REVIEW OF TRIBUNALS IN NEW SOUTH WALES
Issues Paper

1. Introduction

In 2002, the Ombudsman and Police Integrity Commission recommended that Tribunals in NSW be consolidated. While there have been some small changes in NSW, systemic integration of Tribunals has not proceeded.

This is in contrast to a number of other jurisdictions where comprehensive administrative and civil tribunals have been established.

It is an opportune time to reconsider the approach recommended in 2002 by the Parliamentary Committee as there are some emerging issues, particularly in relation to the Industrial Relations Commission, that need to be addressed.

Recent years have seen significant changes occur in the jurisdiction of the NSW Industrial Relations Commission, including the introduction of the Fair Work Act and the referral of industrial relations powers to the Commonwealth for private sector employees. There will be further changes with the harmonisation of occupational health and safety.

Those reforms are anticipated to have a significant reduction in the workload of the Commission. In view of the constitutional protection of judicial members of the Commission, and the statutory protections afforded its non-judicial members, there is a concern that in the short to medium term the Commission will no longer be in a position to deliver value for money to the taxpayers of New South Wales.

There are a range of other bodies and tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters. These include the Administrative Decisions Tribunal.

While any reforms could simply deal with the emerging IRC issues, it is appropriate to consider whether there are also opportunities to consolidate all quasi-judicial tribunals, as has occurred in other jurisdictions.

Accordingly, the Government has made a reference to the Law and Justice Committee to consider opportunities for reform.

2. Developments in other jurisdictions

Other jurisdictions have taken a broader approach to the reform and rationalisation of Tribunals. A Parliamentary Review conducted by the Committee on the Ombudsman and Police Integrity Commission

recommended in 2002 that there ought to be greater consolidation of Tribunals in NSW, however, little integration has occurred since then.

Integrated civil and administrative tribunals or 'super tribunals' have been created in the UK, Victoria, Western Australia, the ACT and Queensland. For example, Victoria has established the Victorian Civil and Administrative Tribunal (VCAT) which exercises all quasi-judicial functions in relation to a broad range of disputes, including:

- purchase and supply of goods and services
- discrimination
- domestic building works
- guardianship and administration
- disability services, health, privacy and mental health
- legal profession services
- residential tenancies, retail tenancies and owners corporations (body corporate)
- consumer credit (pre 1 July 2010 applications only)
- planning and land valuation
- licences to carry on businesses (including medical professionals, travel agents, motor car traders and others)
- State taxation
- many other government decisions (such as Transport Accident Commission decisions and Freedom of Information issues).
- disputes between people and government (State/Local) about:
    - planning and land valuation
    - licences to carry on businesses (including medical professionals, travel agents, motor car traders and others)
    - State taxation
    - many other government decisions (such as Transport Accident Commission decisions and Freedom of Information issues).

In NSW, there are a number of other Tribunals exercising quasi-judicial functions including:

- The Consumer, Trader and Tenancy Tribunal;
- Guardianship Tribunal;
- Mental Health tribunal;
- the health professional tribunals referred to above;
- Vocational Training Tribunal;
- Local Government and Pecuniary Interests Tribunal;
- Workers Compensation Commission.

3. Issues in relation to the Industrial Relations Commission

3.1 *Current role of the IRC*

The IRC's main role is to regulate public sector and local government employment in NSW. It is estimated that between 10 and 15% of the total NSW workforce now falls within the IRC's jurisdiction. The IRC exercises both non-judicial and judicial functions.

Broadly, the Commission in its administrative jurisdiction (i.e. other than when sitting as the Industrial Court) performs the following functions:

- establishing and maintaining a system of enforceable awards which provide for minimum wages and conditions of employment;
- approving enterprise agreements;
- preventing and settling industrial disputes, initially by conciliation, but if necessary by arbitration;
- determining unfair dismissal claims, by conciliation and, if necessary, by arbitration to determine if a termination is harsh, unreasonable or unjust;
- dealing with matters relating to the registration, recognition and regulation of industrial organisations;
- dealing with major industrial proceedings, such as State Wage Cases;
- applications under the Child Protection (Prohibited Employment) Act 1998;
- various proceedings relating to disciplinary and similar actions under the Police Act 1990; and
- matters previously heard by the Government and Related Employee Appeal Tribunal (**GREAT**) and the Transport Appeals Board (**TAB**), which were merged into the IRC in 2010.

When the IRC sits as the Industrial Court, it is a superior court of record of equivalent status to the Supreme Court. The Industrial Court has jurisdiction to hear a range of civil matters, as well as criminal proceedings in relation to breaches of industrial and occupational health and safety laws. The Industrial Court determines unfair contract claims; prosecutions for breaches of occupational health and safety laws; proceedings for the recovery of underpayments of statutory and award entitlements; superannuation appeals; proceedings for the enforcement of union rules; and challenges to the validity of union rules and to the acts of officials of registered organisations.

The IRC has seven judges, three non-judicial members and seven commissioners. Six of the members are dual appointees of Fair Work Australia (**FW Australia**).

3.2 *Changes to the IRC's jurisdiction*

To establish the Fair Work jurisdiction as a comprehensive workplace relations scheme for the private sector, NSW referred power to the Commonwealth in 2009 in relation to private sector employees not falling within the Commonwealth's legislative powers. This referral meant that those employees of private sector employers which were not trading or financial corporations, previously covered by the State system, are now covered by the Federal system. Most other States made similar references. The reference is conditional on the Commonwealth consulting referring states in relation to any proposed amendments to the FWA.

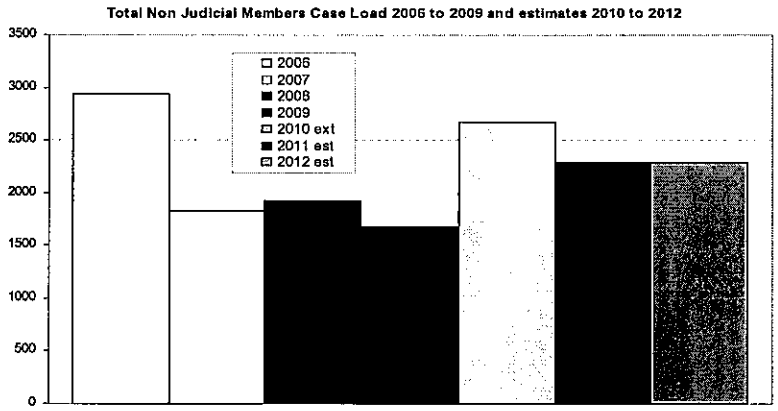
NSW public servants (other than employees of state owned corporations) and local government employees were excluded from the reference, and disputes in relation to these employees are dealt with by the IRC.

Whereas in its arbitral and conciliation jurisdiction it once covered most of the workforce in New South Wales, the Commission now only carries out its functions in relation to less than 15 percent of the workforce. The potential reduction in workload was, however, offset by the transfer of the jurisdiction of Government and Related Employees Appeals Tribunal (GREAT) and TAB to the IRC.

On 1 June 2011, the Work Health and Safety Bill 2011 was passed with amendment. This Bill transfers the jurisdiction of the IRC in relation to more serious occupational health and safety criminal prosecutions (categories 1 and 2) to the mainstream criminal courts, with effect from 1 January 2012.

Since 2006, the number of commissioners has reduced by five. Two of the remaining commissioners work full time for FW Australia. However, two former GREAT members were appointed as acting IRC Commissioners to assist in the integration of GREAT and TAB into the IRC. The appointment of the Acting Commissioners was intended to be a temporary measure, to facilitate a transfer of skills and knowledge to the IRC's permanent members. Their appointments expired on 30 June 2011.

Detailed analysis of the IRC's judicial and non-judicial workload between 2005 and 2009 shows that the IRC's non-judicial workload since the transfer of GREAT and TAB is likely to have almost doubled compared to 2009 levels. This means that the IRC's non-judicial workload is nearing, but still some way short of, pre-WorkChoices (2006) levels as demonstrated by the following chart:



As noted above, the number of Commissioners has been reduced from 12 to seven since 2006. An analysis of commissioner 'availability' (an assessment of actual hearing time against available hearing time) by the IRC in the first quarter of 2010 found that there was spare capacity of 35% of one Commissioner.

This analysis did not take account of judicial member 'availability'. It is likely that that there is, and will be, more spare capacity amongst the judicial officers. 54% of the Industrial Court's workload over the reporting period was accounted for by OH&S prosecutions. Most of these matters will be transferred to the mainstream criminal courts from 1 January 2012. This will mean that the judicial members are likely to be significantly under-utilised once the pending OH&S caseload is cleared (the President has indicated that he will make this a priority, but it may take a number of years).

The number of Industrial Court judges has reduced by three since 2006 (two retired and one was appointed to the Supreme Court). Several judges also have ancillary part-time tribunal appointments. Two judges have also been appointed to the Medical Tribunal and one to the Administrative Decisions Tribunal. One judge also acts as the Parliamentary Remuneration Tribunal.

As a result of the new National OHS legislative scheme, the Industrial Relations Commission in Court Session will lose approximately 50 percent of its current jurisdiction. Accordingly, there is a real risk that many judges will have an insufficient workload.

Of course, judges have tenure by virtue of the Constitution Act, that is, they retain office until they reach 70 years of age or retire, and must be appointed to an equivalent judicial office if their court is abolished. There is a need to address this significantly reduced workload, otherwise there is a risk

taxpayers will not be receiving value for money as judicial officers of the IRC will be severely under-utilised.

3.3 *Opportunities to consolidate employment relation functions*

There are a number of other tribunals or bodies which deal with employment, workplace, occupational, professional or other related disputes or matters. For example:

- The Anti-Discrimination Board (ADB) investigates and conciliates complaints of discrimination in the employment context, while the Equal Opportunity Division of the ADT deals with merits review of those complaints. As well as dealing with complaints in the employment area, these bodies also deal with complaints in the provision of goods and services, education etc. About 23 percent of discrimination matters dealt with by the ADT are employment related;

- There are ten health professional tribunals established in NSW dealing with medical practitioners, nurses, chiropractors, osteopaths, physiotherapists, psychologists, optometrists, podiatrists, dentists and pharmacists which conduct professional discipline inquiries against health professionals;

4. Consumer, Trader and Tenancy Tribunal

The Consumer, Trader and Tenancy Tribunal is an accessible tribunal that resolves disputes about the supply of goods and services, and issues relating to residential property. The Tribunal resolves disputes brought to its nine divisions - Tenancy, Social Housing, Home Building, General, Residential Parks, Strata and Community Schemes, Motor Vehicles, Commercial, and Retirement Villages.

The Tribunal's Annual Report identifies its objectives are to ensure that:

- the Tribunal is accessible
- its proceedings are efficient and effective
- proceedings are determined in an informal, expeditious and inexpensive manner
- decisions are fair and consistent.

Key facts and statistics for the 2009-2010 financial year include:

- **59,403** applications lodged
- **73,822** hearings conducted
- **62,068** matters finalised, with 75% of matters finalised prior to or at hearing and 64% of matters finalised within 35 days

In 2008, the Consumer, Trader and Tenancy Tribunal Amendment Bill 2008 was enacted. This Bill was a response to the 5 year statutory review of the Act and an operational review of the Tribunal commissioned by the former Government. The amending legislation sought to make a number of procedural changes to improve the quality of decision-making. It also provided for the establishment of a Professional Practice and Review Committee for the Tribunal. This was introduced as a response to a high level of complaints about the Tribunal's operations, and dissatisfaction with the outcome of decisions.

The Committee's role is to review and provide advice on matters referred to it by the Minister, the Commissioner for Fair Trading, the Chairperson or another person prescribed in the regulations. Matters considered by the Committee include:

- the education, training or professional development of members;
- performance management of members;
- complaints against members and remedial or disciplinary action to be taken; and
- performance and complaints trends.

It is five years since the statutory review was carried out, and three years since the 2008 amending Act was introduced. There have, at times, been considerable concerns raised regarding the quality of decision-making in the CTTT. The current review provides an opportunity to consider whether the Tribunal is continuing to meet its objectives, but it also provides an opportunity to determine whether operational improvements and efficiencies can be achieved through consolidation.

5. Options for consideration

Having regard to the above and the Committee's deliberations, there are a range of options available for reform. Obviously, each of these options has different advantages and disadvantages. The Government has provided this submission to assist the committee to identify the options, and some of those advantages and disadvantages.

OPTION 1 – Establish an Employment and Professional Services Commission, by renaming the IRC and transferring functions from:

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

Essentially, this option would seek to deal with the immediate issues emerging in relation to the operation, and future efficiency, of the IRC, without looking to capture the broader opportunities for Tribunal consolidation.

Advantages of this approach include:

- Greater flexibility in the allocation of workloads and resources across the different jurisdictions;
- the capacity to take advantage of economies of scale, including through accommodation, ICT, and more efficient member utilisation;
- 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.

Disadvantages and risks of this approach are:

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

OPTION 2A – Rename the ADT the NSW Administrative and Employment Tribunal and:

- **create an Employment Division within the NEAT, headed by a former judge of the Industrial Commission in Court Session and consisting of the IRC Commissioners, to exercise the arbitral and conciliation functions allocated to the Industrial Relations Commission;**

- **Establish an employment list within the Supreme Court, and appoint 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);**

- **Retain a separate Professional Discipline Division within the new NEAT.**

This 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.

OPTION 2B – As for option 2A except that an Employment and Professional Discipline Division will be created which consolidates the employment functions of the IRC with the professional discipline functions of the ADT and the health professional disciplinary tribunals.

Advantages and disadvantages would be as for option 2A, except that, the risks associated with Option 1 of consolidating employment and disciplinary functions may be present.

OPTION 3 – Create a comprehensive Civil and Administrative Tribunal for NSW (called NCAT) which consolidates either Option 2A or 2B with the addition of functions of other Tribunals including the:

- **The Consumer, Trader and Tenancy Tribunal;**
- **Guardianship Tribunal;**
- **Mental Health Tribunal;**
- **the health professional tribunals referred to above;**
- **Vocational Training Tribunal;**
- **Local Government and Pecuniary Interests Tribunal.**

This option would seek to build on the original intention of the Administrative Decisions Tribunal (to be single point of all administrative decision making review). In addition, it would achieve the synergies which have been achieved in other jurisdictions by having all civil and administrative tribunals located within the one jurisdiction.

Specific advantages of this approach would be as follows:

- Greater flexibility in the allocation of workloads and resources across the different jurisdictions;
- The ability to achieve savings by co-locating entities (the CTTT and the ADT), 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 (eg Retail Tenancies, with other commercial dispute functions of the CTTT);
- Consolidation of expertise in tribunal administration and management, including the capacity to take advantage of economies of scale, including through accommodation, ICT, 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.

Establishment of a comprehensive NCAT could be undertaken in a staged manner, for example, and Employment Division could be established, followed by a Protective Division (eg Mental Health Tribunal and Guardianship Tribunal), followed by a Commercial and Consumer Division.

Disadvantages or risks associated with this approach:

- 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;

- 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.

It is noted that the CTTT deals with about 60,000 matters per year, whereas collectively the other bodies deal with only a fraction of this. There is some risk that in consolidating Tribunal's, the CTTT will predominate in any new arrangements. A variant of this option would therefore 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.

8. Conclusion

The Government has no preferred option at this stage, and looks forward to hearing the Committee's deliberations on these issues. That said, there are a number of benefits in having a "citizen focussed" approach whereby a single point of contact is established for all Tribunal related dispute resolution functions, regardless of the source of that dispute. Such an approach has the potential to increase decision-making quality and achieve efficiencies.