STANDING COMMITTEE ON LAW AND JUSTICE OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Unions NSW Responses To Supplementary Questions

1. The NSW Society of Labor Lawyers in its submission (p 24) suggested that the Industrial Court could be maintained in its current form and its jurisdiction expanded to hear appeals from employment and industrial matters in a consolidated jurisdiction of the Industrial Relations Commission. What is your opinion of this suggestion?

This holds some merit, in that the Industrial Court could be maintained but be permitted to deal with appeals from an expanded 'pool' of employment and industrial matters. This would seemingly maintain the integrity of the Industrial Court whilst allowing it to utilise its expertise and capacities in like areas of the law.

The relevant extract referred to in the submission of the NSW Society of Labor Lawyers also in particular identifies appeals arising from proceedings before a health professional tribunal. Such appeal rights are set out in the *Health Practitioner Regulation National Law (NSW) No 86a* as follows:

162 Appeal against Tribunal's decisions and actions [NSW]

(1) A person about whom a complaint is referred to the Tribunal, or the complainant, may appeal to the Supreme Court against—
(a) a decision of the Tribunal with respect to a point of law; or
(b) the exercise of a power by the Tribunal under Subdivision 6 of Division 3.

(2) A person who is a party to an appeal to the Tribunal against the exercise by the Chairperson or a Deputy Chairperson of the Tribunal of any power under Subdivision 6 of Division 3 (including the complainant in respect of the matter), may appeal to the Supreme Court against—
(a) a decision of the Tribunal with respect to a point of law; or
(b) the exercise of any power by the Tribunal under section 158.

(3) An appeal under this section must be made within 28 days (or the longer period allowed by the Supreme Court in a particular case) after the handing

down of the decision or the exercise of power against which the appeal is made.

(4) The Supreme Court may stay any order made by the Tribunal, on the terms the Court sees fit, until the time the Court decides the appeal.

Unions NSW considers that all such appeal rights as contained in the above statute, and suggested by the NSW Society of Labor Lawyers, could be effectively dealt with by the Industrial Court.

2. Your submission (pp 9 and 33) is critical of the Government's Issues Paper for taking an approach that focuses on the 'economic imperative for reform'. What are the overarching principles that should underpin the Committee's consideration of its terms of reference?

Unions NSW holds a concern that terms such as *efficiency* when referred to in the Issues Paper, or *cheaper* when used in the Terms of Reference, is 'measured' solely from the 'one dimensional' perspective of alleged dollar savings that might accrue from changes to administrative arrangements and/or consolidation of certain functions.

The Issues Paper on page 12 (Conclusion) whilst noting *"the Government has no preferred option at this stage"* then indicates that *"there are a number of benefits in having a "citizen focussed" approach"* as it has *"the potential to increase decision-making quality and achieve efficiencies".*

The concern of Unions NSW in relation to such latter comments is that it is respectfully suggested that the Legislative Council Inquiry must have regard to a much wider concept of economic and financial efficiencies beyond what may be claimed will be achieved via administrative streamlining or consolidation. Crude efficiencies in the short term may well be achieved by amalgamating administrative and support activities. But these must be tempered or compared to the significant efficiency that arises from the activities of, for example, the IRC in its current form.

A premium must be applied to the quality and effectiveness of dispute resolution and decision making by the IRC that prevents unnecessary or protracted dislocation within

the workplace. When considering efficiencies, the proven track record (attested to before the Inquiry by both employee and employer representatives/organisations) of the IRC to ensure and prevent escalation of disputes with early and decisive intervention, must of itself be accounted for in its contribution to the industry concerned and ultimately the NSW economy. Any change that may reduce or erode its proven capacity to minimise such disruption must of itself then be considered as a potential economic inefficiency.

This is especially important as these disputes or matters requiring resolution range from those affecting an individual worker to those involving the entire workforce. A single dispute in one of the larger government departments or agencies for example may involve thousands of employees. Accordingly, the minimisation of any such disruption and achieving an effective and enforceable outcome to the dispute is significant and one which holds tangible economic benefits to the NSW economy as well as for the continued provision of services to the community.

The concern of Unions NSW is that when any consideration of the possible economic/financial efficiencies is undertaken in relation to options or alternatives for tribunal consolidation, it is not done in isolation or without due recognition of the considerable benefits to businesses, industries and the economy currently being provided by the IRC.

3. Your submission (p 11) briefly considers the consolidation of health professional tribunals and questions whether these tribunals could successfully co-exist. Can you elaborate on this concern?

Any amalgamation or accommodation of health professional Councils under the auspices of the IRC or another tribunal/body needs to be addressed with some caution and in a collaborative way. Many of the processes affecting the current ten (and soon to be fourteen) health professional Councils under the national registration scheme require the direct involvement of and assessment by those with educational and clinical expertise reflecting the particular profession under investigation.

Each of the Councils established in NSW has the responsibility to deal with complaints about the conduct, professional performance, health and competence (fitness to

practise) of the professional involved. Each of these health professional Councils in turn has a Tribunal established to adjudicate on allegations of professional misconduct which, if proven, could warrant suspension or de-registration. The Tribunal also acts as an appeal body on decisions made by the Council following, for example, an Inquiry by a Professional Standards Committee. It is important to note that each Tribunal is legally separate from and independent of their respective Council.

It is trite to note that the decisions of a Tribunal can have a significant and momentous impact upon a registered health professional and their prospects of continuing employment.

Each constituted Tribunal consists of four members. When the Chairperson or a Deputy Chairperson is appointed to deal with a matter, the Council appoints the other three members. In NSW, the Health Care Complaints Commission ('HCCC') remains the independent investigator and prosecutor of complaints before a Tribunal.

One important difference in the composition of the Tribunals does however arise in relation to the persons deemed qualified to serve as a Chairperson or Deputy Chairperson. Under the *Health Practitioner Regulation National Law (NSW) No 86a*, it states as follows:

> ***165B Chairperson and Deputy Chairpersons of Tribunals [NSW]***
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> *(10) In this section,* ***qualified person*** *means—*
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> *(a) for the Medical Tribunal of New South Wales, a Judge of the Supreme Court (or a Judge or other person having the same status as a Judge of the Supreme Court) or a Judge of the District Court; and*
>
> *(b) for another Tribunal, an Australian lawyer of at least 7 years' standing.*

It is only the Medical Tribunal that currently requires a judicial officer of some standing to undertake the role of Chairperson or Deputy Chairperson. This has already facilitated some judicial officers of the Industrial Court in NSW to hold such appointments. This seems a manifestly appropriate utilisation of both their judicial status and undoubted capacities.

Perhaps with the requisite degree of consultation, a similar approach could be considered for the other Tribunals. This would equally allow any available capacity of judicial officers of the Industrial Court to be utilised in a meaningful and positive way.

This could, without passing any judgement on existing position holders on such Tribunals, potentially be a very positive and beneficial contribution. It may also be seen over the medium to long term as a much better utilisation of government budgetary resources. The use of any stated spare capacity of existing judicial officers must be preferable to paying the (additional) remuneration associated with appointing Chairpersons and Deputy Chairpersons on the non-Medical Tribunals.

If consideration of this proposition was countenanced, then further consideration could be given to the administrative and organisational support/management of such Tribunals falling to the IRC.

4. The dilution of the specialist knowledge contained within existing tribunals is a pressing concern in your submission, especially in relation to police (pp 21-27). To what extent would the establishment of specialist lists within a consolidated tribunal address your concerns?

A specialist list is one thing. Whether a matter on such a list continues to have access to the expertise and experience similar to that of the current IRC members, now and into the future, is the key test. It would seem somewhat inevitable that in such an environment 'generalist' panel members, for example, will become utilised. This is clearly contemplated in the Issues Paper as an outcome of such an approach, in that it is claimed it would allow *"greater flexibility in the allocation of workloads and resources across the different jurisdictions"* (p 11). Unions NSW obviously takes issue with both this approach and the description of it as an advantage.

Certainly from the perspective of Unions NSW, if the Committee considered that some amalgamation of the IRC or its functions was necessary, the 'safeguard' of using a specialist list of employment/workplace matters would only have any practical and genuine effect if it was accompanied by continued access to expertise and experience similar to that of the current IRC members, now and into the future.

One of the great strengths of the IRC is that its members are able to and obliged by the statute to undertake both conciliation (initially) and (then) arbitration of matters. The creation of a specialist list would still need to be accompanied by a continued capacity of those dealing with such matters to be able to exercise both functions. One should not

underestimate the impact on the parties to an industrial dispute that arises from the knowledge that the IRC member conciliating a matter are also likely to subsequently undertake the arbitration if unresolved.

It is also perhaps pertinent in this context to re-emphasis the point that such considerations or options contained in the Issues Paper in large part seemingly rely upon the view that it is time to *"reconsider the approach recommended in 2002 by the Parliamentary Committee"* (p2, Issues Paper).

As a number of submissions to this Inquiry have clearly identified - along with Unions NSW - this Report did not consider or make any reference to the IRC and its jurisdiction. It should also be reiterated that in some of the other state jurisdictions that have developed what might be referred to as a *Super Tribunals*, they do not encompass the functions undertaken by the IRC in NSW. In Victoria, a cited example in the Issues Paper, Fair Work Australia undertakes the role. In Queensland and Western Australia, who have undergone similar consolidation of tribunals, they have retained separate and distinct specialist industrial tribunals.

Accordingly, the fragmentation of the IRC to other tribunals and/or a reliance on specialist lists or divisions can have no reliance on the 2002 Report or the interstate experience.

It must also be said that at face value, the IRC becoming subsumed or fragmented within one or another Tribunal would seem inconsistent with the role at least publicly contemplated by the NSW Government for the IRC during the course of 2011. For example, the relevant Minister, the Hon Greg Pearce MLC, on a number of occasions in the NSW Parliament made reference to the IRC retaining an important central role into the future.

"The New South Wales Government strongly supports the commission's continuing role as a cornerstone of this State's industrial relations system." [3 August 2011]

For the IRC to remain the cornerstone or bedrock of providing such support and services, a position Unions NSW strongly supports, it would require an institution of substance and integrity. The success of resolving industrial disputes or unfair dismissals or award and agreement making (for example) should not be potentially reliant upon the

'luck' to have a matter dealt with by someone who holds the necessary and preferred level of knowledge and experience.

Unions NSW would also reinforce what is also contained in a number of other submissions, that if a specialist list was created for employment and industrial matters in the Supreme Court, it would inevitably increase the potential for legal complexity and cost to the industrial parties. This outcome would accordingly reduce the access to justice for persons and organisations that currently exist when exercising such rights to the Industrial Court.

5. Your submission (p 33) recommends that the NSW Government exercise caution in pursuing the consolidation of tribunals, in part, because it could disrupt valuable coal chain infrastructure in the Hunter Region by invalidating dispute settlement procedures.

Can you elaborate on this concern for the Committee?

The submissions provided by the Hunter Business Chamber and the Industrial Relations Society of New South Wales are both consistent with Unions NSW contention that the IRC has assisted in bringing industrial stability to the region via the specific regional focus brought by the IRC and any arbitrary changes to this model will, if not in the short term certainly over the long term, destabilise the existing cooperative industrial environment

Further, a number of large resource industry construction projects ***(total value of on-going projects is exceeds $4.3 billion)*** have been completed on time and within budget because the IRC has facilitated the finalisation of project agreements including:

- expansion of Port Waratah Coal Services' Kooragang Coal Loader ($1.52 billion),
- Colongra Gas Turbine Construction Project ($400 million),
- Newcastle Coal Infrastructure Group Stage 1 Construction project ($900million), and
- Mangoola Coal Project ($450 million).

Fundamentally, the IRC has been able to actively participate in the development of these agreements, despite the referral by the NSW government of private sector industrial relations powers to the federal government in 2009, through s.146A/B agreements.

As noted in Unions NSW submission, the parties to these construction agreements have developed a significant reliance on the IRC primarily because of the inability of the Fair Work Australia (FWA) system to recognise regional areas. This is a result of the rigidity and inflexibility of the panel system operating within FWA and the absences of any legislative prescription for regional areas within the Fair Work Act, Regulations or Rules

As discussed as part of Unions NSW evidence, the *Industrial Relations Act 1996* ensure a regional focus through specific provisions (s.157) which enables the IRC to designate and financially resource members in regional areas. Regulation 17 prescribes the Hunter and Illawarra as specific regional areas of operation for the IRC.

Unions NSW believes these aspect of the Act and function of IRC need to be maintained as the corresponding federal legislation, the *Fair Work Act 2009*, contains no mention of a specific intent to resource regional areas or arrangements.

The regional knowledge and expertise of the IRC in managing these project agreements will be potentially put at risk by a consolidation of tribunals through the reduction of a specific regional presence.