

¹⁸¹ Submission 38, p 9.

¹⁸² Submission 38, p 9.

¹⁸³ Report of the Committee visit to VCAT and the Law Institute of Victoria, see Appendix 4.

¹⁸⁴ QCAT website, accessed 9 February 2012 <www.qcat.qld.gov.au/qcat-decisions/appealing-a-qcat-decision>

4.47 Judge Alan Wilson, President of QCAT commented that the internal appeals process in the tribunal has generated a lot of work:

...one other major point of distinction between us and Victoria and Western Australia is that we have an internal QCAT appeals tribunal. ... It has generated a vast amount of work for the judges, much more than we saw coming initially and which kept us very busy. We are only now beginning to get on top of it and find ways to manage it ...we had something over 400 appeals in our first year and that has continued to grow.¹⁸⁵

4.48 Accordingly, the need to adequately resource an internal appeals process was emphasised by Judge Wilson:

... the other important thing is to understand, as our experience suggests, if you advertise these facilities extensively when you set up a new tribunal, you need to resource them sufficiently to deal with what will certainly be a tsunami of applications for leave to appeal.¹⁸⁶

Committee comment

4.49 The Committee acknowledges that limiting appeals to only the courts can create a barrier to the availability of appeals for some people due to the cost, delay and formality of court processes. Ensuring access to justice is also about ensuring an accessible appeal mechanism. In the Committee's view it is important that the establishment of any new consolidated tribunal incorporates in its structure a mechanism for internal appeal. Learning from VCAT and QCAT, we recognise that it is important to set this up at the outset and to ensure that it is sufficiently resourced. We also note the importance of setting thresholds for accessing an appeals process, as is demonstrated by QCAT, and therefore we recommend that an easy, timely and cost effective internal merit appeals mechanism, with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave, be established within any consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

4.50 We are also aware that under the current system there are differing and complex appeal mechanisms in tribunals in New South Wales. In the intervening period until tribunals are amalgamated, there may be some scope for the NSW Government to streamline existing appeal processes and reduce the current complexity for people seeking to challenge a tribunal decision.

Recommendation 12

That an easy, timely and cost effective internal merit appeals mechanism, with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave, be established within any consolidated tribunal so as to maximise the potential benefits of greater access to justice through a consolidated tribunal.

¹⁸⁵ Justice Wilson, Evidence, 23 January 2012, p 54.

¹⁸⁶ Justice Wilson, Evidence, 23 January 2012, p 54.

Potential efficiencies and adequacy of resources

- 4.51 This section canvasses the inquiry participants' views on the potential efficiencies that could be achieved through consolidating tribunals and the need to ensure adequate resources are allocated for a consolidated tribunal in New South Wales.

Potential efficiencies

- 4.52 A few inquiry participants suggested that there could be administrative efficiencies in the consolidation of tribunals. The ADT commented that a merger into a consolidated tribunal will 'allow for a leaner senior structure both on the judicial side and the administrative support side than is seen in the present scatter of tribunals in NSW'.¹⁸⁷
- 4.53 The ADT suggested there is a 'benefit to revenue that flows from the efficiencies that can be achieved through common platforms and processes' within a consolidate tribunal.¹⁸⁸ The Law Society of NSW Young Lawyers also indicated that an advantage of consolidating tribunals could be a reductions 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.¹⁸⁹

- 4.54 The Law Society of NSW advised that cost effectiveness and streamlined processes provide obvious benefits for the community and it is appropriate that the Government should look for opportunities to improve efficiency, such as through consolidation.¹⁹⁰
- 4.55 However, a few other stakeholders commented that consolidation would actually be more costly than the current system or that there really has been no thorough analysis on whether a super tribunal in New South Wales would indeed be cheaper.
- 4.56 In the area of the health professional tribunals, Mr Nick O'Neill, Chairperson of the Nursing and Midwifery Tribunal commented that '[t]here are also diseconomies of large scale that occur in all big bureaucracies, and I submit to you that a change in the health tribunal area and indeed in other tribunal areas will cost more'.¹⁹¹
- 4.57 In establishing the ACAT, Ms Linda Crebbin, President of the ACAT, indicated that it was not cheaper than the existing tribunal system in the ACT:

¹⁸⁷ Submission 38, p 4.

¹⁸⁸ Submission 38, p 3.

¹⁸⁹ Submission 82, p 4.

¹⁹⁰ Answers to questions taken on notice, 16 December 2011, Mr Joe Cantazariti, Law Society of NSW, Question 5, p 5.

¹⁹¹ Mr Nick O'Neill, Chairperson, Nursing and Midwifery Tribunal, Evidence, 16 December 2011, p 66.

It is not cheaper. I do not know that it is particularly more expensive, however. I believe that it is faster and I believe there are some areas in which it is much simpler because the super tribunal is much easier for individuals to identify, see and use.¹⁹²

4.58 Further to this Ms Crebbin advised '[t]here was no commitment by the Government to the tribunal necessarily saving costs, which I think was a wise thing'.¹⁹³

4.59 Justice John Chaney of the Western Australian State Administrative Tribunal (WA SAT) commented that it is difficult to compare the costs of the previous tribunal system in Western Australia to the current super tribunal, as it was a disparate system of institutions. He advised that it was unlikely to be cheaper, however, it is certainly more efficient:

Nobody knew or could calculate the cost of the previous system because they were just unidentifiable and a separate cost. One does not know but I do not think the cost—and we can now see it on a budget line—is likely to have been cheaper to actually establish and run the tribunal. But on the other hand I have absolutely no doubt that in a large number of the areas it is a lot cheaper for consumers, the members of the public. It is certainly a lot more efficient. There is no doubt in my mind that the product which you get from a full-time dedicated tribunal that is accessible, whose processes are transparent, who has consistency in decision-making, published written decisions that are accessible to the public, the value to the public is money well spent.¹⁹⁴

Efficiency beyond dollar savings

4.60 Unions NSW suggested that the Committee should adopt a broad view of 'efficiency' in its approach to the Inquiry, beyond potential dollar savings. It stated that a premium should also be applied to the quality and effectiveness of dispute resolution within the IRC, which 'prevents unnecessary or protracted dislocation within the workplace'.¹⁹⁵ The Union further explained that because a single dispute can involve thousands of public sector employees, the minimisation of workplace disruption 'holds tangible economic benefits to the New South Wales economy as well as for the continued provision of services to the community'.¹⁹⁶

4.61 Mr Richard Anicich, President, Hunter Business Chamber, also cautioned the Committee against focusing only on the potential savings in administrative costs that could be made from tribunal amalgamation. He told the Committee that:

In our view it would be a mistake to focus just on savings that might be made in administrative costs resulting from amalgamation of various tribunals. We suspect that those savings would be insignificant in terms of the productivity gains resulting from the efficient and effective operation of the commission in the Hunter and the

¹⁹² Ms Linda Crebbin, President, ACT Civil and Administrative Tribunal (ACAT), Evidence, 18 November, 2011, p 9.

¹⁹³ Ms Crebbin, Evidence, 18 November, 2011, p 6.

¹⁹⁴ Justice John Chaney, President, Western Australia State Administrative Tribunal, Evidence, 18 November, 2011, p 9.

¹⁹⁵ Answers to supplementary questions, 15 December 2011, Unions NSW, Question 2, pp 2-3.

¹⁹⁶ Answers to supplementary questions, 15 December 2011, Unions NSW, Question 2, p 3.

beneficial impact that has had on the delivery of major infrastructure projects in the region.¹⁹⁷

- 4.62** The Newcastle Branch of the Industrial Relations Society expressed the view that the focus of the Issues Paper on cost savings and management of workload is ‘misguided’. Instead, the submission stated, the key issue is ensuring that the quality of service provided by the IRC to its users and the broader community are maintained. This quality of service includes the IRC’s ‘contribution to good industrial relations, and the efficiency and growth of the state economy’.¹⁹⁸

Infrastructure and ensuring regional access

- 4.63** The Committee heard that the existing access to some tribunals in New South Wales on a regional basis is important and should be captured in any plans for a consolidated tribunal. This is particularly the case for the existing tribunal infrastructure of the CTTT and the IRC which has the potential to be utilised for a consolidated tribunal.
- 4.64** The CTTT has eight registries in Sydney CBD, metropolitan and regional New South Wales and can access 70 venues across the state for hearings, providing a comprehensive geographical coverage for parties attending hearings and local employment for CTTT tribunal members and staff.¹⁹⁹
- 4.65** Stakeholders highlighted the success of accessing the IRC regionally to resolve industrial relations matters.²⁰⁰ On a similar note, the NSW Society of Labor Lawyers suggested that there is the potential for a consolidated tribunal to utilise the facilities including court rooms around the state of the IRC.²⁰¹
- 4.66** The ADT commented that it would be ideal for a consolidated tribunal to have key business elements located in one area and pointed to fact that with the creation of VCAT a customised building was also established.²⁰² This was also the case in Queensland and in Western Australia.

A tribunal services unit

- 4.67** The question of which government department would provide tribunal services to a consolidated tribunal arose during the Inquiry. Some inquiry participants suggested that

¹⁹⁷ Mr Richard Anicich, President, Hunter Business Chamber, Evidence, 23 January 2012, p 61.

¹⁹⁸ Submission 74, p 2.

¹⁹⁹ Submission 43, p 36.

²⁰⁰ Submission 55, Hunter Business Chamber, p 3; Submission 58, The Australian Workers’ Union Newcastle, Central Coast and Northern Regions Branch, p 2; Submission 64, p 4; Submission 74, p 4; Submission 78, pp 18-20; Mr Cahill, Evidence, 16 December 2011, p 33; Mr Ben Kruse, Convener, Employment Law Committee, NSW Society of Labor Lawyers, Evidence, 16 December 2011, p 22; Mr Anicich, Evidence, 23 January 2012, p 62; Mr Noel Martin, Industrial Officer, Utilities Services Union, Evidence, 23 January 2012, p 72.

²⁰¹ Submission 37, NSW Society of Labor Lawyers, p vii.

²⁰² Submission 38, p 5.

registry or back end services could sit within the Department of Attorney General and Justice. However, the Committee was cautioned that tribunal services should not become part of the Department's Courts Services division, due to the different demands of each.²⁰³

- 4.68** Judge O'Connor from the ADT acknowledged in its submission that portfolio responsibility for any consolidated tribunal service would likely rest with the Department of Attorney General and Justice. He noted that the tribunal services should not be merged with the court services branch of that Department because it is, albeit understandably, focused on the court system and criminal justice matters and that the management of tribunals is quite different. He stated that 'there are many different demands involved in organising and running tribunals, and implementing the values that underpin their creation, as compared to those that apply to courts especially criminal courts'.²⁰⁴

Adequacy of resources for any consolidated tribunal

- 4.69** Following on from the concern that the creation of a consolidated tribunal in New South Wales may well be costly and noting this was the case in other jurisdictions, is the need to ensure that any consolidated tribunal in New South Wales is adequately resourced.
- 4.70** The importance of this issue was highlighted by a number of stakeholders and also by super tribunals in other jurisdictions.²⁰⁵ The NSW Bar Association suggested that 'the success of any "super tribunal" will depend in large measure on it being provided with adequate resources and appropriate personnel to enable it effectively to discharge its functions in all its jurisdictions'.²⁰⁶
- 4.71** During its visit to VCAT the Committee was informed that it is especially important to ensure adequate ongoing funding from the beginning. Without a comprehensive framework for funding, as new jurisdictions are inevitably added to the tribunal over time, it can be a difficult or at least lengthy process to secure adequate funding to cope with an increased workload.

Committee comment

- 4.72** While it may not be apparent if the consolidation of tribunals will lead to initial cost savings, in the Committee's view, this is an opportunity to improve access to justice for the citizens of New South Wales. This has been demonstrated in other jurisdictions and is the Committee's overarching consideration in determining the benefits or not of consolidation.
- 4.73** People in regional and rural New South Wales will be better served by a tribunal system that has the resources and capacity to operate and resolve disputes locally. Accordingly, the

²⁰³ Answers to supplementary questions, 16 December 2011, Ms Jane Needham, Junior Vice President, NSW Bar Association, Question 2, pp 3-4 and Submission 38, p 15.

²⁰⁴ Submission 38, p 15.

²⁰⁵ Submission 22, NSW Chapter of the Australian Institute of Administrative Law, p 2; Submission 38, p 5; Mr Peter Dodd, Solicitor, Public Interest Advocacy Centre, Evidence, 23 January 2012, p 25, Judge Fleur Kingham, Deputy President, QCAT, Evidence, 23 January, p 56, Report of the Committee visit to VCAT and the Law Institute of Victoria, see Appendix 4.

²⁰⁶ Submission 40, para 46.

Committee recommends that the NSW Government consolidate, wherever appropriate, facilities (such as office space, registries, court and tribunal rooms) between tribunals and establish 'one stop shops' which will enable users in metropolitan and regional centres to have access to tribunal services through single points of contact. This will allow for the full utilisation of the facilities which already exist and the broadening of their use to the general public – thus further enhancing the public's access to justice.

Recommendation 13

That the NSW Government consolidate, wherever appropriate, facilities (including office space, registries, court and tribunal rooms) between tribunals and establish 'one-stop-shops' in metropolitan and regional centres to have access to tribunal services through single points of contact.

- 4.74** The Committee supports the suggestion that a dedicated tribunal services unit to support a consolidated tribunal in New South Wales could be a valuable shift. It may be that not every current tribunal is suitable for having its registry or other services amalgamated but the majority likely would. The discretion as to which services to consolidate and for which tribunals should rest with the expert panel or working group to be established pursuant to Recommendation 2.
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Recommendation 14

That the NSW Government consolidate back-end services across tribunals under one government department, eliminating any undue duplication.

- 4.75** The Committee has already recommended in the previous chapter that an effective consolidated tribunal must be established with adequate resources. Lessons from other jurisdictions have shown that proper planning from the outset to ensure improved access to justice and efficiencies as well as the adequate allocation of resources is especially important.

Chapter 5 Consumer, Trader and Tenancy Tribunal

This chapter examines the role and operation of the Consumer, Trader and Tenancy Tribunal (CTTT). The Committee's terms of reference 2(c) ask it to report on the operation of the CTTT, specifically, if the tribunal is effective in providing a fast, informal and flexible process for resolving consumer disputes. This chapter also presents a brief review of the appropriateness of the tribunal's jurisdiction.

In addition, this chapter presents stakeholders views on how to improve the current complicated appeal process available for CTTT decisions.

Role and workload of the Consumer, Trader and Tenancy Tribunal

- 5.1 The CTTT submission indicated that in general, the role of the CTTT is to provide a forum for the resolution of disputes where, in the past, parties had to either engage in litigation through the court system or there was in fact no remedy available.²⁰⁷
- 5.2 The CTTT has nine divisions to deal with the varying disputes, being Tenancy, Social Housing, Home Building, General, Residential Parks, Strata and Community Schemes, Motor Vehicles, Commercial, and Retirement Villages.²⁰⁸

Tribunal structure and membership

- 5.3 The Chairperson, Ms Kay Ransome, is responsible to the Minister for Fair Trading for the efficient and effective operation of the CTTT and management of its work, including tribunal member management and performance.²⁰⁹ At 30 June 2011, the tribunal membership comprised the Chairperson, two Deputy Chairpersons, eight senior members, nine full-time members and 59 part-time members. Members are located in Sydney, metropolitan, regional and country areas.²¹⁰
- 5.4 On the Committee's visit to the CTTT Sydney office the breadth of cases that members hear was demonstrated, with the Committee observing hearings on a range of matters including general consumer, residential tenancy and home building disputes.²¹¹

Workload

- 5.5 The CTTT described the considerable workload of the tribunal and therefore the large footprint the organisation has across the State:

The CTTT is the largest tribunal in New South Wales with some 60,000 applications a year, eight Registries, seven permanent hearing venues, a total of 39 purpose built hearing rooms and 74 conciliation rooms, 80 Tribunal Members and 124 staff

²⁰⁷ Submission 43, Consumer, Trader and Tenancy Tribunal (CTTT), p 5.

²⁰⁸ Submission 43, p 15.

²⁰⁹ Submission 43, p 15.

²¹⁰ Submission 43, p 16.

²¹¹ Report of the Committee visit to the CTTT, see Appendix 3.

positions. It is almost 10 years since the CTTT began operations. In that time the Tribunal has dealt with disputes involving in excess of 1.4 million people and businesses in New South Wales.²¹²

Issues raised concerning the CTTT

5.6 The terms of reference for the Inquiry provided an opportunity for stakeholders to raise their concerns with the Committee regarding the operation of the CTTT. The Committee has been asked to consider:

- if the CTTT is effectively providing a fast, informal and flexible process for resolving disputes
- the appropriateness of matters within the CTTT jurisdiction, and
- the rights of appeal available to CTTT decisions.²¹³

5.7 A number of inquiry participants have raised concerns with how their matter has been dealt with by the CTTT. Very few participants questioned if the tribunal was providing an informal and flexible process.²¹⁴ On some occasions participants have suggested there have been delays regarding their matter, however, the main concern was inconsistent decision making by tribunal members and the need for specialist tribunal members in particular jurisdictional areas.

Timeliness

5.8 A number of inquiry participants raised issues with the length of time their matter had taken with the CTTT. One submission author commented that in their case the ‘length of time and costs involved in dealing with matters are excessive’. The example provided was that there was a lengthy process in order to obtain a hearing waiting ‘up to 18 months from the date of the original application’.²¹⁵

5.9 The Housing Industry Association raised concern over the lack of efficiency in the resolution of home building disputes:

There is concern over the ability (or inability) of the CTTT to efficiently resolve disputes. Of most concern is the 69% of matters over \$30,000 that take up to 18 months to reach finalisation. In addition 20% of matters over \$30,000 are taking longer than 8 weeks to reach the first directions hearing. This delay is in contradiction to the Chairpersons Direction that a directions hearing will be held up to 42 days after lodgement of the application.²¹⁶

5.10 Housing NSW, who are a client of the CTTT through its social housing division, were also concerned about timeliness in more complex cases in this division involving the illegal

²¹² Submission 43, p 4.

²¹³ See Term of Reference 2(c).

²¹⁴ See Submission 62, Mr Peter Stiles and Submission 34, Ms Patricia Tardini.

²¹⁵ Submission 29, Name suppressed, p 1.

²¹⁶ Submission 48, Housing Industry Association, p 7.

behaviour of tenants. On these occasions, Mr Paul Vevers, Executive Director, Housing NSW, explained that Housing NSW wants to respond quickly to send a message to tenants that illegal behaviour can impact on their tenancy, however, cases get delayed in the CTTT:

It can take many months for those cases to go through the tribunal by which time as far as members of the community are concerned there is no connection between the offence that has taken place and the consequences because they still see those people living where they were living before, even though they know from the newspapers what had happened. Those proceedings can get bogged down as though they are criminal proceedings even though they are not. They are tenancy related proceedings. We do think there is something of a problem in those cases.²¹⁷

- 5.11** Another inquiry participant stated that in their retirement village case they ‘had to wait many months to arrive at the hearing and then many weeks to receive orders’.²¹⁸ A further example of delays in a retirement village case was provided by Mr John Cooper who commented:

There has been an increase in the delay in receiving decisions from Tribunal Members on cases involving Retirement Villages. In one case known to the industry bodies, the final hearing was held on 5 November 2010, with a decision not received until the last week of April in 2011.²¹⁹

- 5.12** Ms Judith Daley, Vice President of the Retirement Village Residents Association, supported these views in her evidence to the Committee. Ms Daley provided an example of a matter that has been ongoing for over six months and commented: ‘No, they [CTTT] are not very timely. Sometimes they are but they are not always timely’.²²⁰

- 5.13** Conversely, the Residents Committee of the Aveo Banora Point Retirement Village praised the CTTT for its handling of their matter:

We have nothing but praise for the way that the matter was handled – both quickly and judiciously and without any major cost to our village.²²¹

- 5.14** Similarly, the Law Society of Young Lawyers NSW, commented that in their view ‘the CTTT provides a fast, informal and flexible process for resolving consumer disputes’.²²²

- 5.15** The CTTT, in its performance measures, has set service standards regarding time taken from lodgement to first hearing and lodgement to finalisation. The standards are that 80 per cent of applications need to have their first hearing and be finalised within the timeframe set for each division. For example, the retirement village division has a six week target for holding the first hearing and a 16 week target for the matter to be finalised.²²³ The table of target timeframes has been reproduced below.

²¹⁷ Mr Paul Vevers, Executive Director, Housing NSW, Evidence, 15 December 2011, p 35.

²¹⁸ Submission 5, Carey Bay Self Care Anglican Village.

²¹⁹ Submission 2, Mr John Cooper, p 2.

²²⁰ Ms Judith Daley, Vice President, Retirement Village Residents Association, Evidence, 15 December 2011, p 52.

²²¹ Submission 39, Aveo Banora Point Retirement Village, p 1.

²²² Submission 82, Law Society of NSW Young Lawyers, p 10.

²²³ Submission 43, p 7.

Table 1 CTTT Target time from Lodgement to First Hearing and Lodgement to Finalisation²²⁴

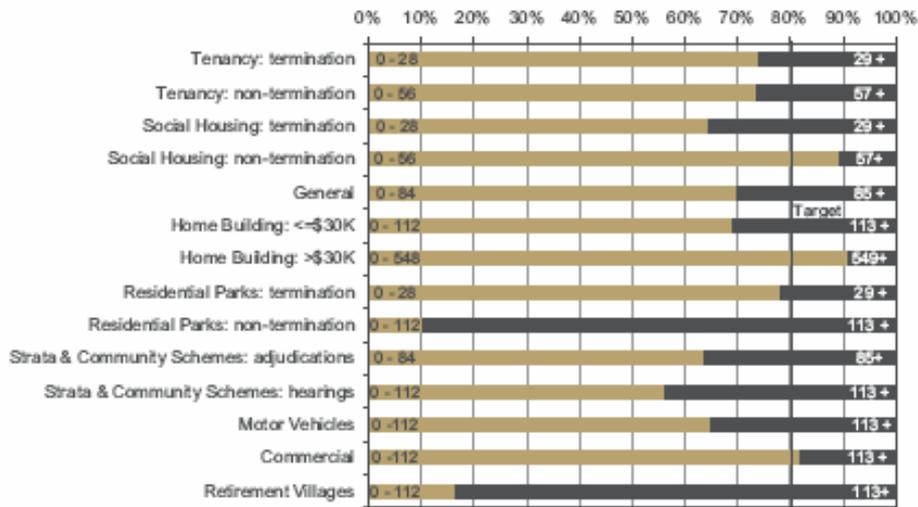
Division	Classification	Lodgement to First Hearing 80% Target	Lodgement to Finalisation 80% Target
Tenancy	termination	3 weeks	4 weeks
	non-termination	4 weeks	8 weeks
Social Housing	termination	3 weeks	4 weeks
	non-termination	4 weeks	8 weeks
General		6 weeks	12 weeks
Home Building	<= \$30K	6 weeks	16 weeks
	> \$30K	8 weeks	18 months
Residential Parks	termination	3 weeks	4 weeks
	non-termination	6 weeks	16 weeks
Strata & Community	adjudication		12 weeks
	hearings		16 weeks
Motor Vehicles		8 weeks	16 weeks
Commercial		6 weeks	16 weeks
Retirement Villages		6 weeks	16 weeks

NOTE: CTTT service standard for Lodgement to First Hearing and Lodgement to Finalisation is 80% within the timeframes indicated above.

5.16 In reviewing the statistics provided in the *CTTT Annual Report 2010-2011* the retirement village division appears to fare badly when looking at time taken to finalise a matter. Less than 20 per cent of retirement village matters were finalised within the target of 16 weeks. The majority of the other divisions within the CTTT also fell short of the 80 per cent target for matters to be finalised within set timeframes.²²⁵ The table for lodgement to finalisation has been reproduced below.

²²⁴ Submission 43, p 7.

²²⁵ CTTT, *Annual Report 2010-2011*, p 61.

Table 2 CTTT Application lodgement to finalisation 2010 – 2011²²⁶

5.17 In response to the issue of timeliness, Ms Ransome advised that the tribunal aims to deal with all matters in the most effective and timely way.²²⁷ It was indicated that there is a common misconception that the CTTT deals with all disputes in a like manner when, in order to handle matters effectively and timely, the tribunal has developed procedures that are tailored to specific divisions and the nature and complexity of the matter.²²⁸ Ms Ransome explained:

In our small claims areas—tenancy, small general consumer claims, small home building claims, motor vehicle matters involving relatively small amounts of money—the vast majority of those claims, something like 75 to 80 per cent, are dealt with within four to eight weeks from the date of lodgement.

There are a number of matters that come before the tribunal in two divisions in particular, the home building division and the strata and community schemes division, that raise issues that are of far greater legal and factual complexity than those in other divisions. Those matters take longer. From time to time matters can take longer than either I would hope or the parties would hope, but that happens for a variety of reasons, which sometimes are not within the tribunal's control.²²⁹

5.18 The CTTT provided further information on the timeliness issue in the home building division, advising that these disputes are generally complex and involve significant amounts of money and can become lengthy. Delays are usually the result of adjournments, which generally arise due to the lack of availability of parties, their witnesses, experts or legal representatives; the requirement to exchange evidence or to obtain additional evidentiary material and additional time to allow for specific actions or events to take place.²³⁰

²²⁶ CTTT, *Annual Report 2010-2011*, p 61.

²²⁷ Ms Kay Ransome, Chairperson, CTTT, Evidence, 15 December 2011, p 42.

²²⁸ Submission 43, p 5.

²²⁹ Ms Ransome, Evidence, 15 December 2011, p 42.

²³⁰ Response to observations made at public hearings, 15 and 16 December 2011, Ms Kay Ransome, Chairperson, CTTT, p 6.

- 5.19** In response to concerns from Housing NSW of delays in CTTT cases that also involved criminal proceedings, the CTTT advised that the delays can be attributed to both parties being legally represented and requiring adequate time to prepare:

There are times when matters involving alleged illegal use of the premises by public housing tenants can involve a longer timeframe than other matters in the Social Housing Division. This is because both parties, including Housing NSW, are likely to be legally represented and must be given adequate time to prepare. Issues regarding self incrimination where criminal proceedings are still on foot, and there can be difficulties in obtaining documentation ... It is important for procedural fairness to be accorded to both parties and an appropriate decision arrive at by the Tribunal. This will help avoid the matter being appealed which would result in further delays, and costs to the parties and the State.²³¹

- 5.20** For the specific area of retirement village disputes, the CTTT responded on the issue of lengthy delays between an application and a first hearing (not finalisation) advising that organising on-site mediations can take some time:

The number of retirement village disputes brought to the CTTT is small, and sometimes bringing the various parties together can result in some lag between an application being lodged and the conduct of mediation or a hearing. The CTTT often convenes mediations on site at a retirement village and the logistics of bringing all the parties together can be considerable. However, this should be balanced against the considerable benefits that arise as it enables more parties to more easily participate in the process.²³²

- 5.21** In summary, on the issue of timeliness Ms Ransome contended that matters heard through the CTTT would take even longer if the matter was heard through the courts:

I cannot sit here, having made an affirmation, and say to you that there is never a case in the tribunal that does not take longer than it should, but I can say that the vast majority of matters in the tribunal are dealt with in as timely a way as is possible and are certainly dealt with within time frames that are, by and large, faster than those in the court. As you are aware, we share jurisdiction with the Local, District and Supreme courts in some matters, particularly in relation to home building disputes. A person can lodge in the District Court or the tribunal and matters get transferred between the jurisdictions. Matters in the tribunal will not take as long as matters in the District Court or Supreme Court, and the cost to the parties and to the State of those matters is less.²³³

Committee comment

- 5.22** It is noted that the CTTT provides a faster resolution for disputes than the courts, however, there are some concerns with the CTTT meeting its service standard of finalising 80 per cent of matters within set timeframes, especially in the retirement village division. This concern was echoed in the evidence from inquiry participants. There would appear to be further room for

²³¹ Response to observations made at public hearings, 15 and 16 December 2011, Ms Ransome, p 5.

²³² Response to observations made at public hearings, 15 and 16 December 2011, Ms Ransome, pp 5-6.

²³³ Ms Ransome, Evidence, 15 December 2011, p 42.

improvement for the CTTT in the area of timeliness of handling matters and in particular finalising matters.

Quality of decision making

- 5.23** A significant issue raised by inquiry participants concerning their dealings with the CTTT was the quality of decision making by the tribunal members. The participants contended that there was little consistency in decisions or in some cases decisions were of poor quality. They were also concerned that previous decisions did not form a precedent for future decisions by the tribunal. To remedy this, a number of inquiry participants suggested specialist tribunal members for certain divisions within the CTTT.
- 5.24** Mr Steven Mills believed his CTTT case regarding residential building provided an example of poor decision making. He advised ‘the decision was against the weight of evidence that I presented.’²³⁴ Mr Mills recommended the specialisation of tribunal members:
- CTTT Members who adjudicate building disputes should be people who have a good understanding of the Building Code of Australia and other relevant building standards. Preferably these people should be from the Building industry and also have some legal background.²³⁵
- 5.25** The Master Builders Association of NSW (MBA NSW) supported the idea of appointing tribunal members with building and construction experience, especially to adjudicate on matters involving costs of up to \$500,000.²³⁶ The Housing Industry Association also highlighted the need for specialist tribunal members in the home building division, as it indicated ‘the lack of technical knowledge of the building industry amongst tribunal members had been a matter of concern for some time’.²³⁷
- 5.26** Similarly, the Strata Community Australia NSW (SCA) commented that the ‘current service delivery from the CTTT is problematic and inconsistent. The SCA recommended the creation of a specialist strata community title dispute resolution facility within the CTTT (at the formal hearing level) conducted by senior members’.²³⁸ These views were also supported by the Australian College of Community Association Lawyers who put forward a similar proposal for specialists in the strata and community title area.²³⁹
- 5.27** The Property Law Committee of the Law Society of NSW reiterated the concerns of other inquiry participants in relation to the quality of decision making in strata title matters and called for specialisation in this area.²⁴⁰

²³⁴ Submission 71, Mr Steven Mills, p 1.

²³⁵ Submission 71, p 3.

²³⁶ Submission 61, Mater Builders Association of NSW, pp 3-4.

²³⁷ Submission 48, pp 8-9. Other submission authors also recommended the specialization of tribunal members see: Submission 29, Name suppressed, p 2; Submission 62, p 2; Submission 27, Mr Stephen Jones, p 2.

²³⁸ Submission 60, Strata Community Australia (NSW), p 2.

²³⁹ Submission 49, Australian College of Community Association Lawyers, p 1.

²⁴⁰ Submission 84, Law Society of NSW, p 6.

5.28 In relation to the retirement village division, Mr Neil Smith raised similar concerns to those in the strata and community title and residential building divisions, that ‘CTTT Members who hear applications do not appear to always be consistent in their rulings’.²⁴¹ Mr Smith commented that ‘precedent, based upon other Members’ previous rulings on an issue does not appear to be adopted by other Members hearing another application’. Mr Smith suggests that tribunal members with specialist knowledge of retirement village legislation and issues would be beneficial.²⁴²

5.29 Ms Daley of the Retirement Village Residents Association also commented on inconsistencies in decisions relating to the retirement village division:

We have examples where there have been inconsistencies. The matter that Ms Ransome spoke about earlier was one of the cases that comes to mind, but there have been many instances in connection with the interpretation of "replacement and repair" where we have no idea how anyone arrived at the decisions that have come out.²⁴³

5.30 Mr John Cooper stated that ‘sections of the *Consumer, Trader and Tenancy Act 2001* advises that there should be consistency in the Tribunal, however, there is no precedent set by decisions made in the Tribunal. In his view this has made matters proceeding to the Tribunal somewhat of a “lottery”’.²⁴⁴

5.31 Housing NSW indicated that as CTTT decisions do not form precedent, situations can arise where there are different interpretations of the legislation and different standards of evidence by individual tribunal members. Mr Nathan Cureton, Solicitor, Housing NSW, commented that this lack of precedence can lead to inconsistencies in decision making:

We are bound by precedent from a higher court, but they are not bound by the decisions of other tribunal members. Certainly there is an expectation that there will be some consistency between decision-makers, but that does not always play out.²⁴⁵

5.32 Interestingly, while the Tenants’ Union of NSW did raise some concern about decision making in a specific case of the CTTT, it commented that measuring the quality of decision making in dispute resolution is difficult:

Measuring the quality of decision making in the dispute resolution context is notoriously difficult. Perceptions about a lack of quality are often impressionistic and imprecise. The Tenants’ Union regularly hears from tenants or tenant advocates who are dissatisfied with the CTTT’s process or ultimate decision, but it would be difficult to move from those reports to an assessment of the CTTT’s decision making generally.²⁴⁶

²⁴¹ Submission 8, Mr Neil Smith, p 3.

²⁴² Submission 8, p 4.

²⁴³ Ms Daley, Evidence, 15 December 2011, p 51.

²⁴⁴ Submission 2, pp 2-3.

²⁴⁵ Mr Nathan Cureton, Solicitor, Housing NSW, Evidence, 15 December 2011, p 37.

²⁴⁶ Submission 80, Tenants’ Union of NSW, p 2.

- 5.33** In response to inquiry participants concerns of inconsistent decision making by tribunal members, the Chair of the CTTT indicated that while issues seem to be similar in a number of cases, the actual evidence presented can differ and that is what the tribunal member makes their decision on. Ms Ransome provided an example from the retirement villages division:

We had a matter earlier this year in the retirement villages division of the tribunal involving whether an operator who owned a number of villages could apportion costs across different villages and the costs be sheeted home to the residents through their recurrent charges. The wording in the Act says, in simple terms, that the operator has to show that these costs can be attributed to the village.

A matter came before the tribunal and the tribunal member made a decision that the costs that the operator was seeking to attribute to a particular village could not be charged because the operator could not show that they could be apportioned in that way. That matter went on appeal to the Supreme Court and the tribunal's decision was upheld. While that was going on an application was brought to the tribunal in relation to another village owned by the same operator. Part way through the process the Supreme Court's decision was handed down and an adjournment was sought by the operator, who came back with further evidence in support of the case. In that case he was able to show, because of the new evidence, that those costs were in fact attributable to that village. In that case a different decision was made because what was before the tribunal was very different evidence about the same issue. So it is very difficult to say there is inconsistency.²⁴⁷

- 5.34** The CTTT contended that, in response to issues raised regarding the quality of decision making in the CTTT, the dissatisfaction with the tribunal can be measured by the rate of rehearing and appeal and by the number of complaints received from aggrieved parties.
- 5.35** The Committee was advised that in 2010-11, of the 59,956 applications finalised, only 1,940 applications for rehearing were received. Of these, 960 or 1.6 per cent of all applications were granted. The most common reason for granting a rehearing is because the party did not receive the notice of hearing or did not attend for reasons outside their control and orders were made in their absence. The CTTT stated that this is no reflection on the original decision itself which was made without the benefit of one party's evidence.²⁴⁸
- 5.36** In terms of appeals to the courts in 2010-11, 85 appeals about CTTT matters were made to the District or Supreme Courts. During the same period the tribunal finalised 59,956 applications. The CTTT indicated that this represents an appeal rate of 0.1 per cent. In the appeals determined by the District and Supreme Courts during that year, 72 per cent resulted in no error being detected and no change being made to the tribunal's decision. The CTTT advised that as very few decisions are overturned, there is no systemic issue of poor quality decisions.²⁴⁹
- 5.37** In relation to complaints to the Minister and Chairperson, there were 580 complainants in 2010-11. The CTTT advised that this number must be seen in light of the fact that during that

²⁴⁷ Ms Ransome, Evidence, 15 December 2011, p 44.

²⁴⁸ Submission 43, p 11.

²⁴⁹ Submission 43, p 11.

time the tribunal held 72,836 hearings and made 88,339 orders. The most common complaint is dissatisfaction with the outcome of the tribunal proceedings.²⁵⁰

- 5.38** The Tenants' Union of NSW questioned the use of the number of appeals to measure dissatisfaction with decision making in the CTTT:

I note that the tribunal [CTTT] has used as a metric for the potential measure of dissatisfaction with its decision-making the fact that 0.1 per cent of its decisions have been the subject of some sort of appeal. I do not think that is a very pertinent measure. We had a quick look at the New South Wales Court of Appeal, which is the high watermark of justice in New South Wales, and for the period January to June this year, expressed as a percentage of the matters it heard, 25 per cent of its decision were the subject of further proceedings in an attempt to take a matter to the High Court. Of course, only a relatively small number get past the special leave stage. However, by the tribunal's measure its decision-making is 250 times better than the Court of Appeal's. That is not a useful measure, but it is very difficult to come up with useful measures of the quality of decision-making.²⁵¹

- 5.39** The CTTT made no specific comment on the calls for specialised members in certain divisions of the tribunal. However, comment was made on the qualification of members and the special skill set required to deal with sometimes quite emotive issues:

In terms of qualifications of members, the qualifications are set out in the Act. There are selection criteria that we apply for the different classes of membership that members meet. We have 80 tribunal members around New South Wales. It would be fair to say that in any organisation or profession you could not expect all 80 to be exactly the same. There will be some variance in experience and skill level, but there is a threshold that all have to meet. ...

In fact, one of the most difficult aspects of a member's role in the CTTT, particularly because there are no lawyers, there is no filter between the member and the person. The raw emotion will come across the table. It is a very difficult environment to work in, and members have to have particular skills to work in that environment.²⁵²

Committee comment

- 5.40** The Committee understands that the issue of the quality of decision making in the CTTT, and in particular the alleged inconsistencies in decision making, is a significant concern for inquiry participants. The Committee acknowledges the CTTT response that rehearing, appeal and complaint figures are low. However, the Committee is concerned that this may not be an accurate measure of the quality of decision making in the tribunal, especially, in light of concerns with accessing the appeals process, which is discussed later in this chapter.
- 5.41** The Committee believes a more accurate measure for determining the quality of decision making in the CTTT is worth investigating. The Committee therefore recommends that the CTTT investigate ways to more accurately measure the quality of decision making in the tribunal.

²⁵⁰ Submission 43, pp 11-12.

²⁵¹ Mr Colin Freer, Solicitor, Tenants' Union of NSW, Evidence, 15 December 2011, p 57.

²⁵² Ms Ransome, Evidence, 15 December 2011, p 50.

Recommendation 15

That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal, the tribunal investigate ways to more accurately measure the quality of decision making in the tribunal.

Appropriateness of matters within the CTTT jurisdiction

- 5.42 The majority of inquiry participants did not raise any significant issues with the appropriateness of matters within the CTTT jurisdiction.
- 5.43 The tribunal has an unlimited jurisdiction in the residential parks, strata and community schemes, retirement villages and commercial divisions (this means that no monetary limit is prescribed). The jurisdiction is also unlimited in the Motor Vehicles Division when the tribunal is dealing with new vehicles purchased for private purposes. The jurisdiction in the Home Building Division has a \$500,000 limit for residential building work. Other consumer claims involve a limit of \$30,000 and in residential tenancy disputes the limit is \$15,000 and \$30,000 in relation to a bond.²⁵³
- 5.44 In terms of how this compares to tribunals in other states, the CTTT provided the following table:

Table 3 Jurisdictional limits comparison – VCAT, QCAT and CTTT²⁵⁴

Jurisdiction	Jurisdictional limits \$		
	VCAT	QCAT	CTTT
Tenancy	\$10,000	\$25,000	\$15,000 \$30,000 (bond only)
General	Unlimited	\$25,000	\$30,000
Home Building	Unlimited	\$25,000 (civil claim/debt recovery)	\$500,000
Motor Vehicles	Unlimited	\$25,000 (defects/maintenance)	\$30,000 Unlimited (new cars used for private purposes)

- 5.45 It is noted that the Victorian Civil and Administrative Tribunal generally has an unlimited jurisdiction, except for in tenancy matters, in comparison to the CTTT. Whereas the

²⁵³ Submission 43, p 8. Where matters are above the jurisdictional limit or are not matters over which the tribunal has jurisdiction remedy may be sought in the Local, District or Supreme Court.

²⁵⁴ Submission 43, p 9.

Queensland Civil and Administrative Tribunal has a standard jurisdictional limit of \$25,000 in matters that the CTTT may have a greater limit.

- 5.46** Housing NSW commented that the CTTT current jurisdiction of \$15,000 for residential tenancy disputes, including social housing, is reasonable, although an increase to \$20,000 would be supported.²⁵⁵
- 5.47** The Law Society of Young Lawyers NSW, indicated that they believe the jurisdiction of the CTTT is appropriate for its purpose as a consumer dispute resolution forum that is an alternative to the court process. It states ‘the monetary jurisdiction of \$30,000 is appropriate and fair’.²⁵⁶
- 5.48** In relation to home building disputes, the NSW Bar Association proposed a reduction in the jurisdiction from \$500,000 to \$100,000, with matters over \$100,000 being heard in the courts.²⁵⁷
- 5.49** The Motor Traders Association recommended that the scope of the CTTT be expanded to allow determination in matters that arise between businesses. The Association advised ‘this would require an expansion of the jurisdiction of the Tribunal but as the name suggested it is a “Trader” Tribunal’.²⁵⁸
- 5.50** The CTTT advised that it ‘makes no comment on the suitability or otherwise of the jurisdictional limits that apply other than to note that its flexible procedures can be adapted to deal with a variety of circumstances’.²⁵⁹
- 5.51** However, in response to further questioning on the jurisdiction of the CTTT, it commented:

In general, there is little difficulty caused by the different monetary limits or time limits on applications across the jurisdictions. However, differences in CTTT jurisdictional limits compared to those in the Local Court for the same matter can create confusion for some people. For example, a consumer claim must be made to the CTTT within 3 years while the time limit for the same claim to the Local Court is 6 years. ...

There are some other disputes of a commercial nature, for example, retail tenancies, which do not fall within the CTTT’s jurisdiction. Sometimes these cases may also involve an associated residential tenancy or strata dispute and the parties may have to make applications in more than one tribunal to have the entirety of their dispute resolved. These issues may be overcome in a super tribunal.²⁶⁰

²⁵⁵ Submission 31, Housing NSW, p 4.

²⁵⁶ Submission 82, p 11.

²⁵⁷ Submission 40, NSW Bar Association, para 37-43.

²⁵⁸ Submission 28, Motor Traders Association NSW, p 3.

²⁵⁹ Submission 43, p 9.

²⁶⁰ Answers to supplementary questions, 15 December 2011, Ms Kay Ransome, Chairperson, CTTT, Question 1, pp 2-3.

Committee comment

5.52 Based on the limited evidence received on the matter of jurisdiction, the Committee is not in a position to comment on the appropriateness of the jurisdiction for the CTTT.

Rights of appeal for CTTT decisions

5.53 The issue of rights of appeal available for CTTT decisions was raised by a number of inquiry participants. Primarily, participants commented that the rehearing and appeals mechanisms for CTTT cases were complicated, potentially costly and therefore not always accessible for users of the tribunal.

5.54 The *Consumer, Trader and Tenancy Tribunal Act 2001 (CTTT Act)* provides for limited rights of rehearing and appeal. Rehearings may be granted by the Chairperson or her delegate. An applicant seeking a rehearing must be able to show that they may have suffered a substantial injustice on one or more of the following grounds:

- the decision was not fair and equitable
- the decision was against the weight of evidence or
- significant evidence is now available that was not reasonably available at the time of hearing.²⁶¹

5.55 The CTTT advised that dissatisfaction with the decision is not a sufficient reason for a rehearing. In 2010-11, 960 matters were reheard representing 1.6% of all applications received. When a matter is reheard, the proceedings commence afresh and the matter is reheard in its entirety, unless the Chairperson limits the rehearing to specific matters.²⁶²

5.56 Appeals from decisions made by the CTTT can be taken under sections 65 or 67 of the *CTTT Act* to either the NSW District Court on a question of law or to the NSW Supreme Court on the grounds of jurisdictional error or denial of procedural fairness.²⁶³ During 2010-11 there were 85 appeals from CTTT matters to the District or Supreme Courts.²⁶⁴

Lack of clarity about appeal mechanisms

5.57 Prior to amendments to the *CTTT Act* in 2008, all appeals from the CTTT were to the Supreme Court. A CTTT decision could be appealed with respect to a matter of law (section 67 of the *CTTT Act*) or jurisdictional error or denial of procedural fairness (section 65 of the *CTTT Act*). Any procedural difficulty that might have arisen from confusion about the two forms of relief was dealt with internally by the Supreme Court.²⁶⁵

²⁶¹ Submission 43, p 9.

²⁶² Submission 43, p 9.

²⁶³ The *Strata Schemes Management Act 1996* and the *Community Land Management Act 1998* contain their own appeal mechanisms which apply in those disputes.

²⁶⁴ Submission 43, p 9.

²⁶⁵ Submission 43, p 10.

- 5.58** Since changes in 2008, the statutory appeal under section 67 of the *CTTT Act* is to the District Court. The CTTT indicated that this situation has led to some difficulties for litigants in choosing which forum is best to prosecute their appeal and has also led, in some cases, to multiple appeals about the same issue.²⁶⁶
- 5.59** Following the changes in 2008, the question arose as to whether the District Court has power to grant relief under section 65 of the *CTTT Act* in addition to the statutory appeal under section 67. The prevailing view is that the District Court does not have the power to conduct judicial review of the tribunal's decisions and these applications should continue to be dealt with by the Supreme Court.²⁶⁷
- 5.60** The CTTT stated that 'a person ... who wishes to have a decision of the CTTT reviewed by a higher authority now faces a choice: pursue a statutory appeal to the District Court or seek judicial review in the Supreme Court of NSW'.²⁶⁸
- 5.61** However, nothing in the legislation prevents a person who has unsuccessfully appealed to the District Court against a tribunal decision from then seeking judicial review of the same tribunal decision in the Supreme Court.²⁶⁹

Stakeholder comments on rehearings and appeal mechanism in the CTTT

- 5.62** Stakeholders believed the current appeal mechanisms for CTTT decisions are complicated and potentially costly if pursued through the courts. Stakeholders contended that this is a disincentive for most self-represented users of the tribunal. Inquiry participants also commented that the granting of applications for rehearing a matter within the CTTT is an arbitrary process.
- 5.63** In light of Mr Mills experience with a residential building case in the CTTT, he recommended an improved appeals and rehearing process:
- All appeals and/or requests for a rehearing should be reviewed by a separate team of people – not the same CTTT Members who adjudicate within the CTTT chambers. Requests for appeals and rehearings should be taken seriously and at present are not taken seriously by the CTTT. Consumers should also be given a written reason why their request has been approved or declined. At present the CTTT is unwilling to give reasons/feedback why they have decided to decline a consumer's request for an appeal or rehearing.²⁷⁰
- 5.64** The MBA NSW also raised concerns with the rehearing process. It stated that the determination of an application of rehearing is an arbitrary process by the CTTT Chairperson,

²⁶⁶ Submission 43, p 10.

²⁶⁷ Submission 43, p 10. Please note that this question was going to be answered by the Court of Appeal in the *Obieta* cases (see *Obieta v Consumer, Trader and Tenancy Tribunal* (No 2) [2009] NSWCA 249). However, there was a lack of prosecution and the matter ultimately did not come before the Court of Appeal for determination.

²⁶⁸ Submission 43, p 10.

²⁶⁹ Submission 43, p 10. Such a situation arose in *Muldoon v Church of England Children's Homes Burwood* [2011] NSWSC 772.

²⁷⁰ Submission 71, p 3.

which places the Chairperson in direct conflict with the role of overseeing the operation of the CTTT.²⁷¹

- 5.65** The cost of District Court appeals was considered a disincentive. In relation to motor vehicle disputes, the Motor Traders Association of NSW indicated that it does not consider there to be any rights of appeals as the Association has not been involved in any matter that has been granted a rehearing and because appeals to the District Court are expensive ‘and almost always not worth pursuing on a cost basis alone’.²⁷²
- 5.66** The Redfern Legal Centre also contended that tribunals that have an appeal mechanism to a higher court, like the CTTT, means that in practice appeals are limited due to the potential cost and complexities involved. This is particularly so for disadvantaged members of the community. The Centre recommended that if the CTTT remains a standalone tribunal, an appeal panel should be introduced.²⁷³
- 5.67** Issues with the appeals process was also highlighted by Mr John Cooper in relation to the retirement village division. Mr Cooper commented that:
- An appeal process is fundamental in the Australian Legal System, however the threat of huge legal costs being forced on residents when that are not the appellants after an operator has lost a decision in a CTTT case is an unequitable outcome. Residents are either self funded retirees or receiving a pension, giving limited amount of financial ability to fund cases they have been successful in when appealed to a higher court.²⁷⁴
- 5.68** The MBA NSW indicated that the prospect of pursuing an appeal in the District or Supreme Court for some parties is ‘daunting and unaffordable in circumstances, especially where a party has already suffered substantial costs prior to even contemplating an appeal’.²⁷⁵ The Association suggested that the ‘informality objective of the tribunal warrants an initial independent mechanism of review’.²⁷⁶
- 5.69** The Housing Industry Association supported the view that appeals on a question of law can raise difficulties for applicants, especially when legal representation may not have originally been engaged. It commented that ‘in these circumstances the question of law may not have been properly articulated in the first instance and may limit a party’s ability to appeal a decision’.²⁷⁷
- 5.70** The Business Law Committee (BLC) of the Law Society of NSW commented that the ‘avenues for appeal from decisions of the Tribunal are complex and difficult for a lay litigant to understand ... The avenues for appeal or review of a decision of the CTTT are numerous’.²⁷⁸ Further to this, the BLC advised that the analysis required to select the

²⁷¹ Submission 61, p 5.

²⁷² Submission 28, p 3.

²⁷³ Submission 77, Redfern Legal Centre, pp 2-3.

²⁷⁴ Submission 2, p 3.

²⁷⁵ Submission 61, p 5.

²⁷⁶ Submission 61, p 5.

²⁷⁷ Submission 48, p 11.

²⁷⁸ Submission 84, p 7.

appropriate forum for an appeal would require the engagement of professional legal advice and as such ‘would seem ill-suited to a lay tribunal’.²⁷⁹

5.71 Housing NSW also held concerns with the complicated appeals mechanism for CTTT decisions, calling the appeal mechanism ‘bifurcated’ costly and extremely inefficient:

[T]he bifurcated appeal mechanisms in the CTTT Act make appeals from the CTTT costly and extremely inefficient. Section 65 of the CTTT Act provides for appeals on procedural fairness point to the Supreme Court while questions of law go to the District Court under s67. Tenants often have appeals encompassing both procedural fairness and questions of law, which results in separate appeals to both the District and Supreme Court ... Housing NSW supports the revision of mechanisms for appeals to higher courts from the Tribunal concerned with tenancy matters including resolution of this time consuming and expensive anomaly.²⁸⁰

5.72 The Tenants’ Union of NSW described the present system for appeals from the CTTT as ‘unsatisfactory’, especially since the 2008 amendment to the *CTTT Act*. The Union raised similar issues regarding the potential for appeals to become costly and be brought to both the District and Supreme Court. The Union suggested that to remedy this ‘at the least, a right of appeal to the Supreme Court of NSW from the CTTT ought to be reinstated’.

5.73 The Tenants Union also suggested that consideration should be given to more sweeping changes to rights of appeal from CTTT decisions, citing other jurisdictions, including the internal appeals mechanism in the Queensland Civil and Administrative Tribunal as an attractive alternative.²⁸¹

5.74 Similarly, Ms Jane Needham, Junior Vice President of the NSW Bar Association, suggested that the rehearing and appeals process for the CTTT is lacking and supported the idea of an internal appeal mechanism in the CTTT:

It [CTTT] has a system of rehearings, which from personal experience I believe does not work very well. Then there is an appeal to the District Court on matters of law and then the ability to engage the Supreme Court jurisdiction on procedural fairness and the like. One of the difficulties is that you have someone who is aggrieved by a Consumer, Trader and Tenancy Tribunal decision turning up in the District Court and English may not be their first language. The judge might ask where is the question of law arising out of the decision because he or she has no jurisdiction to do otherwise. There is a very strong case for an internal appeal.²⁸²

5.75 However, further to this, Ms Needham did recognise that there is a problem with unlimited merits appeals: ‘quite frankly, that they are a bit easy and people will appeal’.²⁸³

5.76 In response to calls for an internal appeals process in the CTTT, the tribunal indicated that any internal appeal in addition to or in substitution for existing appeal mechanisms would

²⁷⁹ Submission 84, p 8.

²⁸⁰ Submission 31, p 4.

²⁸¹ Submission 80, pp 6-7.

²⁸² Ms Jane Needham, Junior Vice President, NSW Bar Association, Evidence, 16 December 2011, p14.

²⁸³ Ms Needham, Evidence, 16 December 2011, p14.

have significant cost implications for the CTTT and parties, particularly where very small disputes are involved.²⁸⁴ Ms Ransome commented that ‘in a tribunal that deals with 60,000 matters, you would need to be careful of the structure you put in place, so that the appeal structure did not overwhelm everything else’.²⁸⁵

- 5.77** The Redfern Legal Centre acknowledged that because of the large volume of matters in the CTTT about claims for relatively small amounts of money, that there could be legitimate concerns that disproportionate resources may need to be directed to appeals. The Centre suggested that ‘the right to appeal to the appeal panel could be restricted for money claims where the amount in dispute is over a prescribed threshold’.²⁸⁶

Committee comment

- 5.78** The Committee acknowledges and agrees with inquiry participants that the rehearing and appeals process for CTTT decisions is indeed complex. Further, the Committee supports the view that due to the complexities and potential costly appeals process through either or both of the District and Supreme Courts the appeals mechanism is not readily accessible for users of the tribunal.
- 5.79** The suggestion of an internal appeals panel for the CTTT certainly has merit in addressing the issue of cost and accessibility for users, however, the Committee does acknowledge that significant resources would be required to run such a panel and there may well be a need to have a monetary threshold.
- 5.80** The Committee notes the concerns raised by inquiry participants, such as the MTA, that the current internal rehearing process is too restrictive and is not an adequate remedy to either correct error or impose consistency in decision making.
- 5.81** The detail of how an internal appeals panel could be established and operate specifically in the CTTT has not been forthcoming in our evidence. Further to this, if the NSW Government was to decide to progress with the establishment of a super tribunal in New South Wales, incorporating the CTTT, then as suggested by the Tenants’ Union, an internal appeals mechanism should be considered.
- 5.82** Therefore the Committee recommends that, if the CTTT remains a standalone tribunal, the CTTT and NSW Government should consider the establishment of an internal appeals panel in the CTTT with an appropriate monetary threshold.

Recommendation 16

That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal, the NSW Government and the Consumer, Trader and Tenancy Tribunal consider establishing an internal appeals panel in the tribunal with an appropriate threshold.

²⁸⁴ Answers to questions taken on notice during evidence 15 December 2011, Ms Kay Ransome, Chairperson, CTTT, Question 2, p 2.

²⁸⁵ Ms Ransome, Evidence, 15 December 2011, p 45.

²⁸⁶ Answers to questions taken on notice during evidence 16 December 2011, Ms Natalie Ross, Senior Solicitor, Redfern Legal Centre, Question 1, pp 1-2.

- 5.83** In relation to earlier recommendations in this report, the Committee believes that the work of the expert panel should take into consideration these recommendations for the CTTT to ensure the issues inquiry participants have raised with timeliness, consistent decision making and access to an appeals mechanism are addressed in a new consolidated tribunal.

Chapter 6 Industrial Relations Commission

This chapter addresses the Committee's terms of reference in relation to the Industrial Relations Commission (IRC). Specific issues raised by the inquiry participants related to the potential consolidation of the IRC are considered. These include the recent change in the IRC's workload and the impacts for regional areas. The Committee has not made any recommendations regarding the IRC, but believes the expert panel should consider the issues raised in this chapter in its deliberations.

This chapter will use the acronym 'IRC' as an umbrella term for the tribunal as a whole, that is, both the Commission and the Industrial Court. When specifically considering its function as a tribunal it will refer to the 'Commission' and when addressing its function as a court it will refer to the 'Industrial Court'.

Role of the IRC

- 6.1 As outlined in Chapter 2, the IRC is comprised of two important parts: a commission and a court. When operating as the 'Commission' the IRC deals mostly with public sector and transport promotion and disciplinary appeals as well as, to a lesser extent, unfair dismissal claims and industrial disputes, including contract of carriage matters. When the IRC sits as the Industrial Court it has equivalent status to the NSW Supreme Court. Decisions of the Commission can be appealed to the Industrial Court.²⁸⁷

Workload changes

- 6.2 In 2011, there were 3,460 filings in the IRC and the commission anticipates a slight decrease in total filings in 2012 to 3,245 and in 2013 to 3,010. The average case load per full time equivalent (FTE) tribunal member in 2011 was 245 cases. The IRC calculates that this will increase to 304 and 388 cases in 2012 and 2013 respectively. The predicted increase in caseload is partly due to an anticipated decrease in the number of FTE members, which is expected to decrease from 14.5 in 2011 to 11 in 2012 and 8 in 2013.
- 6.3 When Workchoices commenced in March 2006, all employment related matters concerning corporations transferred to the federal jurisdiction. The effect of this was a substantial decrease in the number of matters filed in the IRC. The transfer of the remainder of the private sector to the federal jurisdiction from 1 January 2010 further decreased the IRC's workload.
- 6.4 Whereas, in the three years prior to the introduction of Workchoices the IRC had averaged 7,250 matters lodged per annum, this dropped to 2,300 in 2007, although by 2011 the number of matters lodged had increased to 3,460. Unfair dismissals declined from 4,000 cases lodged in 2003 to fewer than 500 in 2007, and to only 190 matters in 2011. The number of industrial disputes has also more than halved. The passage of the *Work Health and Safety Act 2011* and

²⁸⁷ The Industrial Court has jurisdiction to hear a range of civil matters arising under legislation as well as criminal proceedings in relation to breaches of industrial and occupational health and safety laws. It also determines proceedings for avoidance and variation of unfair contracts, for the recovery of underpayments of statutory and award entitlements and challenges to the validity of union rules amongst other matters.

the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* will impact further on the workload of the IRC.

- 6.5 The Committee was informed by Justice Boland, President of the IRC, that it has been working with the Department of Attorney General and Justice to rationalise resources in light of its decreasing workload.
- 6.6 Nevertheless, the IRC continues to have jurisdiction over public sector employees in New South Wales. This includes all state government and local government employees, which at June 2011 constituted 444,700 people.²⁸⁸ Some recent additions to the IRC's jurisdiction have expanded its workload somewhat. In the financial year 2010-11 the Government and Related Employees Appeal Tribunal was abolished and its jurisdiction transferred to the IRC. Similarly, matters concerning public sector transport disciplinary and promotional appeals have been transferred to the IRC through the transfer of the Transport Appeal Boards jurisdiction. The IRC also now hears appeals in relation to police hurt on duty.
- 6.7 Changes under the Commonwealth Government's Fair Work Australia policy have also impacted upon the IRC's workload. Pursuant to the Commonwealth *Fair Work Act 2009* (the Fair Work Act) the parties to a federal employment agreement can decide what dispute resolution mechanisms will exist within that agreement. Section 146B of the *Industrial Relations Act 1996* permits parties to a federal enterprise agreement to nominate the IRC to act as conciliator and arbitrator of their agreement. The Committee received evidence from inquiry participants that the IRC is commonly nominated,²⁸⁹ especially in relation to large construction projects in the Hunter region.²⁹⁰ In addition, several IRC members are dual appointees to both Fair Work Australia and the IRC.

Recent developments

- 6.8 Two recent developments were brought to the Committee's attention which may affect the operation of the IRC and consequently any recommendations the Committee makes.²⁹¹ Firstly, the Commonwealth Government is undertaking a review of the *Fair Work Act 2009* (Cth) which could have implications for the workload of the IRC judges appointed to both the IRC and Fair Work Australia.²⁹²
- 6.9 The second is whether the Public Service Association (PSA) succeeds in its bid to obtain special leave to appeal to the High Court a decision of the Full Bench of the Industrial Court. The relevant decision upheld the validity of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* which inserted section 146C into the *Industrial Relations Act 1996*. Section 146C directs that the Commission is to give effect to certain aspects of

²⁸⁸ Drabsch T, *Statistical Indicators: Public Administration and Politics in New South Wales: A Statistical Profile*, Sydney, NSW Parliamentary Library Research Service, 2012, p 4.

²⁸⁹ Answers to questions on notice taken during evidence 16 December 2011, Mr Ben Kruse, Convener, Employment Law Committee, NSW Society of Labor Lawyers, Question 1, p 9.

²⁹⁰ Submission 55, Hunter Business Chamber, pp 4-6; Submission 78, Unions NSW, pp 18-20.

²⁹¹ Correspondence from Justice Boland to Chair, 17 January 2012, attachment pp 7-8.

²⁹² Correspondence from Justice Boland to Chair, 17 January 2012, p 8. For the terms of reference and more information on this review, see: Department of Education, Employment and Workplace Relations, accessed 18 January 2012, <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx>>.

government policy on public sector employment. If leave to appeal is granted then any subsequent decision of the High Court will impact upon the jurisdiction of the IRC.²⁹³

Stakeholder comments on workload changes

- 6.10** Mr Mark Morey, Deputy Assistant Secretary of Unions NSW, noted that most of the large construction projects in the Hunter have adopted dispute resolution procedures that nominate the IRC as the final arbiter on any disputes.²⁹⁴ The Newcastle Branch of the Industrial Relations Society listed 25 major construction projects that have nominated the IRC as its third party dispute resolution provider and pointed out that the total value of these projects exceeds \$4.3 billion dollars.²⁹⁵ In this context, the PSA was concerned that the ongoing reduction in the workload of the IRC was being overstated.²⁹⁶
- 6.11** In relation to the IRC's workload more generally, Mr John Cahill, General Secretary of the PSA, pointed out that although the jurisdiction has reduced, there has also been some natural attrition among the judges that has meant the actual workload of the remaining judges has not reduced proportionately with the loss of jurisdiction.²⁹⁷ Mr Cahill also stated that because the IRC now primarily deals with public service disputes, there is no longer the commercial incentive to expedite litigation:
- Because the [IRC is] predominantly dealing with public service issues now... there is not the commercial incentive to take shortcuts in litigation, because we are dealing with the Government and we are dealing with the union which has a strong conviction about what it is all about. Far more cases run the distance.²⁹⁸
- 6.12** The NSW Bar Association added that the workforce that currently falls under the jurisdiction of the IRC are people who perform essential services and that prolonged industrial action by these workers could have significant effects on the New South Wales economy.²⁹⁹ Ms Jane Needham, barrister and Junior Vice President of the NSW Bar Association, explained that on this basis it is important to ensure that there remains a body with the 'skills and respect' of the judges of the IRC to continue to resolve these disputes.³⁰⁰
- 6.13** A consideration for the Committee in this inquiry is how best to manage the apparent additional capacity within the IRC created by the loss of primary jurisdiction over the private sector which constitutes most of the New South Wales workforce, notwithstanding possible indirect oversight as an eligible State court for the purposes of the *Fair Work Act 2009* (Cth).
- 6.14** In relation to the present standing of the IRC, a strong view was expressed by inquiry participants that the IRC is an outstanding institution in terms of the expertise of its members

²⁹³ Correspondence from Justice Boland to Chair, 17 January 2012, attachment p 7.

²⁹⁴ Mr Mark Morey, Deputy Assistant Secretary, Unions NSW, Evidence, 15 December 2011, p 4.

²⁹⁵ Submission 74, Industrial Relations Society Newcastle Branch, p 4 and Appendix A.

²⁹⁶ Submission 15, Public Sector Association, pp 3-4.

²⁹⁷ Mr John Cahill, General Secretary, Public Sector Association NSW, Evidence, 16 December 2011, p 31; see also Submission 66, Development and Environmental Professionals' Association, p 1.

²⁹⁸ Mr Cahill, Evidence, 16 December 2011, p 32.

²⁹⁹ Ms Jane Needham, Junior Vice President, Bar Association, Evidence, 16 December 2011, p 16.

³⁰⁰ Ms Needham, Evidence, 16 December 2011, p 16.

and their capacity to resolve disputes. Overall, the IRC was considered an independent and effective institution that enjoys the confidence and respect of the public and the parties that come before it. Unions, non-government organisations and the private sector all expressed this view.³⁰¹

The Industrial Court of the IRC

- 6.15** As outlined in Chapter 2, the IRC is made up of a Court and a Commission. The Committee's terms of reference ask the Committee to consider what should become of the Industrial Court of the IRC should the arbitral and conciliation functions exercised by the Commission be consolidated into another tribunal.
- 6.16** The judges in the Industrial Court hold equivalent status to judges of the Supreme Court of NSW. This means that by law they could not be simply shifted to a tribunal as a non-judicial member without legislative amendment. As the NSW Bar Association noted, Section 56 of the Constitution Act requires that if the Industrial Court were to be abolished, the judges of that court should be appointed to another court of equivalent or higher status: that is either the Supreme Court or the Land and Environment Court.³⁰²
- 6.17** Stakeholders canvassed a few options as to the best way forward if the Commission of the IRC were consolidated. However, most of those inquiry participants that commented on the IRC favoured the retention of both the Commission and the Industrial Court. Stakeholders emphasised in particular the skill and expertise of the members of the Industrial Court that they would not like to see lost.
- 6.18** The majority of those who commented presumed that Options 2A, 2B and 3 would see the judges of the Industrial Court of the IRC transferred to an employment list of the Supreme Court of NSW but for one judge who would head the division of the tribunal to which the Commission's functions were transferred.
- 6.19** Justice Boland advised that if these options were pursued, one judge to head the Employment Division under 2A or the Employment and Professional Discipline Division under 2B would not be sufficient to deal with the workload. In Justice Boland's view at least two and more likely three judges would be required.³⁰³
- 6.20** This proposal could provide a neat fit for the judges but may not provide the same accessibility due to the greater cost and delay associated with matters being heard in the Supreme Court. To combat this, the NSW Bar Association and the NSW Industrial Relations

³⁰¹ Submission 37, NSW Society of Labor Lawyers, p v; Submission 40, NSW Bar Association, para 30; Submission 41, Mr Richard Perrignon, p 9; Submission 64, United Services Union, p 2; Submission 68, Local Government and Shires Association NSW p 5; Submission 46, NSW Nurses' Association, pp 2-4; Submission 55, Hunter Business Chamber, p 4; Submission 74, p 2; Submission 78, p 4; Mr Noel Martin, Industrial Officer, United Services Union, Evidence, 23 January 2012, p 72.

³⁰² Mr Ingmar Taylor, barrister, NSW Bar Association, Evidence, 16 December 2012, p 18.

³⁰³ Correspondence from Justice Boland to Chair, 17 January 2012, pp 28-29.

Society suggested that instead, the judges of the Industrial Court might be appointed to the Supreme Court but then seconded to a relevant tribunal or division of a tribunal.³⁰⁴

- 6.21** As an alternative, the NSW Young Lawyers suggested that the Industrial Court could be retained in its current form and vested with appellate jurisdiction for industrial relations matters heard in the super tribunal, including professional disciplinary and anti-discrimination matters.³⁰⁵
- 6.22** As outlined in Chapter 3, a further option for the Industrial Court is the establishment of a new court of equivalent status to the Supreme Court to preside over any consolidated tribunal. The new court could exercise the residual jurisdiction of the Industrial Court in relation to workplace health and safety, enforcement of industrial instruments, local and NSW Government industrial matters and police matters.³⁰⁶
- 6.23** Appeals arising from employment and industrial matters could be brought to the new court, including those arising from the employment and industrial relations list of the new tribunal.³⁰⁷ Similar to present arrangements in the IRC, the members of the new court could receive dual appointments which would allow them to also exercise the non-judicial functions of the tribunal.³⁰⁸

Stakeholder comments on options in the Ministerial Issues Paper

- 6.24** Stakeholder comments on the options in the Ministerial Issues Paper are canvassed in Chapter 3. The comments below relate specifically to the impact the options may have on the IRC.

Option 1

- 6.25** In general those inquiry participants that commented on the IRC were in favour of its retention as a standalone institution comprising both a court and a tribunal and for this reason supported Option 1. Given the recent decline in the volume of work for the IRC, some stakeholders felt that Option 1 would better utilise existing IRC resources including the knowledge of judges and the physical infrastructure by adding functions from the ADT and health professional tribunals.³⁰⁹
- 6.26** In support of Option 1, many inquiry participants supported retaining a separate specialist employment and industrial relations tribunal.³¹⁰ Unions NSW for example stated that the specialist knowledge of the judges, non-judicial members and commissioners of the IRC is ‘an

³⁰⁴ Submission 10, NSW Industrial Relations Society, p 4; Submission 40, p 8; Ms Needham, Evidence, 16 December 2011, p 16.

³⁰⁵ Submission 82, NSW Young Lawyers, Law Society of NSW p 14.

³⁰⁶ Submission 82, p 14.

³⁰⁷ Submission 82, p 14.

³⁰⁸ Submission 82, p 14.

³⁰⁹ Submission 46, p 4.

³¹⁰ Submission 32, Transport Workers’ Union of NSW, p 2; Submission 46, p 4; Submission 64, p 6; Submission 67, Hon Paul Lynch MP, p 3; Submission 68, p 3; Submission 74, pp 2-3; Submission 78, pp 3-4; Answers to questions on notice taken during evidence 16 December 2011, Mr Wayne Forno, State Secretary, Transport Workers’ Union, Question 2, p 1.

invaluable resource that should not be diluted or removed from the New South Wales judicial system.³¹¹

- 6.27** The Newcastle Branch of the Industrial Relations Society supported retaining a specialist employment tribunal in part because of the difficult and complex nature of industrial relations law.³¹² Similarly, the Transport Workers' Union (TWU) stated that 'it would be impossible for members of an administrative tribunal who lack extensive industrial knowledge and expertise to properly discharge industrial functions'.³¹³
- 6.28** The Committee heard from some several stakeholders who expressed the view that the IRC is especially effective at dealing with collective industrial disputes and that it was vital to retain the IRC for this reason.³¹⁴ This is especially so because each of these matters 'affects thousands of employees and their families'.³¹⁵

Options 2A, 2B and 3

- 6.29** Inquiry participants suggested that because the IRC has powers of conciliation and arbitration coupled with judicial powers, it can move seamlessly from one stage to another in a particular dispute. The NSW Bar Association asserted that the hybrid nature of the IRC, as both a court and a tribunal, has been one of the primary reasons for its success. Due to this hybrid structure there is no delay if matters arising in proceedings before the tribunal have to be dealt with by the Industrial Court. It stated that the IRC is 'in effect a one-stop shop for industrial and employment related matters'. Further to this:

It is able to deal seamlessly, flexibly and speedily with all manner of industrial matters that come before it. As a hybrid body, the IRC offers the optimum mix of practical approach to industrial relations and ready access to more formal legal processes.³¹⁶

- 6.30** Several stakeholders felt that it was important that the functions of the Industrial Court and the Commission remain as part of a single institution.³¹⁷ Options 2A, 2B and 3 would remove this ability by removing the IRC. Mr Oshie Fagir, a Legal Officer with the TWU, expressed the view that for reasons of efficiency, fairness, equity and access, it is important that the Industrial Court and the Commission remain together.³¹⁸
- 6.31** In the context of the workload of the IRC and dual appointments to Fair Work Australia as well as the IRC's role as a eligible state court *Fair Work Act 2009* (Cth), inquiry participants

³¹¹ Submission 78, p 4.

³¹² Submission 74, p 2.

³¹³ Submission 32, p 2.

³¹⁴ Submission 40, p 8; Mr Ben Kruse, Convener, Employment Law Committee, NSW Society of Labor Lawyers, Evidence, 16 December 2011, p 23; Mr Richard Anicich, President, Hunter Business Chamber, Evidence, 23 January 2012, pp 63-64.

³¹⁵ Mr Kruse, Evidence, 16 December 2011, p 20.

³¹⁶ Submission 40, p 8.

³¹⁷ Mr Oshie Fagir, Legal Officer, Transport Workers' Union, Evidence, 16 December 2011, p 44; Submission 40, p 8; Mr William McNally, Lawyer, Public Sector Association, Evidence, 16 December 2011, p 33.

³¹⁸ Mr Fagir, Evidence, 16 December 2011, p 44.

were concerned about the impact, particularly on regional communities if this role was lost due to the implementation of Options 2A, 2B or 3.³¹⁹

- 6.32** Several stakeholders called attention to the importance of dual appointments of some judges of the Industrial Court to Fair Work Australia³²⁰ and noted that they could be lost as an effect of Options 2A, 2B and 3.³²¹ The Hunter Business Chamber added that one of the problems with Fair Work Australia is that it is not well represented in regional areas.³²² Mr Richard Anicich, President of the Hunter Business Chamber, elaborated that unlike the IRC, Fair Work Australia does not address the issue of regionalisation and so their matters are primarily dealt with in capital cities.³²³

Approach taken in other Australian jurisdictions

- 6.33** Several stakeholders pointed out that none of the other states that have consolidated tribunals have included the scope of jurisdiction of the IRC.³²⁴ Mr Dennis Ravlich, Executive Director, Australian Salaried Medical Officers' Federation, noted, for example, that in Victoria, employment matters are handled by Fair Work Australia.³²⁵ Queensland and Western Australia have retained a separate industrial relations tribunal.
- 6.34** However, Justice John Chaney, President of the Western Australia State Administrative Tribunal (WA SAT) advised the Committee that the Western Australian Government is considering incorporating its Industrial Relations Commission into the WA SAT.³²⁶
- 6.35** Those states that have not pursued the widespread consolidation of tribunals continue to operate Industrial Relations Commissions. The South Australian Industrial Relations Commission, Industrial Court and Workers Compensation Tribunal are separate institutions that share a single registry.³²⁷ The Tasmanian Industrial Relations Commission hears Tasmanian industrial relations matters that fall outside the federal jurisdiction.

³¹⁹ Mr Phillip Boncardo, Treasurer, NSW Society of Labor Lawyers, Evidence, 16 December 2011, p 21.

³²⁰ Submission 46, p 5; Submission 47, Australian Industry Group, p 2; Submission 74, p 5; Mr Anicich, Evidence, 23 January 2012, pp 61-62.

³²¹ Pursuant to the *Fair Work Act 2009* s 629(2); Submission 74, p 5; Mr Anicich, Evidence, 23 January 2012, pp 61-62.

³²² Submission 74, p 5.

³²³ Mr Anicich, Evidence, 23 January 2012, p 63.

³²⁴ Submission 68, p 7.

³²⁵ Mr Dennis Ravlich, Executive Director, Australian Salaried Medical Officers' Federation, Evidence, 15 December 2011, p 5.

³²⁶ Justice John Chaney, President, Western Australia State Administrative Tribunal, Evidence, 18 November 2011, p 7.

³²⁷ Industrial Court South Australia, South Australian Industrial Relations Tribunals, accessed 25 January 2012 <<http://www.industrialcourt.sa.gov.au/>>.

Committee comment

- 6.36** While, the Committee recognises the view among stakeholders that the IRC is an effective institution, we also acknowledge the apparent forthcoming dilemma in managing the workload of the IRC as a consequence of federal regulation of most employment matters in New South Wales. We note that we have received evidence that questions the impact of this change but we remain of the view that the IRC's workload has diminished and is likely to further decline.
- 6.37** Properly managed, the establishment and operation of a consolidated tribunal that included the IRC should not result in the dilution of industrial relations expertise to regional areas. In the view of the Committee, with careful implementation, these services can be maintained.
- 6.38** The Committee acknowledges that other states have elected not to include industrial relations matters within a consolidated tribunal structure, however, given the decreased workload of the IRC and the desirability of retaining the expertise of its staff for the benefit of the people of New South Wales, the Committee recommends that the expert panel include the IRC in its deliberations.
- 6.39** In this context we note that if the NSW Government were to pursue Options 2A, 2B or 3 of the Ministerial Issues Paper, legislative amendment may need to be sought from the Commonwealth to ensure a consolidated tribunal would be an eligible third party dispute resolution provider recognised by the *Fair Work Act 2009* (Cth). Similarly, this may also be needed for members of the consolidated tribunal to be appointees to Fair Work Australia. The Committee suggests that these issues are an important consideration for the expert panel recommended in Chapter 3.

Chapter 7 Issues raised in evidence

This chapter canvases a number of issues that inquiry participants raised in evidence that specifically relate to the Guardianship Tribunal and the Mental Health Review Tribunal (MHRT).

Guardianship Tribunal

7.1 Most stakeholders who commented on the Guardianship Tribunal emphasised the importance of its operation as an independent tribunal and the maintenance of its structure due to its underlying principles and specialist features.

Principles underpinning the tribunal

7.2 Some inquiry participants noted that people with disability have greater vulnerability within the legal system and also experience barriers accessing the system. The NSW Council for Intellectual Disability (NSW CID) stated that these barriers include accessibility of premises, formality and technicality, and negative perceptions about people with disabilities.³²⁸

7.3 The NSW CID pointed out that the Guardianship Tribunal uniquely addresses these barriers and vulnerabilities. In this regard, the Council drew the Committee's attention to the principles contained in section 4 of the *Guardianship Act 1987*:

- the welfare and interests of the person should be given paramount consideration
- the freedom of decision and freedom of action of the person should be restricted as little as possible
- the person should be encouraged, as far as possible, to live a normal life in the community
- the views of the person in relation to the exercise of the functions prescribed under the Act should be taken into consideration
- the importance of preserving the family relationships and the cultural and linguistic environments of the person should be recognized
- the person should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs
- the person should be protected from neglect, abuse and exploitation
- the community should be encouraged to apply and promote these principles.³²⁹

7.4 In light of these principles, some stakeholders commented positively on the way in which the current operation of the Guardianship Tribunal fits within State Government policy and international conventions. These include the principles enshrined in the NSW Government's

³²⁸ Submission 59, NSW Council for Intellectual Disability, p 1.

³²⁹ *Guardianship Act 1987* s 4; Submission 59, p 1.

disability policy, *Stronger Together II*, as well as the *United Nations Convention on the Rights of Persons with Disabilities* (the UN Convention).³³⁰

7.5 The Trustee and Guardian and Public Guardian also asserted that the ‘New South Wales guardianship legislation meets the requirements of the Convention and is advanced in the area of dealing with capacity.’³³¹

7.6 The Public Guardian explained that whereas most tribunals deal with competing claims, the Guardianship Tribunal is concerned only with the life of an individual. Accordingly, he said:

The GT is a unique tribunal which places the person with a disability as a central concern. The GT has been set up to allow people to participate as far as possible given their cognitive disabilities. It’s more than just “inclusion” and “accessibility”; it’s about the centrality of the person, because a guardianship (or Financial Management) order is all about the person.

The GT has designed its procedures to be as informal as possible resulting in a much more accessible process than that employed by most other tribunals.³³²

7.7 In the opinion of People With Disability, the creation of a specialist division of a super tribunal is ‘not a sufficient measure’ to protect the human and legal rights of people with disability.³³³ This view was shared by the Elder Law Committee of the NSW Law Society and the NSW CID.³³⁴

Three member panels

7.8 A number of inquiry participants felt that the three member panel was an especially important feature of the tribunal.³³⁵ Mr Malcolm Schyvens, President, NSW Guardianship Tribunal, explained to the Committee that the use of the multidisciplinary panel ‘ensures that in addition to determining the legal issues of the application, the tribunal also focuses on the physical, psychological, social and emotional needs of the person the hearing is about.’³³⁶ Mr Schyvens described the Guardianship Tribunal’s panel structure as being ‘strongly supported by the disability sector’.³³⁷

³³⁰ Submission 44, *Alzheimer’s Australia*, p 4; Submission 59, p 5.

³³¹ Answers to questions on notice taken during evidence 23 January 2012, Ms Imelda Dodds, Chief Executive Officer, NSW Trustee and Guardian, Question 2, p 2.

³³² Submission 51, Public Guardian, Department of Attorney-General and Justice, p 2.

³³³ Submission 70, *People with Disability*, p 3.

³³⁴ Mr Jim Simpson, Senior Advocate, NSW Council for Intellectual Disability, Evidence, 23 January 2012, p 20; and Mr Joe Cantanzariti, Law Society of NSW, Evidence, 16 December 2011, p 6.

³³⁵ Submission 51, p 2; Submission 59, p 4; Submission 84, Law Society of NSW, p 3; Mr Malcolm Schyvens, President, NSW Guardianship Tribunal, Evidence, 23 January 2012, p 3, Ms Imelda Dodds, Chief Executive Officer, NSW Trustee and Guardian Evidence, 23 January 2012, p 13; Mrs Jeanette Moss, parent of a person with a disability, Evidence, 23 January 2012, p 18.

³³⁶ Mr Schyvens, Evidence, 23 January 2012, p 3.

³³⁷ Mr Schyvens, Evidence, 23 January 2012, p 3.

- 7.9** Mr Schyvens noted that while most protective jurisdictions in Australia had once operated this way, this feature had not been retained as usual practice within an amalgamated tribunal model.³³⁸ Ms Imelda Dodds, Chief Executive Officer of the NSW Trustee and Guardian, reiterated that in jurisdictions where guardianship matters have been consolidated into a larger tribunal the use of three member panels has eroded over time.³³⁹

Hearing preparation process

- 7.10** The Guardianship Tribunal expressed the view that its hearing preparation process enhances access to justice for the individuals before it.³⁴⁰ Hearing preparation is undertaken by people with ‘skills and experience in communicating with people with disability’. The staff of the tribunal also employs those skills to identify ‘circumstances requiring the appointment of a separate representative for the person’.³⁴¹

International attention

- 7.11** Ms Dodds stated, the NSW Guardianship Tribunal is ‘the leader in terms of its effectiveness in dealing with people with a disability in the most sensitive and appropriate way’ and an ‘international leader in protecting the rights of people subject to substitute decision making’.³⁴²
- 7.12** Ms Dodds noted that the work done by the NSW Guardianship Tribunal had generated international interest, with the Governments of Hong Kong and Singapore having sent delegates to look at the New South Wales system.³⁴³ After visiting the NSW Guardianship Tribunal, Hong Kong established a ‘Guardianship Board’ modelled closely on the New South Wales tribunal. In April 1999, training was provided to Hong Kong tribunal members by the NSW Guardianship Tribunal and the NSW Public Trustee and Guardian.³⁴⁴

Approach taken in other Australian jurisdictions

- 7.13** Queensland, Western Australia, Victoria and the Australian Capital Territory have all incorporated guardianship matters into a consolidated tribunal structure.
- 7.14** In the Western Australia State Administrative Tribunal (WA SAT), the human rights stream constitutes between 55 and 60 per cent of its filings and guardianship matters can be appealed internally from a single member to a panel of three.³⁴⁵ Similarly, Australian Capital Territory

³³⁸ Mr Schyvens, Evidence, 23 January 2012, p 3.

³³⁹ Ms Dodds, Evidence, 23 January 2012, p 13.

³⁴⁰ Answers to questions on notice taken during evidence 23 January 2012, Mr Malcolm Schyvens, President, NSW Guardianship Tribunal, Question 1, p 2.

³⁴¹ Answers to questions on notice taken during evidence 23 January 2012, Mr Schyvens, Question 1, p 2.

³⁴² Answers to questions on notice taken during evidence 23 January 2012, Ms Dodds, Question 2, p 2.

³⁴³ Ms Dodds, Evidence, 23 January 2012, p 13.

³⁴⁴ Answers to questions on notice taken during evidence 23 January 2012, Ms Dodds, Question 1, p 1.

³⁴⁵ Justice John Chaney, President, Western Australia State Administrative Tribunal, 18 November 2011, pp 1, 8.

Civil and Administrative Tribunal (ACAT) has both original and review jurisdiction in relation to guardianship and mental health matters.³⁴⁶ Mental health matters can be heard only by a presidential member of the tribunal even at first instance.³⁴⁷ The tribunal retains a pool of part-time sessional community members.³⁴⁸

7.15 When the Victorian Civil and Administrative Tribunal (VCAT) was established in 1998, the Victorian Guardianship and Administration Board was shut down and its jurisdiction brought into the VCAT.³⁴⁹ Guardianship matters at VCAT are usually heard by a single member. That member will sit across a range of jurisdictions having experience and / or received training on hearing guardianship matters. Guardianship may not necessarily be that person's specialist area of expertise.³⁵⁰

7.16 The WA SAT takes a similar approach. Justice John Chaney from the WA SAT emphasized the importance of having members sit across a range of jurisdictions. In his view, if the tribunal were to bring together a range of jurisdictions and then run them all as completely separate lists with individual members sitting only on one or two of those, then it defeats the purpose of having created a consolidated tribunal. He explained:

There was a real danger when we started that you would have people brought in from all the different tribunals and they would sit in one little section of the tribunal saying "we do planning stuff. We are the old Town Planning Appeal Tribunal" and somebody else would say "We are the old Guardianship and Administration Board" and there would not be a real single tribunal.³⁵¹

7.17 With respect to guardianship matters, Justice Alan Wilson, President of QCAT told the Committee that the QCAT model acknowledges that guardianship is distinct from the other areas of law over which the tribunal exercises jurisdiction. He also noted that at QCAT the tribunal encourages its members 'to use their talents in other jurisdictions and learn them.'³⁵²

VCAT and the Victorian Law Reform Commission inquiry

7.18 There has been some level of criticism regarding the incorporation of the guardianship jurisdiction into VCAT. Stakeholders referred the Committee to the report of the Victorian

³⁴⁶ Ms Linda Crebbin, General President, ACT Civil and Administrative Tribunal, Evidence, 18 November 2011, p 4.

³⁴⁷ Ms Crebbin, Evidence, 18 November 2011, p 5.

³⁴⁸ Ms Crebbin, Evidence, 18 November 2011, p 5.

³⁴⁹ *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) pt 8; *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

³⁵⁰ Victorian Civil and Administrative Tribunal, (VCAT) <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin-Hearings?OpenDocument&1=60-Guardianship+and+Admin~&2=20-Hearings~&3=~>> at 30 January 2012; and Report of the Committee visit to VCAT and the Law Institute of Victoria, see Appendix 4.

³⁵¹ Justice Chaney, Evidence, 18 November 2011, p 2.

³⁵² Justice Alan Wilson, President, Queensland Civil and Administrative Tribunal, Evidence, 23 January 2012, p 57.

Law Reform Commission (VLRC) and to the report of former President of VCAT, Justice Kevin Bell.³⁵³

- 7.19** In the ten year review of the VCAT undertaken in 2009 by Justice Bell, and mentioned by some stakeholders to the present inquiry,³⁵⁴ his Honour suggested improvements that could be made to the guardianship list in Victoria. One of these was that VCAT's guardianship jurisdiction would benefit from integrated case officer management. That is, 'a more personalized form of administrative support'. This would include the triaging applications and assisting people completing forms.³⁵⁵
- 7.20** Several inquiry participants emphasised that this is what that the NSW Guardianship Tribunal already does well. The NSW CID praised the hearing preparation process undertaken by the tribunal and noted that the tribunal staff assist parties to be prepared for the hearing and seeks out the views of the individual subject to the application.³⁵⁶ Mr Schyvens pointed out that applications to the Guardianship Tribunal are already 'triaged' and the tribunal holds hearings promptly as the need arises.³⁵⁷
- 7.21** The VLRC's Consultation Paper on guardianship in Victoria was published in February 2011. The report was illustrative of some 'strong dissatisfaction' within the community relating to the processes and decisions of the Guardianship List at VCAT.³⁵⁸
- 7.22** The VLRC acknowledged that a tribunal structure is preferable to a formal court system in dealing with guardianship matters but suggested that the existing Guardianship List within VCAT could be improved.³⁵⁹ The VLRC's final report is expected to be tabled in the Victorian Parliament shortly.
- 7.23** In 2010, the current President of VCAT published a strategic plan, *Transforming VCAT*. The Plan describes proposed improvements to VCAT over a three-year period including to the operation of the Guardianship List and community access to the tribunal more generally.³⁶⁰ In its 12 month progress report on *Transforming VCAT*, the tribunal noted that it had implemented a review of all forms and notices in the guardianship jurisdiction and has improved practices in this area.³⁶¹

³⁵³ Submission 59, pp 6-7; Submission 84, p 5; Mr Schyvens, Evidence, 23 January 2012, pp 4, 6; Ms Dodds, Evidence, p 13. In 2009, the Victorian Attorney-General asked the VLRC to review guardianship laws in that State and to report on what changes might be needed. The VLRC released a consultation paper in March 2011, which commented on the guardianship tribunal jurisdiction, including how it operates within VCAT.

³⁵⁴ See, for example: Submission 84, p 3; Answers to supplementary questions 15 December 2011, Judge Kevin O'Connor, President, Administrative Decisions Tribunal, Question 4, p 8.

³⁵⁵ Justice Kevin Bell, *One VCAT: President's Review of VCAT*, 2009, p 30.

³⁵⁶ Submission 59, p 4.

³⁵⁷ Mr Schyvens, Evidence, 23 January 2012, p 3.

³⁵⁸ Victorian Law Reform Commission, *Guardianship*, Consultation Paper 10 (2011) pp 388.

³⁵⁹ Victorian Law Reform Commission, *Guardianship*, Consultation Paper 10 (2011) p 397.

³⁶⁰ VCAT, *Transforming VCAT: Three Year Strategic Plan 2010/11 – 2012/13*, 2010, pp 4-5.

³⁶¹ Victorian Civil and Administrative Tribunal, *Transforming VCAT: Promoting Excellence*, April 2011, p 8.

Mental Health Review Tribunal

- 7.24** Similar issues regarding the importance of the specialist features and responsiveness to matters have been raised in relation to the MHRT.
- 7.25** Justice Greg James, President of the MHRT, explained the responsiveness required of the MHRT. It runs a 24 hour service to arrange hearings and they can be and are arranged for the very next morning if necessary.³⁶² At the same time, the registry staff of the MHRT work quickly to obtain specialist medical and progress reports from hospitals and treating physicians to ensure this information is with the tribunal members before the hearing. He stated that a large registry could not do this and also said:
- We probably have the most flexible and effective registry of any tribunal in New South Wales. I would hate to lose that to some tribunal that has to try to organise, at counsel's convenience, to do a consumer trading matter.³⁶³
- 7.26** Mr John Feneley, Deputy President of the MHRT, stated that registry staff not only deal with the treating teams and medical personnel but also the person with a mental illness themselves. Justice James added they are also often in touch with relatives and, in relation to patients who have committed a criminal offence, the victims of that person.³⁶⁴
- 7.27** Other stakeholders also emphasised the importance of the specialist expertise within the MHRT. Mr Nick O'Neill, President of the Nursing and Midwifery Tribunal, commented that in the MHRT there are 'different purposes, different personnel required, different criteria from courts to be applied and different kinds of evidence.' In Mr O'Neill's view, the key concern is that when the facts have been established there are people there with expertise and experience to determine what to do next.³⁶⁵
- 7.28** Additional sensitivities unique to the jurisdiction create other challenges for registry staff.³⁶⁶ An example provided was that registry staff will ensure that a tribunal hearing is not organised on the birthday, or anniversary of the death, of someone who was killed by the person the hearing is about.³⁶⁷ The importance of community trust in a jurisdiction such as mental health was also mentioned by some stakeholders as important.³⁶⁸

³⁶² The Hon Greg James, President, Mental Health Review Tribunal, Evidence, 23 January 2012, p 55.

³⁶³ The Hon James, Evidence, 23 January 2012, p 55.

³⁶⁴ Mr John Feneley, Deputy President, Mental Health Review Tribunal, Evidence, 23 January 2012, p 55; and The Hon James, Evidence, 23 January 2012, p 55.

³⁶⁵ Mr Nick O'Neill, Chairperson, Nursing and Midwifery Tribunal, Evidence, 16 December 2011, p 65.

³⁶⁶ The Hon James, Evidence, 23 January 2012, p 55.

³⁶⁷ The Hon James, Evidence, 23 January 2012, p 55.

³⁶⁸ Ms Brenda Bailey, Senior Policy Officer, Council of Social Services of NSW, Evidence, 15 December 2011, p 29.

Approach taken in other Australian jurisdictions

- 7.29** ACAT is the only super tribunal that has original jurisdiction in respect of mental health matters and it overtook that jurisdiction only after substantial debate.³⁶⁹ As noted by the NSW MHRT, despite similar moves to consolidate tribunals in Western Australia, Queensland, Victoria and South Australia, the equivalent mental health review body in those states has remained a standalone tribunal.³⁷⁰
- 7.30** In terms of New South Wales, Judge Kevin O'Connor, President of the ADT, felt that there was 'no in-principle difficulty' in merging mental health and guardianship matters into a protective division of a super tribunal. He stated that:

I appreciate that mental health review has tended to be left outside the super tribunal structures in Australia, but I do not see any fundamental reasons of policy as to why that need be so. Obviously, great care needs to be taken in relation to the management of the forensic patients' jurisdiction.³⁷¹

Other tribunals

- 7.31** As mentioned earlier in this report, some tribunals, such as the Workers Compensation Commission, the Vocational Education Tribunal, the Local Government Pecuniary Interests Tribunal, Local Lands Boards and the Victims of Crime Tribunal are not considered in detail in this report. However, the Committee urges the NSW Government and expert panel recommended by the Committee (see Recommendations 2 and 3) to give consideration to all the evidence relating to these specific tribunals received by the Committee as part of its deliberations.

Committee comment

- 7.32** The Committee notes the comments of the ADT and the NSW Bar Association in Chapter 3 that, on the face of it, there is no obstacle to the amalgamation of the Guardianship Tribunal or the Mental Health Review Tribunal into a consolidated tribunal. These views echo statements regarding the Guardianship Tribunal that were contained within the 2002 Report on the ADT³⁷² and the operation of the super tribunals in other jurisdictions.
- 7.33** The Committee acknowledges that the Guardianship Tribunal upholds the principles enshrined in the NSW Government disability policy, *Stronger Together II* and those of international conventions. We also understand that there is a great deal of support for the way in which the Guardianship Tribunal currently operates.

³⁶⁹ Ms Crebbin, Evidence, 18 November 2011, p 4.

³⁷⁰ Submission 52, Mental Health Review Tribunal, p 1.

³⁷¹ Answers to questions on notice taken during evidence, 15 December 2011, Judge Kevin O'Connor, Administrative Decisions Tribunal, Question 1, p 5.

³⁷² NSW Parliament, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal*, November 2002, pp 43-44.

- 7.34** The Committee believes that the key factors that make the Guardianship Tribunal successful, such as its underlying principles, use of three member panels and sensitive and responsive hearing preparation, can be captured and drawn upon in a new consolidated tribunal. We also believe this is the case for the Mental Health Review Tribunal. As recommended earlier, the Committee believes it is important to have separate divisions within the consolidated tribunal which can focus on particular areas such as guardianship matters and draw on and implement these specialist features of the current tribunal. To this end, the Committee believes that the expert panel should consider stakeholder comments in relation evidence on the specific tribunals received by the Committee as part of its Inquiry.
- 7.35** Further to this, the Committee's recommendation for a review of the effectiveness of a consolidated tribunal after three years can ensure that the access to justice for tribunal users, including those accessing the tribunal for guardianship and mental health matters is maintained to the same level of the current tribunals, that is, that the current successful specialist features are not eroded over time.

Appendix 1 Submissions

No	Author
1	Mr Alex Portnoy
2	Mr John Cooper
3	Mr Christopher Enright
4	Dr Michael Yeates
5	Carey Bay Self Care Anglican Village
6	Confidential
7	Mr Zenon Helinski
8	Mr Neil Smith
9	Mr John Muxworthy
10	Industrial Relations Society of NSW
11	Name suppressed
12	Affiliated Residential Park Residents Association Inc.
13	Workers Compensation Commission
14	Council of Social Service of NSW
15	Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales
16	Name suppressed
17	Mr Timothy Flynn
18	Mental Health Coordinating Council
19	Mr Roger Compton
20	Australian Clinical Psychology Association
21	Mr Bruce Ryan
22	NSW Chapter of the Australian Institute of Administrative Law
23	Confidential
24	Retirement Village Residents Association Inc.
24a	Retirement Village Residents Association Inc.
25	Ms Ning de Tarle
26	NSW Department of Attorney General and Justice
27	Mr Stephen Jones
28	Motor Traders' Association NSW
29	Name Suppressed
30	Local Land Boards of New South Wales

No	Author
31	Housing NSW
32	Transport Workers' Union of NSW
32a	Transport Workers' Union of NSW
33	Mr Rob Harvie
34	Ms Patricia Tardini
35	Mr Gregory Kelly
35a	Mr Gregory Kelly
36	Ms Julie Murray
37	NSW Society of Labor Lawyers
38	Administrative Decisions Tribunal of NSW
39	Aveo Banora Point Retirement Village Residents Committee
40	NSW Bar Association
41	Mr Richard Perrignon
42	Health Professional Councils Authority
43	Consumer, Trader and Tenancy Tribunal
44	Understand Alzheimer's Educate Australia
45	Confidential
45a	Confidential
46	NSW Nurses' Association
46a	NSW Nurses' Association
47	Australian Industry Group
48	Housing Industry Association
49	Australian College of Community Association Lawyers
50	Australian Manufacturing Workers' Union
51	Office of the Public Guardian
52	Mental Health Review Tribunal
53	Public Interest Advocacy Centre
54	NSW Nursing and Midwifery Tribunal
54a	NSW Nursing and Midwifery Tribunal
55	Hunter Business Chamber
56	Medical Council of NSW
57	Caravan and Camping and Manufactured Housing Industry Association of NSW
58	The Australian Workers' Union
59	NSW Council for Intellectual Disability
60	Strata Community Australia (NSW)

No	Author
61	Master Builders Association of NSW
62	Mr Peter Stiles
63	Health Care Complaints Commission
64	United Services Union
65	Vocational Training Tribunal
66	Development and Environmental Professionals' Association
67	Hon Paul Lynch MP
68	Local Government and Shires Association NSW
69	Pharmacy Council NSW
70	People With Disability
71	Mr Steven Mills
72	Australian Road Transport Industrial Organisation NSW
72a	Australian Road Transport Industrial Organisation NSW
73	Australian Medical Association (NSW) Limited
74	Industrial Relations Society Newcastle Branch
75	Public Service Commission
76	Ms Leshia Bubniuk
77	Redfern Legal Centre
78	Unions NSW
79	Name Suppressed
80	Tenants' Union of NSW Co-Op Limited
81	Confidential
81a	Confidential
82	NSW Young Lawyers, Law Society of NSW
83	NSW Pharmacy Tribunal
84	The Law Society of New South Wales
85	Older Persons Tenants' Service
86	Ms Jennifer Wilton
87	Mental Health Association NSW
88	Mr Anthony Herro
89	Australian Lawyers Alliance

Appendix 2 Witnesses

Date	Name	Position and Organisation
Friday 18 November 2011 Waratah Room Parliament House <i>(Roundtable discussion)</i>	Justice John Chaney	President, Western Australia State Administrative Tribunal
	Ms Linda Crebbin	General President, Australian Capital Territory Civil and Administrative Tribunal
Thursday 15 December 2011 Macquarie Room Parliament House	Mr Mark Lennon	Secretary, Unions NSW
	Mr Mark Morey	Deputy Assistant Secretary, Unions NSW
	Ms Alisha Wilde	Senior Industrial Officer, Unions NSW
	Mr Dennis Ravlich	Executive Director, Australian Salaried Medical Officers' Federation
	Mr Andrew Lillicrap	Industrial Services Manager, Health Services Unions East
	Mr Greg Chilvers	Director of Research, NSW Police Association
	Hon Kevin O'Connor	President, Administrative Decisions Tribunal (ADT)
	Ms Nancy Hennessy	Magistrate and Deputy President, ADT
	Hon Greg Keating	President, Workers' Compensation Commission
	Ms Sian Leathem	Registrar, Workers Compensation Commission
	Ms Alison Peters	Director, Council of Social Service of NSW (NCOSS)
	Ms Brenda Bailey	Senior Policy Officer, NCOSS
	Mr Paul Vevers	Executive Director, Housing Services, Housing NSW
	Ms Catherine Stuart	Director, Client Service Operations, Housing NSW
	Mr Nathan Cureton	Solicitor, Housing NSW
	Ms Kay Ransome	Chairperson, Consumer, Trader and Tenancy Tribunal (CTTT)
Mr Garry Wilson	Deputy Chairperson, Registry and Administration, CTTT	
Dr Gary Martin	President, Affiliated Residential Park Residents Association (ARPRA) NSW	
Mr Jock Plimmer	President, ARPRA Central Coast Branch	
Ms Judith Daley	Vice President, Retirement Village Residents Association	
Ms Julie Foreman	Executive Officer, Tenants' Union of NSW	

Date	Name	Position and Organisation
	Mr Carl Freer	Solicitor, Tenants' Union of NSW
Friday 16 December 2011	Ms Heather Moore	Manager, Policy and Practice Department, Law Society of NSW
Macquarie Room	Mr Joe Catanzariti	Chair, Employment Law Committee, Law Society of NSW
Parliament House	Ms Jane Needham SC	Junior Vice President, NSW Bar Association
	Mr Ingmar Taylor	Barrister, Industrial Law Section, NSW Bar Association
	Dr Hugh McDermott	President, NSW Society of Labor Lawyers
	Mr Phillip Boncardo	Treasurer, NSW Society of Labor Lawyers
	Mr Ben Kruse	Convener – Employment Law Committee, NSW Society of Labor Lawyers
	Mr John Cahill	General Secretary, Public Service Association and Professional Officers Association Amalgamated Union of NSW (PSA)
	Mr William McNally	Lawyer, PSA
	Ms Sue Walsh	President, PSA
	Mr Wayne Forno	NSW State Secretary, Transport Workers Union NSW
	Mr Oshie Fagir	Legal Officer, Transport Workers Union NSW
	Mr Ray Childs	Delegate, Transport Workers Union NSW
	Ms Phoenix van Dyke	Team Leader, Inner Sydney Tenancy Advice & Advocacy Service, Redfern Legal Centre
	Ms Natalie Ross	Senior Solicitor, Redfern Legal Centre
	Hon Greg James QC	President, Mental Health Review Tribunal
	Mr John Feneley	Deputy President, Mental Health Review Tribunal
	Ms Sarah Hanson	Acting Registrar, Mental Health Review Tribunal
	Mr Nick O'Neill	Chairperson, NSW Nursing and Midwifery Tribunal
Monday 23 January 2012	Mr Malcolm Schyvens	President, Guardianship Tribunal of New South Wales
Jubilee Room	Ms Amanda Curtin	Registrar, Guardianship Tribunal
Parliament House		

Date	Name	Position and Organisation
	Ms Imelda Dodds	Chief Executive Officer, NSW Trustee and Guardian
	Ms Justine O'Neill	Manager, Client Information and Support, NSW Public Guardian
	Mr Jim Simpson	Senior Advocate, NSW Council for Intellectual Disability
	Mrs Jeanette Moss AM	Parent and Former Chairman, NSW Council for Intellectual Disability
	Mr Peter Dodd	Solicitor, Health Policy and Advocacy, Public Interest Advocacy Centre
	Mr David Smith	Senior Manager, Divisional Services, Motor Traders Association
	Mr Brett Holmes	General Secretary, NSW Nurses' Association
	Ms Linda Alexander	Legal Officer, NSW Nurses' Association
	Mr Stephen Hurley-Smith	Industrial Officer, NSW Nurses' Association
	Dr Greg Kesby	Deputy President, Medical Council of NSW
	Mr Ameer Tadros	Executive Officer, Medical Council of NSW
	Mr Peter Dwyer	Chairperson, NSW Pharmacy Tribunal
	Justice Alan Wilson	President, Queensland Civil and Administrative Tribunal (QCAT)
	Judge Fleur Kingham	Deputy President, QCAT
	Ms Mary Shortland	Executive Director, QCAT
	Mr Richard Anicich	President, Hunter Business Chamber
	Ms Kristen Keegan	CEO, Hunter Business Chamber
	Mr Philip Boyce	Senior Chairperson, Local Land Boards of NSW
	Mr Noel Martin	Industrial officer, United Services Union

Appendix 3 Report of Committee visit to the NSW Consumer, Trader and Tenancy Tribunal

Thursday 19 January 2011

The following Committee members attended the site visit: Mr David Clarke (*Chair*), Mr Peter Primrose (*Deputy Chair*), Mr Shaoquett Moselmane, Ms Sarah Mitchell, Mr David Shoebridge. The Committee was accompanied by the following Secretariat staff: Ms Rebecca Main and Ms Miriam Cullen.

The Consumer Trader and Tenancy Tribunal

The Committee arrived at approximate 9.00 am and was met by Ms Anne Ratu, Manager Continuous Improvement and Mr Garry Wilson, Deputy Chairperson. Ms Ratu and Mr Wilson escorted the members to a conference room where they introduced the members to Ms Kaye Ransome, Chairperson of the CTTT and Ms Vikki Hardwick, Registrar.

Ms Ransome answered questions from the members about the day to day operation of the CTTT including security arrangements, procedures and staffing. Ms Ransome, Mr Wilson, Ms Ratu accompanied the Committee on a tour of the CTTT. The Committee saw conciliation rooms and the main waiting room, and observed hearings including general matters, a residential tenancy matter, and a home building dispute.

The members went back to the conference room with Ms Ransome, Mr Wilson, Ms Ratu and Ms Hardwick for a de-briefing where members asked further questions regarding ensuring the consistency of decisions, the technology used in hearing rooms and the volume of matters heard at the CTTT.

The visit concluded at 11.00 am.

Appendix 4 Report of Committee visit to the Victorian Civil and Administrative Tribunal and the Law Institute of Victoria

Tuesday 24 January 2011

The following Committee members attended the site visit: Mr David Clarke (*Chair*), Mr Peter Primrose (*Deputy Chair*), Mr Scot MacDonald, Mr Shaoquett Moselmane, Ms Sarah Mitchell, Mr David Shoebridge. The Committee was accompanied by the following Secretariat staff: Ms Rachel Callinan and Ms Miriam Cullen.

Victorian Civil and Administrative Tribunal

The Victorian Civil and Administrative Tribunal (VCAT) was established in 1998 and was the first super tribunal established in Australia. VCAT sits in a range of locations, with its head office in Melbourne, Victoria.

The Committee flew to Melbourne and arrived at VCAT by taxi at 10.00 am where it was met by Acting Principal Registrar Tony Jacobs, who introduced the members to the President of VCAT, The Hon Justice Iain Ross and the Chief Executive Officer, Andrew Tenni.

Justice Ross and Mr Tenni answered questions from the members about the Victorian experience of tribunal consolidation. Justice Ross and Mr Tenni provided the members with information on a number of issues including internal appeals, funding, the various lists and divisions, and the successes and challenges involved in managing and operating a super tribunal.

Mr Tenni suggested that it is important in any legislation establishing a super tribunal that the objects of the tribunal are clear.

In relation to appeals Justice Ross and Mr Tenni expressed the view that the creation of an internal appeal is not desirable to the cost and workload it would create. Although Justice Ross noted it would be possible to limit appeals in some way, he queried how this could be done, noting that a dollar limit would not deal well with human rights matters.

Mr Jacobs accompanied the Committee on a tour of VCAT. The Committee saw a mock hearing room used to train staff as well as several hearings in progress. The members observed proceedings including a freedom of information claim, a residential tenancy dispute, and a planning matter.

Mr Jacobs then introduced the Committee to another tribunal member, Mr Ian Proctor. Mr Proctor was involved in the establishment of VCAT and was its first principal registrar. Mr Proctor talked to the Committee about a number of matters including those important to any transition into a super tribunal such as the development of a strategic plan for implementation and ensuring adequate funding. Mr Proctor noted that any internal appeal mechanism should be created at the time the super tribunal is created rather than after.

The visit concluded at 2.30 pm.

The Law Institute of Victoria

The Law Institute of Victoria (LIV) was founded in 1859 and is the professional association and regulator of solicitors in Victoria. The LIV represents the interests of its members and works towards improving the law.

The Committee arrived at the Law Institute of Victoria at 2.45 pm.

The Committee was met by Ms Laura Helm, Lawyer, and introduced to Mr Eric Dryenfurth, member of the Administrative Review and Constitutional Law, Access to Justice and State Taxes Committees and Mr Jim Brassil, member of the Elder Law Committee.

Discussion centered on VCAT and whether there should be a requirement to give written reasons for a decision, complaint mechanisms, the training of judicial members and the extent to which some jurisdictions, including guardianship, are appropriately housed within a super tribunal.

Mr Brassil suggested it was important to look closely at the nature of each jurisdiction before determining whether it is appropriate for consolidation.

Mr Dryenfurth emphasized it was important to consider the structure of a super tribunal, noting that judges are commonly appointed to head tribunals but that judges are not generally trained professional administrators.

Ms Helm explained that the LIV had made submissions to the Victorian Law Reform Commission regarding its inquiry into the guardianship jurisdiction.

The visit concluded at 3.40 pm.

Appendix 5 Minutes

Minutes No. 4

Monday 17 October 2011

Macquarie Room, Parliament House, Sydney, at 9.50 am

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Shoebridge

2. Apologies

Mr Moselmane

3. ***

4. ***

4.1 ***

4.2 ***

4.3 ***

4.4 ***

4.5 ***

4.6 ***

4.7 ***

5. Other business

5.1 Inquiry into opportunities to consolidate tribunals in New South Wales

The Committee noted correspondence of 14 October 2011 from the Hon Greg Pearce MLC, Minister for Finance and Services, the Hon Greg Smith MP, Attorney-General and the Hon Anthony Roberts MP, Minister for Fair Trading referring the following terms of reference:

That the Standing Committee on Law and Justice inquire into and report on opportunities to consolidate Tribunals in NSW, and, in particular:

1. have regard to the 2002 Report of the Committee on the Ombudsman and Police Integrity Commission into the Administrative Decisions Tribunal and arrangements that are in place in other jurisdictions such as the Victorian Civil and Administrative Tribunal;
2. in conducting its inquiry, consider the following specific issues:
 - a. opportunities to reform, consolidate or transfer functions between tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters, having regard to:
 - i. the current and forecast workload for the Industrial Relations Commission (including the Commission in Court Session) as a result of recent changes such as National OHS legislation and the Commonwealth Fair Work Act;

- ii. the current and forecast workload of other Tribunals (such as the Administrative Decisions Tribunal and health disciplinary Tribunals);
- iii. opportunities to make tribunals quicker, cheaper and more effective
- b. options that would be available in relation to the Industrial Relations Commission in Court Session, should the commissions arbitral functions be consolidated with or transferred to other bodies;
- c. the jurisdiction and operation of the Consumer Trader and Tenancy Tribunal, with particular regard to:
 - i. its effectiveness in providing a fast, informal, flexible process for resolving consumer disputes;
 - ii. the appropriateness of matters within its jurisdiction, having regard to the quantum and type of claim and the CTTT's procedures
- d. any consequential changes which might arise.

We request that the Committee report by 31 January 2012.

The Committee noted the reporting date of 31 January 2012.

Discussion ensued.

Resolved, on the motion of Mr Primrose: That the Committee defer acceptance of the terms of reference to allow the Chair to consult with Ministers Pearce, Smith and Roberts to seek an extension of the reporting date.

6. Adjournment

The Committee adjourned at 5.18 pm until a time to be decided on Wednesday 19 October 2011.

Rachel Callinan

Clerk to the Committee

Minutes No. 5

Thursday 20 October 2011

Room 1153, Parliament House, Sydney, at 1.05 pm

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Shoebridge

2. Apologies

Mr Moselmane

3. Minutes

Resolved, on the motion of Mr MacDonald: That Draft Minutes No. 4 be confirmed.

4. ***

4.1 ***

5. Inquiry into opportunities to consolidate tribunals in New South Wales

The Chair advised the Committee that Ministers Pearce, Smith and Roberts had revised the reporting date to 29 February 2012 and that a letter to that effect would be sent to the Committee.

Resolved, on the motion of Mr MacDonald: That the Committee adopt the terms of reference with the revised reporting date, and note that the reporting date may need to be revisited again later subject to the development of the Inquiry.

Resolved, on the motion of Mrs Mitchell: That the Committee note the Issues Paper provided by the Ministers with the terms of reference and that the paper be placed on the Inquiry webpage for the information of inquiry participants.

Resolved, on the motion of Mrs Mitchell: That the inquiry be publicised on the Committee's website and through a press release on 21 October 2011.

Resolved, on the motion of Mr MacDonald: That the Inquiry and the call for submissions be advertised on the earliest practicable date in *The Sydney Morning Herald*, *The Daily Telegraph*, *The Land* and through Media Monitors, with a due date for submissions of 25 November 2011.

Resolved, on the motion Mr Shoebridge: That the Secretariat distribute to the Committee for consideration and input a list of stakeholders to be invited to participate in the Inquiry, and that the stakeholders be invited to make a submission.

Resolved, on the motion Mr Shoebridge: That the Committee hold two full days of hearings on 15 and 16 December 2011, and that a reserve date be set aside for a possible third hearing on 23 January 2012.

Resolved, on the motion Mr Shoebridge: That the Committee consider conducting a site visit to the Victorian Civil and Administrative Tribunal on 24 January 2012 and that the Secretariat explore the possibility of the site visit.

Resolved, on the motion of Mrs Mitchell: That the Committee authorises the publication of all submissions to the Inquiry, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues.

The secretariat advised that there will be a meeting of the executive of the National Council of Australasian Tribunals (COAT) in Sydney on Friday 18 November, which will be attended by Tribunal heads from Victoria, Queensland, Western Australia, South Australia, Tasmania, the ACT and New Zealand.

Resolved, on the motion Mr Shoebridge: That the Secretariat explore the possibility of the Committee meeting with members of the executive of the National COAT on Friday 18 November 2011.

6. *****7. Adjournment**

The Committee adjourned at 1.25 pm *sine die*.

Rachel Callinan
Clerk to the Committee

Minutes No. 6

Thursday 10 November 2011

Members Lounge, Parliament House, Sydney, at 1.05 pm

1. Members present

Mr Clarke (*Chair*)
 Mr Primrose (*Deputy Chair*)
 Mr MacDonald
 Mrs Mitchell
 Mr Moselmane (at 1.09 pm)
 Mr Shoebridge

2. Minutes

Resolved, on the motion of Mr Shoebridge: That Draft Minutes No. 5 be confirmed.

3. Inquiry into opportunities to consolidate tribunals in New South Wales

Resolved, on the motion of Mr Shoebridge: That the Committee hold a roundtable discussion with the President of the WA State Administrative Tribunal and the President of the ACT Civil and Administrative Tribunal on Friday 18 November 2011.

Resolved, on the motion of Mrs Mitchell: That a sub-committee consisting of Mr Clarke, Mr Primrose, Mr Moselmane and Mr Shoebridge be established to take evidence during the roundtable discussion on Friday 18 November 2011 for the inquiry into opportunities to consolidate tribunals in NSW, and that Mr Clarke be appointed to Chair the sub-committee.

Mr Moselmane arrived.

Resolved, on the motion of Mr Shoebridge: That the Committee seek the approval of the President of the Legislative Council to conduct a site visit to the Victorian Civil and Administrative Tribunal on Tuesday 24 January 2012, and that the Committee seek to also meet with the Law Society of Victoria.

4. ***

4.1 ***

4.2 ***

4.3 ***

5. Adjournment

The Committee adjourned at 1.35 pm until Friday 18 November 2011, at 8.30 am.

Teresa McMichael
Clerk to the Committee

Minutes No. 7

Thursday 24 November 2011

Members Lounge, Parliament House, Sydney, at 1.05 pm

1. Members present

Mr Clarke (*Chair*)
 Mr Primrose (*Deputy Chair*)
 Mr MacDonald
 Mrs Mitchell
 Mr Moselmane
 Mr Shoebridge

2. Minutes

Resolved, on the motion of Mrs Mitchell: That Draft Minutes No. 6 be confirmed.

3. Correspondence

The Committee noted the following item of correspondence received:

- 21 October 2011 – Letter from Transport Workers' Union of NSW to the Chair requesting a meeting to discuss the inquiry into opportunities to consolidate tribunals in NSW.

The Committee noted the following item of correspondence sent:

- 11 November 2011 – Memorandum to the President from the Chair regarding approval for the Committee's site visit to Victoria.

4. Inquiry into opportunities to consolidate tribunals in New South Wales

The Committee noted that three members of the Committee, Mr Primrose, Mr Shoebridge and Mr Moselmane, held a roundtable discussion with the President of the WA State Administrative Tribunal, Justice John Cheney, and the President of the ACT Civil and Administrative Tribunal, Ms Linda Crebbin on Friday 18 November 2011.

Resolved, on the motion of Mr Shoebridge: That the Committee adopt the transcript from the roundtable meeting on 18 November 2011, and authorise its publication.

5. *****5.1 *******6. Adjournment**

The Committee adjourned at 1.25 pm until Tuesday 13 December 2011 at 9.00 am.

Teresa McMichael
Clerk to the Committee

Minutes No. 8

Tuesday 13 December 2011

Room 1153, Parliament House, Sydney, at 10.30 am

1. Members present

Mr Clarke (*Chair*)
Mr Primrose (*Deputy Chair*)
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 7 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received**3.1 *****

3.2 *****3.3 Inquiries into opportunities to consolidate tribunals*****Sent:***

- 21 November 2011 – From Chair to Justice Chaney, President, WA State Administrative Tribunal, thanking him for participating in the roundtable discussion for the tribunals inquiry
- 21 November 2011 – From Chair to Ms Linda Crebbin, General President, ACT CAT, thanking her for participating in the roundtable discussion for the tribunals inquiry
- 21 November 2011 – From PCO to Chief of Staff of Attorney General and Minister for Justice, requesting further clarification on the definition of 'tribunal' for the purpose of the inquiry.

Received

- 20 October 2011 – From Ministers Pearce, Smith and Roberts to the Chair, advising the revised reporting date of 29 February 2012
- 28 October 2011 – From Mr Nick O'Neill, Chairperson, Nursing and Midwifery Tribunal, to Committee secretariat, expressing interest in appearing as a witness at committee hearings
- 14 November 2011 – From Mr Mick Grimson, on behalf of the President, Industrial Relations Commission of New South Wales, to the Chair, declining invitation to make a submission to the inquiry
- 22 November 2011 – From Chief of Staff of Attorney General and Minister for Justice to Principal Council Officer, providing advice on the definition of tribunals
- 25 November 2011 – From Judge Graeme Henson, Chief Magistrate, The Chief Magistrate of the Local Court NSW, declining invitation to make a submission to the inquiry.

The Committee noted the correspondence from Mr Grimson and resolved, on the motion of Mrs Mitchell: That the Committee defer consideration of the letter until after the hearing on Friday 16 December.

4. Inquiry into opportunities to consolidate tribunals - submissions**4.1 Consideration of requests for name suppression**

Resolved, on the motion of Mr Primrose: That the Committee authorise the publication of Submissions Nos. 11, 16, 29 and 79, with the exception of the name and other identifying details of the authors which are to remain confidential.

4.2 Consideration of request for confidentiality

Resolved, on the motion of Mr Primrose: That Submission Nos. 81 and 81a remain confidential.

4.3 Consideration of possible adverse mention

Resolved, on the motion of Mr Primrose: That the Committee authorise the publication of Submissions Nos. 2, 4, 8 and 9, with the exception of information identifying third parties, including case numbers and case names, which are to remain confidential.

Resolved, on the motion of Mr Primrose: That the Committee authorise the publication of Submission No. 71, with the exception of the section entitled "Section 2: History" which is to remain confidential.

4.4 Consideration of adverse mention throughout submission

Resolved, on the motion of Mr Primrose: That Submission Nos. 6, 23 and 45 remain confidential.

5. *****6. *******7. Adjournment**

The Committee adjourned at 12.55 pm until 9.00 am on Thursday 15 December 2011.

Rachel Callinan
Clerk to the Committee

Minutes No. 9

Thursday 15 December 2011

Macquarie Room, Parliament House, Sydney, at 9.00 am

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Participating members

Ms Sophie Cotsis (*2.30 pm – 2.50 pm*)

3. Inquiry into opportunities to consolidate tribunals in NSW

3.1 Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Mark Morey, Deputy Assistant Secretary, Unions NSW
- Ms Alisha Wilde, Senior Industrial Officer, Unions NSW
- Mr Dennis Ravlich, Executive Director, Australian Salaried Medical Officers' Federation
- Mr Andrew Lillicrap, Industrial Services Manager, Health Services Unions East
- Mr Greg Chilvers, Director of Research, NSW Police Association.

Mr Mark Lennon, Secretary, Unions NSW, joined the meeting and was sworn and examined together with other witnesses.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Administrative Decisions Tribunal were sworn and examined:

- Hon Judge Kevin O'Connor, President
- Ms Nancy Hennessy, Deputy President.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Workers Compensation Commission were sworn and examined:

- Hon Judge Greg Keating, President
- Ms Sian Leatham, Registrar.

The evidence concluded and the witnesses withdrew.

The following witnesses from NCOSS were sworn and examined:

- Ms Alison Peters, Director

- Ms Brenda Bailey, Senior Policy Officer.

The evidence concluded and the witnesses withdrew.

The following witnesses from Housing NSW were sworn and examined:

- Mr Paul Vevers, Executive Director, Housing Services
- Ms Catherine Stuart, Director, Client Service Operations
- Mr Nathan Cureton, Solicitor.

Ms Cotsis joined the meeting.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Consumer, Trader and Tenancy Tribunal were sworn and examined:

- Ms Kay Ransome, Chairperson
- Mr Garry Wilson, Deputy Chairperson (Registry and Administration).

Ms Cotsis left the meeting.

Ms Ransome tendered the following documents:

- *Annual report 2010-2011 on the Consumer, Trader and Tenancy Tribunal*
- A brochure entitled '*A guide to the CTTT*'
- DVD entitled '*A guide to the CTTT*'.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Gary Martin, President, Affiliated Residential Park Residents Association (ARPRA) NSW
- Mr Jock Plimmer, President, ARPRA Central Coast Branch
- Ms Judith Daley, Vice President, Retirement Village Residents Association.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Tenants' Union of NSW Co-op Ltd were sworn and examined:

- Ms Julie Foreman, Executive Officer
- Mr Carl Freer, Solicitor.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.00 pm. The public and the media withdrew.

4. Adjournment

The Committee adjourned at 5.00 pm until 9.15 am Friday 16 December 2011.

Rebecca Main
Clerk to the Committee

Minutes No. 10

Friday 16 December 2011

Macquarie Room, Parliament House, Sydney, at 9.15 am

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Participating members

Ms Cotsis (*9.50 am – 2.15 pm*)

3. Inquiry into opportunities to consolidate tribunals in NSW

3.1 Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from the Law Society of NSW were sworn and examined:

- Mr Joe Catanzariti, Chair, Employment Law Committee
- Ms Heather Moore, Manager, Policy and Practice Department.

Ms Cotsis joined the meeting.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Bar Association were sworn and examined:

- Ms Jane Needham SC, Junior Vice President
- Mr Ingmar Taylor, Industrial Law Section.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Society of Labor Lawyers were sworn and examined:

- Dr Hugh McDermott, President
- Mr Phillip Boncardo, Treasurer
- Mr Ben Kruse, Convenor – Employment Law Committee.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Public Service Association and Professional Officers Association Amalgamated Union of NSW were sworn and examined:

- Ms Sue Walsh, President
- Mr John Cahill, General Secretary
- Mr Bill McNally, Lawyer.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Transport Workers Union NSW were sworn and examined:

- Mr Wayne Forno, NSW State Secretary
- Mr Oshie Fagir, Legal Officer
- Mr Ray Childs, Delegate.

Mr Forno tendered the following documents:

- *Explanatory memorandum-Road Safety Remuneration Bill 2011*, House of Representatives, The Parliament of the Commonwealth of Australia
- Road Safety Remuneration Bill 2011
- A list of comparisons between the Road Safety Remuneration Bill and Chapter 6 of the *Industrial Relations Act 1996*.

The evidence concluded and the witnesses withdrew.

Ms Cotsis left the meeting.

Mr Primrose left the meeting.

The following witnesses from the Redfern Legal Centre were sworn and examined:

- Ms Phoenix van Dyke, Team Leader-Inner Sydney Tenancy Advice & Advocacy Service
- Ms Natalie Ross, Senior Solicitor.

The evidence concluded and the witnesses withdrew.

Mr Primrose rejoined the meeting.

The following witnesses from the Mental Health Review Tribunal were sworn and examined:

- Hon Greg James QC, President
- Mr John Feneley, Deputy President
- Ms Sarah Hanson, Forensic Team Leader.

Hon Judge James tendered the following document:

- Mental Health Review Tribunal, *Annual Report 2010-2011*.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Nick O'Neill, Chairperson, NSW Nursing and Midwifery Tribunal

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.00 pm. The public and the media withdrew.

3.2 Tendered documents

Resolved, on the motion by Mr Shoebridge: That the Committee accept the following documents tendered during the public hearings:

- Consumer, Trader and Tenancy Tribunal, *Annual Report 2010-2011*, a brochure entitled '*A guide to the CTTT*' and information DVD

- *Explanatory memorandum-Road Safety Remuneration Bill 2011*, House of Representatives, The Parliament of the Commonwealth of Australia
- Road Safety Remuneration Bill 2011
- A list of comparisons between the Road Safety Remuneration Bill and Chapter 6 of the *Industrial Relations Act 1996*
- Mental Health Review Tribunal, *Annual Report 2010-2011*.

3.3 Correspondence

The Committee noted the following items of correspondence:

Sent

- ***

Received

- 12 December 2011 – From Mr Graeme Kelly, General Secretary, United Services Union, to Committee secretariat, expressing interest to appear as a witness at a future committee hearing
- 15 December 2011 – From Mr Brett Holmes, General Secretary, NSW Nurses Association, to Committee secretariat, expressing interest to appear as a witness at a future committee hearing.

3.4 Additional questions on notice

Resolved, on the motion of Mr Shoebridge: That the Committee provide any additional questions on notice to the secretariat by 12.00 pm, Tuesday 20 December 2011.

3.5 Future conduct of inquiry

Resolved, on the motion of Mr Primrose: That the Committee use its reserve day of 23 January 2012 for a public hearing and that the hearing notice be circulated to the Committee for comment.

Resolved, on the motion of Mr Shoebridge: That the Committee write to the Industrial Relations Commission and invite it to provide a submission containing factual information regarding the work of the Commission that relates to the terms of reference of the inquiry.

Resolved, on the motion of Mr Shoebridge: That a subcommittee consisting of Mrs Mitchell, Mr Moselmane, Mr Primrose and Mr Shoebridge be established to undertake a visit to the Consumer, Trader and Tenancy Tribunal, and that Mrs Mitchell be appointed to Chair the sub-committee.

Resolved, on the motion of Mr Primrose: That the Committee hold a report deliberative for the inquiry on Monday 20 February 2012.

4. ***

5. ***

6. Adjournment

The Committee adjourned at 5.20 pm until 9.00 am Monday, 23 January 2012.

Rebecca Main
Clerk to the Committee

Minutes No. 11

Thursday 19 January 2012

Consumer, Trader and Tenancy Tribunal, 175 Castlereagh Street, Sydney, at 9.00 am

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mrs Mitchell

Mr Moselmane
Mr Shoebridge

Also present from the Secretariat

Ms Rebecca Main, Principal Council Officer
Ms Miriam Cullen, Senior Council Officer

2. Apologies

Mr MacDonald

3. Inquiry into opportunities to consolidate tribunals in NSW

3.1 Site visit – Consumer, Trader and Tenancy Tribunal (CTTT)

The Committee and Secretariat staff attended the CTTT.

The Committee was provided with a briefing by the following staff of the CTTT:

- Ms Kay Ransome, Chairperson
- Mr Garry Wilson, Deputy Chairperson
- Ms Anne Ratu, Manager Continuous Improvement
- Ms Vikki Hardwick, Registrar.

The Committee also observed a number of hearings of the tribunal.

4. Adjournment

The Committee adjourned at 11.00 am until 9.00 am Monday 23 January 2012.

Rebecca Main
Clerk to the Committee

Minutes No. 12

Monday 23 January 2012

Jubilee Room, Parliament House, Sydney, at 9.00 am

1. Members present

Mr Clarke (*Chair*)
Mr Primrose (*Deputy Chair*)
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Inquiry into opportunities to consolidate tribunals in NSW

2.1 Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from the Guardianship Tribunal were sworn and examined:

- Mr Malcolm Schyvens, President
- Ms Amanda Curtin, Registrar.

Mr Schyvens tendered the following documents:

- *'Annual Report 2010/2011'*, Guardianship Tribunal
- A DVD entitled *'For Ankie's Sake'*.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Imelda Dodds, Chief Executive Officer, NSW Trustee and Guardian
- Ms Justine O'Neill, Manager, Client Information and Support, Office of the Public Guardian.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Council for Intellectual Disability were sworn and examined:

- Mr Jim Simpson, Senior Advocate
- Mrs Jeanette Moss, Former Chairman.

Mr Simpson tendered the following document:

- A document entitled *'Position Statement on the NSW Guardianship Tribunal'*

The evidence concluded and the witnesses withdrew.

The following witness from Public Interest Advocacy Centre was sworn and examined:

- Mr Peter Dodd, Solicitor, Health Policy and Advocacy.

The evidence concluded and the witness withdrew.

The following witness from the Motor Traders Association was sworn and examined:

- Mr David Smith, Senior Manager, Divisional Services.

The evidence concluded and the witness withdrew.

The following witnesses from the NSW Nurses Association was sworn and examined:

- Mr Brett Holmes, General Secretary
- Ms Linda Alexander, Legal Officer
- Mr Stephen Hurley Smith, Industrial Officer.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Medical Council of NSW was sworn and examined:

- Dr Greg Kesby, Deputy President
- Mr Ameer Tadros, Executive Officer.

The evidence concluded and the witnesses withdrew.

The following witness from the NSW Pharmacy Tribunal was sworn and examined:

- Mr Peter Dwyer, Chairperson.

The evidence concluded and the witness withdrew.

The following witnesses from the Queensland Civil and Administrative Tribunal were sworn and examined via tele-conference:

- The Hon Justice Alan Wilson, President

- The Hon Judge Fleur Kingham, Deputy President
- Ms Mary Shortland, Executive Director.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Hunter Business Chamber were sworn and examined:

- Mr Richard Anicich, President
- Ms Kristen Keegan, CEO.

The evidence concluded and the witnesses withdrew.

The following witness from Local Land Boards of NSW was sworn and examined:

- Mr Philip Boyce, Senior Chairperson.

The evidence concluded and the witness withdrew.

The following witness from the United Services Union was sworn and examined:

- Mr Noel Martin, Industrial officer.

The evidence concluded and the witness withdrew.

The public hearing concluded at 5.00 pm. The public and the media withdrew.

2.2 Draft minutes

Resolved, on the motion of Mr David Shoebridge: That the Committee confirmed Draft Minutes Nos. 8, 9 and 10.

2.3 Correspondence

The Committee noted the following items of correspondence:

Received:

- 20 December 2011 – From Mr Mick Grimson, Industrial Registrar, IRC, to secretariat advising will provide information to Committee by 20 January 2012
- 23 December 2011 – From Mr Nick O'Neill, Chairperson, Nursing and Midwifery Tribunal, to secretariat, providing additional information to the Committee
- 11 January 2012 – From Judge Greg Keating, President, Workers Compensation Commission, providing answers to QON
- 13 January 2012 – From Judge Greg James, President, Mental Health Review Tribunal, providing answers to QON
- 13 January 2012 – From Mr Nathan Keats, Solicitor, Public Services Association, providing answers to QON
- 16 January 2012 – From Ms Natalie Ross, Senior Solicitor, Redfern Legal Centre, providing answers to QON
- 16 January 2012 – From Mr Carl Freer, Solicitor, Tenants' Union, providing answers to QON
- 16 January 2012 – From Mr Nick McIntosh, Chief Advisor, Transport Workers' Union, providing answers to QON
- 16 January 2012 – From Dr Hugh McDermott, President, NSW Society of Labor Lawyers, providing answers to QON
- 16 January 2012 – From Ms Brenda Bailey, Senior Policy Officer, NCOSS, providing answers to QON
- 16 January 2012 – From Unions NSW, providing answers to questions on notice

- 16 January 2012 – From Ms Kay Ransome, Chairperson, CTTT, providing answers to QON
- 17 January 2012 - From Justice Boland, President, IRC, to Chair, providing information requested by the Committee on the IRC, and requesting that Table 2 be kept confidential
- 18 January 2012 - from Paul Vevers, Executive Director, Housing Services, providing answers to questions on notice
- 19 January 2012 - from Mr Malcolm Schyvens, President, Guardianship Tribunal, to the Chair, apologising for not having previously provided a written submission as he was unaware of the submission invitation
- 20 January 2012 - from Judge Kevin O'Connor AM, President, Administrative Decision Tribunal NSW to the Committee, providing answers to questions on notice
- 20 January 2012 - from Mr Ross Nassif, Vice President, Industrial Relations Society of NSW, to the committee secretariat, advising that the representative of the Society was no longer available to attend the hearing on 23 January 2012.

Sent:

- 20 December 2012 – From Chair to Justice Boland, President, IRC, requesting information regarding the work of the Commission.

Resolved, on the motion of Ms Mitchell: That the Committee publish the correspondence and attachments from the IRC, keeping Table 2 confidential, as requested by Justice Boland.

2.4 Tendered documents

Resolved, on the motion by Mr Primrose: That the Committee accept the following documents tendered during the public hearings:

- *'Annual Report 2010/2011, Guardianship Tribunal'* and a DVD entitled *'For Ankie's Sake'*, tendered by Mr Schyvens
- A document entitled *'Position Statement on the NSW Guardianship Tribunal'*, tendered by Mr Simpson

Resolved on the motion of Mr Primrose: That the Committee public the document entitled *'Position Statement on the NSW Guardianship Tribunal'*, tendered by Mr Simpson.

3. Adjournment

The Committee adjourned at 5.05 pm until Tuesday, 24 January 2012 at the Victorian Civil and Administrative Tribunal.

Miriam Cullen

Clerk to the Committee

Minutes No. 13

Tuesday 24 January 2012

Melbourne, Victoria, at 10.00 am

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mrs Mitchell

Mr MacDonald

Mr Moselmane

Mr Shoebridge

Also present from the Secretariat

Ms Rachel Callinan, Director

Ms Miriam Cullen, Senior Council Officer

2. Inquiry into opportunities to consolidate tribunals in NSW

2.1 Site visit – Victorian Civil and Administrative Tribunal (VCAT)

The Committee and Secretariat staff attended VCAT.

The Committee was provided with a briefing by the following Members and staff of the VCAT:

- Justice Iain Ross, President of VCAT and President of the Council of Australian Tribunals (COAT)
- Mr Andrew Tenni, Chief Executive of VCAT and COAT
- Mr Ian Proctor, VCAT Tribunal Member
- Mr Tony Jacobs, A/Principal Registrar.

The Committee also observed a number of hearings of the tribunal.

Justice Ross tendered the following documents:

- Collection of eight journal articles relating to the consolidation of tribunals
- Booklet, *Taking it to VCAT: A guide to Residential Tenancies, Civil Claims and Owners Corporation Disputes at VCAT.*

2.2 Site visit – Law Institute of Victoria

The Committee and Secretariat staff attended the Law Institute of Victoria.

The Committee was provided with a briefing from the following members of the Institute:

- Ms Laura Helm, Elder Law, Succession Law, Administrative Law and Human Rights
- Mr Eric Dyrenfurth, Administrative Review and Constitutional Law, Access to Justice and State Taxes Committees,
- Mr Jim Brassil, Elder Law Committee.

3. Adjournment

The Committee adjourned at 3.45 pm until Monday 20 February 2012.

Miriam Cullen

Clerk to the Committee

Minutes No. 14

Tuesday 15 February 2012

Parkes Room, Parliament House, Sydney, at 1.00 pm

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Inquiry into opportunities to consolidate tribunals in NSW

2.1 Extend reporting date

Resolved, on the motion of Mr Moselmane: That the Committee extend the reporting date for the Inquiry into opportunities to consolidate tribunals until Thursday 22 March 2012 and that the Chair write to the Minister for Finance, Attorney General and Minister for Fair Trading to advise of the new reporting date.

2.2 New report deliberative date

Resolved, on the motion of Mr Shoebridge: That the Committee hold a report deliberative for the Inquiry into opportunities to consolidate tribunals on a date to be confirmed with the Chair and Committee Members.

3. Adjournment

The Committee adjourned at 1.09 pm *sine die*.

Rebecca Main
Clerk to the Committee

Draft Minutes No. 15

Friday 16 March 2012

Parkes Room, Parliament House, Sydney, at 10.05 am

1. Members present

Mr Clarke (*Chair*)

Mr Primrose (*Deputy Chair*)

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mrs Mitchell: That draft Minutes Nos. 11, 12, 13 and 14 be confirmed.

3. ***

4. Inquiry into opportunities to consolidate tribunals in NSW

4.1 Correspondence

The Committee noted the following items of correspondence:

Received

- 18 January 2012 – From Mr Paul Vevers, Executive Director, Housing Services, NSW Housing to the secretariat, providing answers to questions on notice
- 20 January 2012 – From Mr Mick Grimson, Industrial Registrar, NSW Industrial Relations Commission, to the secretariat, providing supplementary material for the Committee
- 20 January 2012 – From Judge Kevin O'Connor AM, President, Administrative Decisions Tribunal of NSW, to the Committee, providing answers to questions on notice
- 25 January 2012 – From Mr Justin Dowd, President, Law Society of NSW, to the secretariat, providing answers to questions on notice
- 25 January 2012 – From NSW Bar Association to the Committee, providing answers to questions on notice
- 31 January 2012 – From Mr Peter Dwyer, Chairperson, NSW Pharmacy Tribunal, providing additional information to the Committee
- 2 February 2012 – From Justice Alan Wilson, President, Queensland Civil and Administrative Tribunal, to the secretariat, providing answers to questions on notice
- 2 February 2012 – From Mr Philip Boyce, Senior Chairperson, Local Land Boards, to the Committee, providing answers to questions on notice
- 6 February 2012 – From Guardianship Tribunal to the Committee, providing answers to questions on notice

- 6 February 2012 – From Ms Imelda Dodds, CEO, NSW Trustee and Guardian, to the Committee, providing answers to questions on notice
- 6 February 2012 – From Mr Peter Dodd, Solicitor, Health Policy and Advocacy, Public Interest Advocacy Centre, to Committee Chair, providing answers to questions on notice
- 6 February 2012 – From Mr Ameer Tadros, Executive Officer, Medical Council of NSW, to Committee Director, providing answers to question on notice
- 6 February 2012 – From Mr Jim Simpson, Senior Advocate, NSW Council for Intellectual Disabilities, to the Committee, providing updated organisation's position statement

Sent:

- 15 February 2012 – From Chair to the Hon Greg Pearce, Minister Finance and Services, regarding an extension of the reporting date for the tribunals inquiry

4.2 Submissions

Resolved, on the motion of Mr Shoebridge: That Submission No. 45a remain confidential.

4.3 Chair's draft report

The Chair tabled his draft report entitled Inquiry into the opportunities to consolidate tribunals in NSW, which having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Mr Shoebridge: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mrs Mitchell: That Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Shoebridge: That Recommendation 1 be amended by inserting a new sentence at the end of the Recommendation to read 'This does not preclude the possibility of further consolidation of existing jurisdictions within tribunals already in existence.'

Resolved, on the motion of Mr Shoebridge: That where the Committee makes changes to the Recommendation, the secretariat in consultation with the Chair, make consequential amendments to relevant Committee comment sections.

Resolved, on the motion of Mr Shoebridge: That Recommendation 2 be amended by omitting the words 'or working group'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.51 be amended by inserting a new sentence at the end of the paragraph to read: 'It would appear appropriate that the panel's Chair be a nominee of the Attorney General.'

Resolved, on the motion of Mr Shoebridge: That Recommendation 3 be amended by inserting a new dot point to reads: 'There must be equitable access to justice for all citizens'.

Resolved, on the motion of Mr MacDonald: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Shoebridge: That following Recommendation 9 an additional paragraph and recommendation be inserted to read:

'The quality of any decision making is enhanced by requiring those making decisions to justify them with reasons. This was particularly a matter of concern in relation to busy jurisdictions such as the CITT. Reasons for decision are also essential if appeal rights are to be granted.'

Recommendation: ‘That any persons affected by an administrative tribunal decision be provided with reasons for that decision, to a quality and extent consistent with the issue in dispute.’

Resolved, on the motion of Mrs Mitchell: That Recommendation No. 9 be omitted and two new recommendations be inserted as follows:

‘That any consolidated tribunal have a simple, user friendly standard set of forms able to be completed online’.

‘That any consolidated tribunal have user friendly practices and procedures.’

Resolved, on the motion of Mr MacDonald: That Recommendation 10 be amended by inserting the words ‘timely’ after the word ‘easy’.

Resolved, on the motion of Mr Shoebridge: That Recommendation 10 be amended by inserting after the word ‘mechanism’ the words ‘with the requirement to establish error of either fact or law and an appropriate threshold including the requirements to obtain leave’.

Resolved, on the motion of Mr Shoebridge: That Recommendation 11 be amended by omitting the words ‘all’ and inserting ‘wherever appropriate’ after the word ‘consolidate’.

Resolved, on the motion of Mr Primrose: That Chapter 4, as amended, be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Shoebridge: That Recommendation 13 be amended by inserting at the beginning of the recommendation the words ‘That, if the Consumer, Trader and Tenancy Tribunal remains a standalone tribunal,’.

Resolved, on the motion Mr Shoebridge: That paragraph 5.78 be amended by omitting the word ‘always’ and inserting instead ‘readily’.

Resolved, on the motion of Mr Shoebridge: That a new paragraph be inserted after paragraph 5.79 to read:

‘The Committee notes the concerns raised by inquiry participants, such as the MTA, that the current internal rehearing process is too restrictive and is not an adequate remedy to either correct error or impose consistency in decision making.’

Resolved, on the motion of Mr Shoebridge: That Recommendation 14 be amended by omitting the word ‘monetary’.

Resolved, on the motion of Mr Moselmann: That Chapter 5, as amended, be adopted.

Chapter 6 read.

Moved, on the motion of Mr Shoebridge: That paragraph 6.37 be amended by:

- omitting the word ‘should’ and inserting instead the word ‘may’
- omitting the word ‘can’ and inserting instead ‘may be able to’.

Question put.

The Committee divided.

Ayes: Mr Moselmann, Mr Shoebridge, Mr Primrose

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell

Question resolved in the negative on the casting vote of the Chair.

Moved, on the motion of Mr Primrose: That paragraph 6.37 be deleted.

Question put.

The Committee divided.

Ayes: Mr Moselmane, Mr Shoebridge, Mr Primrose

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell

Question resolved in the negative on the casting vote of the Chair.

Moved, on the motion of Mr Shoebridge: That a new paragraph be inserted following paragraph 6.39 to read:

‘The Committee recognises that the nature of the IRC’s jurisdiction, dealing with wide ranging industrial disputes that can affect key sectors of the economy, together with the making of new rights through industrial awards, is a unique jurisdiction that must be very carefully dealt with in any review of tribunals in NSW.’

Question put.

The Committee divided.

Ayes: Mr Moselmane, Mr Shoebridge, Mr Primrose

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr MacDonald: That Chapter 6, as amended, be adopted.

Chapter 7 read.

Resolved, on the motion of Mr Shoebridge: That Chapter 7 be adopted.

Resolved, on the motion of Mr Primrose: That the Committee adopt the site visit reports regarding its visit to the Consumer, Trader and Tenancy Tribunal and Victoria as set out in Appendix 3 and 4 of the report.

Resolved, on the motion of Mr Shoebridge:

- That the draft report, as amended, be the report of the Committee
- That the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the inquiry, except documents kept confidential by resolution of the Committee.
- That the report be tabled by Thursday 22 March 2012.
- That dissenting statements be provided to the secretariat by 1.00 pm on Monday 19 March 2012.

5. Adjournment

The Committee adjourned at 12.05 pm, *sine die*.

Rebecca Main

Committee Clerk

Appendix 6 Dissenting statement

BY THE HON SHAOQUETT MOSELMANE MLC, THE HON PETER PRIMROSE MLC,
MR DAVID SHOEBRIDGE MLC

The committee's report is, for the very large part, a product of consensus amongst the committee membership. There is however one aspect of the committee report on which the members of the committee did not reach consensus.

We dissent on the decision by the majority in relation to committee comment on page 72, not to include additional commentary, reflective of the evidence before the committee regarding the unique jurisdiction of the Industrial Relations Commission. That evidence raised concerns that amalgamation could pose a threat to its critical, and historic, role in regional areas and in overlooking crucial parts of the state economy, such as its hospitals, police, the public service and railways.

Evidence for instance from the Hunter Business Chamber, the Newcastle Branch of the Industrial Relations Society, Unions NSW and others, all detailed the likely dilution of industrial relations expertise and negative economic consequences for the Hunter of moving the IRC into a consolidated tribunal. The majority cited no evidence to justify dismissing these concerns.

The balance of the evidence before the committee was that the Industrial Relations Commission is a unique jurisdiction that must be very carefully considered in any more detailed review of tribunals here in NSW. It is unique in that it is the only tribunal that deals with wide ranging industrial disputes that can affect key sectors of the economy, together with the making of new rights through industrial awards. It does this whilst also exercising judicial powers, a factor not found in any other tribunal reviewed by the committee.

In its century long history, the Industrial Relations Commission has developed a distinct set of skills and a well recognised institutional capacity that is not found in any other tribunal that was reviewed by the committee. This allows the Industrial Relations Commission to effectively maintain a public sector awards system, co-operatively and competently resolve complex industrial disputes and address broader issues that go beyond the immediate interests of the parties before it; such as the public interest in an efficient and productive State economy, equal remuneration, non-discrimination and industrial democracy.

In submitting this dissenting report we recognise that it is not a matter the subject of a substantive recommendation from the committee. Nevertheless, it is a matter that we considered of sufficient importance to warrant this brief dissenting report.