

**NEW SOUTH WALES BAR ASSOCIATION SUBMISSION TO THE LEGISLATIVE
COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE: RESPONSE TO
QUESTIONS ON NOTICE AND SUPPLEMENTARY QUESTIONS**

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Internal appeals (see transcript 16 December 2011, page 14)

1. Given the complexity of the question, and the range of potential jurisdiction for any proposed new Tribunal, rather than make specific recommendations the Association will address this question by reference to principles it believes are important to bear in mind.
2. As noted in the Association's submission (at paragraph 3(f)) the Tribunals and other bodies mentioned in the Issues Paper exercise a range of distinct functions which include:
 - a. administrative review of original decisions;
 - b. adjudication of individual private rights in respect of:
 - i. commercial matters, in the Consumer, Trader and Tenancy Tribunal (CTTT);
 - ii. retail leases, in the Retail Leasing Division of the Administrative Decisions Tribunal (ADT); and
 - iii. equal opportunity rights, in the Equal Opportunity Division of the ADT;
 - c. industrial rights, in the IRC (Industrial Relations Commission);
 - d. original jurisdiction in respect of disciplinary matters; and
 - e. conciliation and arbitration of collective industrial rights, in the IRC.
3. Any model for appeals must recognise that there will be no 'one size fits all' option.
4. The Association suggests it would generally be appropriate to retain the ADT model of an internal appeal panel in relation to the review of administrative decisions and its Equal Opportunity Division. That is, a right of appeal on questions of law, with leave of the Appeal Panel required to extend the appeal to the merits of the matter. A similar model could be applied to the Guardianship Tribunal.

5. In relation to the CTTT, a form of internal review on questions of law, where leave may be granted by the internal review or appeal panel to extend the appeal to the merits of the matter could be considered.
6. In relation to CTTT and ADT matters, where there is no requirement for leave for an appeal to extend to the merits, in a no cost jurisdiction, an unrepresented litigant has no reason not to seek a full re-hearing of a matter.
7. Where there is a restriction on appeals on questions of law, such as applies to CTTT matters, where an appeal on a question of law lies to the District Court, but prerogative relief would need to be sought in the Supreme Court (as noted in the Association's submission at paragraph 41), there is unnecessary procedural complexity for potential appellants.
8. In relation to disciplinary matters, the legislation conferring jurisdiction on the Tribunal in relation to barristers and solicitors specifically excludes any internal appellate review of decisions of the Tribunal by an Appeal Panel of the Tribunal. The predecessor to the current legislation, the *Legal Profession Act 1987* was specifically amended to this effect in August 2004. All appeals from the Legal Services Division are to the Court of Appeal. As noted in the Association's submission (at paragraph 22) there is a separate right of appeal against a decision of a Council to suspend or refuse to renew a practising certificate to the Supreme Court.
9. In respect of health practitioners, under the *Health Practitioner Regulation National Law*, an appeal lies to the Supreme Court against a decision of the Tribunal with respect to a point of law or specified kinds of disciplinary order. There are ten Tribunals:
 - Chiropractic Tribunal
 - Dental Tribunal
 - Medical Tribunal – chaired by a District Court judge
 - Nursing and Midwifery Tribunal
 - Optometry Tribunal
 - Osteopathy Tribunal
 - Pharmacy Tribunal
 - Physiotherapy Tribunal
 - Podiatry Tribunal
 - Psychology Tribunal.

Appeal proceedings are assigned to the Court of Appeal where Tribunal at first instance included a judge of the District Court.

10. The Association suggests this model ought to be retained for such disciplinary matters.

11. Further, the Association suggests that the current assignment of business under the *Supreme Court Act* continue such that an appeal from an Appeal Panel to the Supreme Court would be dealt with by the Court of Appeal, and other proceedings regarding Tribunal decisions be dealt with by a single judge only where the Tribunal hearing the matter did not include a judge [*compare transcript at p 15.5*].

UK Experience of super-tribunals with large volumes of small matters (see transcript 16 December 2011, page 14)

12. Unfortunately the Association has not, in the time available and over the Christmas break, been able to access any useful information on this point.

Pecuniary Interests Tribunal (see transcript 16 December 2011, page 19)

13. As noted in the Association's submission (at paragraph 44), it is proposed by the Association that the Local Government and Pecuniary Interests Tribunal should become part of the Land and Environment Court of NSW. The Association has been asked to consider the inclusion of that Tribunal in any consolidated Professional Discipline Tribunal (or Division of a Tribunal).
14. It seems to the Association that the work of the Local Government and Pecuniary Interests Tribunal is so intimately and inextricably connected with Local Councils that the expertise of the Land and Environment Court is more appropriate. The jurisdiction expands beyond merely 'discipline' and into other areas of local government that would make the work of the Tribunal somewhat anomalous in the context of a purely disciplinary Tribunal.

Head of NCAT a Supreme Court judge (see Supplementary Question no 1)

15. The Association proposes that any expanded Tribunal (which was given the name NCAT in the Association's submission) be headed by a Supreme Court judge. This was to recognise the significant jurisdiction expected to be contained in such a Tribunal, and to provide a level of recognition and prestige to NCAT analogous with the higher Courts. Currently the Judges of the IRC have Supreme Court status, as do the judges of the Land and Environment Court. While not itself a Court, NCAT's work is important and having a Supreme Court judge as its head would provide the Tribunal with appropriate recognition of that importance.

Tribunal Services Unit (see Supplementary Question no 2)

16. The Association respectfully agrees with his Honour Judge O'Connor that *it is critical that Tribunal Service not be merged into the Courts Service* of Department of Attorney General and Justice. The charter of each service would be separate. The charter of a Tribunal Service is to provide adequate resources and logistics to either NCAT or continuing (as new) separate Tribunals. As the Bar Association's

submission made clear this extends to premises, facilities and appropriate staff. Whilst noting the reservations of Judge O'Connor at page 15 [100], the Association does not understand his Honour to be suggesting that any other Department is better placed to provide the relevant expertise to run a Tribunals Service. One of the disadvantages of the present system is, for example, the Fair Trading Department is responsible for the CTTT, other departments may be responsible for a particular tribunal. But each department, one can confidently assume, by reason of their history and experience are unlikely to have any particular expertise, or interest in the nuts and bolts of the administration of justice. It makes sense for the Attorney General to be the responsible minister, not least because of the 'Court-substitute' role of many Tribunals, and therefore, of many divisions of a proposed NCAT.

17. Whether or not NCAT eventuates, the Bar Association is of the view that there is a real need now for the establishment of a Tribunals Service to properly fund and provision the existing Tribunals.

The experience of other state jurisdictions in Tribunal consolidation (see supplementary question no 3)

18. Unfortunately the Association has not, in the time available and over the Christmas break, been able to access any useful information on this point.