

Industrial Relations Amendment (Industrial Court) Bill 2016

Second Reading

The Hon. JOHN AJAKA (Minister for Ageing, Minister for Disability Services, and Minister for Multiculturalism) (11:39): I move:

That this bill be now read a second time.

The Government is pleased to introduce the Industrial Relations Amendment (Industrial Court) Bill 2016. I will speak briefly on the background and give an overview of the Industrial Relations Commission [IRC]. The Industrial Relations Commission is currently made up of two bodies: the Commission in Court Session, otherwise known as the Industrial Court of New South Wales; and the commission. The Industrial Court is a court of superior record, of equivalent status to the Supreme Court of New South Wales, and exercises a range of judicial functions, including hearing appeals from industrial magistrates in the Local Court; hearing unfair contracts disputes; determining prosecutions for offences under the Industrial Relations Act 1996; and making orders for the recovery of money and issuing civil penalties where an industrial instrument is alleged to have been breached.

The Industrial Court is currently comprised of a single judicial officer, who is also the President of the IRC. The commission, on the other hand, is a tribunal that performs non-judicial functions, such as the arbitration and conciliation of industrial disputes. The commission is currently comprised of five commissioners. The current constitution of the IRC, being both a court and a tribunal in a single body that exercises both judicial and non-judicial functions, is uncommon. For example, in the Federal jurisdiction, judicial matters are dealt with in the Federal Court or the Federal Circuit Court rather than in the Fair Work Commission.

I will now proceed to an overview of the bill. The bill gives effect to the Government's decision to integrate the Industrial Court with the Supreme Court of New South Wales. The bill amends the Industrial Relations Act 1996 and other Acts to abolish the Industrial Court; appoint the current president as a judge of the Supreme Court; transfer the functions of the Industrial Court to the Supreme Court, the District Court or the commission; and reconstitute the commission so that it consists of a chief commissioner and commissioners.

The case for change is due to the reduction in workload. The decision to integrate the Industrial Court with the Supreme Court has been made in response to the significant reduction in the workload of the Industrial Court over recent years. Following referral to the Commonwealth of New South Wales industrial relations powers over private sector employees and employers in late 2009, the jurisdiction of the IRC has been reduced to the New South Wales public sector, the local government sector, taxidrivens and owner-drivers. This has led to a significant reduction in the IRC's workload, which can most easily be seen by observing that the number of commission members has fallen from 21 in 2009 to five today.

This, and the transfer of occupational health and safety prosecutions to the District Court in 2013, has had an even more material impact on the Industrial Court, with the number of matters commenced in the court falling from 766 in 2005 to only 37 in 2015. The practical effect is that there is now insufficient work in the Industrial Court to occupy the single remaining judicial member. Due to its decreased workload, the Industrial Court is not operating as effectively as larger courts. This bill recognises that the judicial functions performed by the Industrial Court are

important and must be performed, but that the resources devoted to those functions need to be managed differently so as to be more effective.

There are a number of benefits of the changes proposed in the bill. Integrating the Industrial Court with the Supreme Court will allow existing Supreme Court judges to hear matters as demand requires. There will be efficiencies of scale associated with handling matters under the larger jurisdiction of the Supreme Court. This will benefit parties through increasing the capacity of the court to attend to urgent industrial matters. With only one judge currently available to hear matters in the Industrial Court, parties could be significantly delayed in seeking the assistance of the court if the current president, and the only judicial member, is occupied with a lengthy hearing.

By contrast, the Supreme Court will be able to urgently allocate judicial resources to matters as required from a larger pool of judges. There is also a number of judges who are currently appointed to the Supreme Court with industrial relations expertise. The Industrial Court and the Supreme Court both have status as superior courts of record. Judicial industrial relations matters will therefore continue to be heard in a superior court by judges with appropriate expertise. The Supreme Court already hears matters falling within the Industrial Court's jurisdiction where necessary, including when the sole judge of the Industrial Court is on leave. The changes mean that New South Wales will mirror the Commonwealth industrial relations framework, where the Federal Court and Federal Circuit Court determine industrial relations matters that require judicial consideration and non-judicial matters are dealt with by the Fair Work Commission.

I turn now to the practical impact of the change outlined in the bill. The practical impact of the change will be minimal. The move of the judicial functions and the sole judge of the Industrial Court to the Supreme Court will in practice create minimal change to the jurisdiction and functioning of the commission. The actual distribution of functions between the commission and the Industrial Court will remain unchanged, the only difference being that the court's functions will be performed within the Supreme Court. The conciliation and arbitration functions of the commission will continue to be performed by the non-judicial members of the commission, known as commissioners, with no alteration to the range of non-judicial functions performed and how they are performed. The number of commissioners will remain unchanged at five.

A new head of the Industrial Relations Commission jurisdiction will be appointed, titled the chief commissioner. The chief commissioner will exercise the tribunal functions currently assigned to the president, such as managing and allocating the case load, creating full benches where required, and providing an annual report. It is proposed that the chief commissioner be a person who holds or has held judicial office or a person who is legally qualified. Importantly, all current Industrial Court fee exemptions for organisations of employers and employees and others will remain unchanged. This will ensure that the current access to justice enjoyed by employers, employees and their representative organisations will continue.

Further, the functions of the online registry of the Supreme Court will become available for matters currently heard in the Industrial Court, allowing applicants to file applications, lodge documents and receive updates about their matters online. This will particularly assist regional and remote communities. The new arrangements will ensure that the people of New South Wales continue to have access to a fast, fair and accessible system of conciliation and arbitration in the commission, while the increased capacity of the Supreme Court benefits those seeking judicial determination of their issues.

I will now detail the consultation that has taken place in regard to the bill. The Chief Justice of the Supreme Court and the current President of the Industrial Relations Commission were both closely consulted on the proposals in the bill. The bill was also released to stakeholders in the form of an exposure draft, accompanied by an explanatory brief. The Department of Justice and Industrial Relations met with stakeholders, and many stakeholders made formal submissions regarding the provisions of the bill. Submissions were received from stakeholders including the Heads of Jurisdiction, the Law Society and the Bar Association, various government agencies, Unions NSW and affiliates, and the NSW Business Chamber. All submissions have been carefully considered in the development of the bill, and I thank those stakeholders for their input into this important reform.

I turn now to the detail of the bill, firstly, with respect to the changes to the Industrial Relations Act. I will start with the amendments to the Industrial Relations Act 1996—the Industrial Relations Act—which give effect to most of the changes. The bill will transfer the majority of the judicial functions currently exercised by the Industrial Court to the New South Wales Supreme Court. The bill achieves this primary purpose by taking the already identified functions of the Industrial Court and conferring them, in the form of new powers, on the Supreme Court.

Many of those functions are outlined in proposed new section 355B of the Industrial Relations Act.

In addition to the existing functions of the Industrial Court, the IRC's functions relating to cancelling the registration of associations and registered organisations will be transferred to the Supreme Court. Having regard to the existing need to bring substantial legal expertise to bear on matters of this kind as well as the sometimes serious nature of applications to cancel registration, it has been decided that such matters are most appropriately dealt with judicially by the Supreme Court. In recognition of the important relationship between the arbitral and judicial functions of the current IRC, the newly constituted commission will have powers to refer questions of law to the Supreme Court under the proposed new section 178A of the Industrial Relations Act. New section 178B will allow the commission to transfer whole proceedings to the Supreme Court, if it is satisfied that the Supreme Court is the appropriate jurisdiction.

In addition, the new sections 355B and 355C of the Industrial Relations Act inserted by the bill will provide the Supreme Court with the power to make declarations of right. This ensures that all legal questions that arise before the commission that are not able to be resolved by the commission under the existing section 175 of the Industrial Relations Act can be settled promptly and finally by the Supreme Court. Conversely, recognising the benefit of the commission's flexible approach to conciliation processes, the Supreme Court will have power under the proposed new section 109 of the Industrial Relations Act to refer applications to the commission for conciliation, if it considers it appropriate to do so. A new section 371 of the Industrial Relations Act will also require parties to recovery of remuneration matters to engage in mandatory conciliation before proceeding in the Supreme Court. In total, these amendments preserve the important relationship between the non-judicial and judicial functions of the industrial relations framework in New South Wales while providing greater access to justice for those whose matters require judicial determination.

I now turn to changes to other Acts that confer jurisdiction. A number of other Acts confer functions on the Industrial Court that require amendment to provide for the abolition of the court. I will briefly outline the most substantial of those changes. The Health Services Act 1997 currently provides for a judicial member of the commission to arbitrate disputes about the terms

and conditions of work performed by visiting medical officers. That function will now be performed by an independent arbitrator, with appeals to be made to the Supreme Court. The Police Act 1990 currently provides for appeals of unfair dismissal reviews to be conducted before a full bench of the commission, constituted by one presidential member who is a judicial member, and two other members who are Australian lawyers. Those matters will continue to be heard before a full bench of the commission. If there are insufficient legally qualified commissioners to constitute a full bench, magistrates will be appointed on a temporary basis to the commission to hear the appeal.

The Parliamentary Remuneration Act 1990 provides for the constitution of the Parliamentary Remuneration Tribunal by "a judicial member or retired judicial member of the Industrial Relations Commission appointed by the President". The tribunal will in future be constituted by a person who holds, or has held, judicial office, appointed on the recommendation of the Chief Justice of the Supreme Court. The Dangerous Goods (Road and Rail Transport) Act 2008, the Explosives Act 2003, the Workplace Injury Management and Workers Compensation Act 1998 and the Workplace Health and Safety Act 2011 all require functions to be performed by the Industrial Court. Those functions will in future be performed by the District Court.

Finally, the bill also provides for the abolition of the Courts and Crimes Legislation Amendment Act 2009, the Courts and Crimes Legislation Further Amendment Act 2010, the Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act 2009, and the Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Act 2009, which will all be redundant once the Industrial Court is abolished. The bill also repeals the Transport Appeals Boards Act 1980, which conferred appellate jurisdiction on the Industrial Court, and is now spent.

In conclusion, I emphasise that this bill is a necessary consequence of the changing industrial landscape. The expansion of the Federal jurisdiction and the concurrent contraction of the New South Wales industrial jurisdiction have had a significant effect on the workload of the IRC in both its arbitral and judicial role. Those changes have now led to the conclusion that a separate Industrial Court, consisting of a single judicial member, cannot be sustained and action by the Government is required. This said, it must also be recognised that the judicial functions now performed by the Industrial Court still need to be performed, and the transfer of those functions to the Supreme Court provides the best and most efficient means of ensuring that this happens. Also, the arrangements put in place will ensure that access to justice for users of the Industrial Court continues unchanged from its present level.

It must also be emphasised that the approach taken by this bill seeks to ensure that the commission's conciliation and arbitration functions can and will continue to be performed as usual. The bill makes no changes to these functions and provides that the current number of commissioners remains at five, including the chief commissioner. I have every confidence that the reconstituted commission and the Supreme Court, as the new custodian of the Industrial Court's judicial functions, will continue to deliver industrial relations services no less excellent than the IRC has done in its combined role. In closing, I recognise the contribution of Justice Walton, who has served the people of New South Wales as a judge and vice-president of the IRC since 1998, before being appointed the president in 2014. I am pleased that Justice Walton will continue his important work as a judge of the Supreme Court. I commend the bill to the House.