The President

Industrial Relations Commission of New South Wales

47 Bridge Street, Sydney

17 January 2012

The Honourable David Clarke MLC
Chair
Law and Justice Committee
Parliament House
SYDNEY NSW 2000

Dear Chair,

Request for information on the work and structure of the Industrial Relations Commission of NSW

In a letter dated 14 November 2011, the Industrial Registrar advised the Chair of the *Law and Justice Committee,* the Honourable David Clarke, MLC, that the Commission would not be making a submission to the *Inquiry into opportunities to consolidate tribunals in NSW.* However, the Registrar indicated on behalf of the President of the Commission that the President would provide any information about the Commission that the Committee considered might assist it in its deliberations.

By letter dated 20 December 2011, the Chair accepted the President's offer to provide information. In doing so the Chair noted, in particular, two of the Inquiry's terms of reference, they being:

> 2(a)(i) the current and future 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.
>
> 2(b) options that would be available in relation to the Industrial Relations Commission in Court Session, should the Commission's arbitral functions be consolidated with or transferred to other bodies.

The letter then stated:

> Given this focus of the terms of reference, the Committee would appreciate the assistance of the IRC in providing factual information concerning these terms of reference. The Committee is interested in receiving as much information as possible regarding the work and structure of the Commission. It would also be useful for the Committee to understand the impact that recent legislative changes have and will have on the workload of the IRC and how best to utilise the resources of the Commission.
>
> In addition the Committee has held two days of public hearings in which we have heard a considerable amount of evidence regarding the Commission's work. It would be of benefit to the Committee if the IRC would consider responding to the evidence we have received at these hearings that relates to the Commission's work.

Structure of Response

In responding to these requests the Commission's understanding is that the Committee seeks:

(A) factual information regarding the work and structure of the Commission with particular reference to how the Commission's workload has been and will be affected by recent Commonwealth and New South Wales legislative changes and how best to utilise the Commission's resources ("Work and Structure of the Commission");

(B) factual information regarding the options that would be available in relation to the Industrial Relations Commission in Court Session, should the Commission's arbitral functions be consolidated with or transferred to other bodies ("Options for the Court"); and

(C) a response to the evidence the Committee has received relating to the Commission's work ("Response to Evidence taken by the Committee").

A response to these three requests will necessarily involve some overlap.

Comment on first request

In responding to the first request regarding the work and structure of the Commission, noting the Committee is seeking "as much information as possible", the Response has been structured as follows:

(1) Brief history of the Commission;

(2) Powers and functions of the Commission and the Industrial Court;

(3) Work of the Commission;

(4) Work of Members;

(5) Membership of the Commission;

(6) Budget of the Commission;

(7) Workload of the Commission;

Comment on second request

In relation to the second request, which is term of reference 2(b), the following comments are prefaced by the observation that based on an objective consideration of the evidence before the Committee, a conclusion open to the Committee would be that provided more work of a suitable judicial and non-judicial nature was directed to the Commission there would be really no need to consolidate the IRC with any other tribunal(s).

Having made that observation, it is assumed that what was meant in the second request was the Commission's *conciliation and arbitral* functions. It would make little sense to consolidate or transfer the arbitral function and leave only a conciliation function for the Commission to exercise. The point of the term of reference would seem to be that if the non-judicial work of the Commission is consolidated with the work of other bodies or transferred to other bodies, what is to be done in respect of the judicial work of the Industrial Court and the judges that undertake that work?

If the non-judicial work of the Commission is consolidated with the work of other bodies or transferred to other bodies it is assumed that the existing non-judicial members of the Commission would take up positions in the consolidated body or the body to which the Commission's functions have been transferred. To do otherwise would make no sense at all. One aspect, however, that should not be overlooked is the Commonwealth-New South Wales arrangement regarding dual appointments of a number of the non-judicial members to Fair Work Australia. It should also not be overlooked the non-judicial Deputy Presidents of the Commission are very senior appointments[1], receiving the

[1] In his second reading speech introducing the concept of non-judicial Deputy Presidents, the Minister, P D Hills, referred to the pace of technological commercial and sociological developments to ground the inclusion of specialists and experienced practitioners at the senior

same salary as judges of the Industrial Court and they are judicial officers for the purposes of the *Judicial Officers Act* 1986[2].

Assuming the above interpretation of the term of reference 2(b) is correct, if the non-judicial work is to be consolidated with the work of other bodies or transferred to other bodies that could mean any of the four options canvassed in the Ministerial Issues Paper accompanying the terms of reference. We shall deal with these four options later in this Response in addressing the second of the Committee's requests.

Comment on third request

In relation to the third request regarding a response to the evidence taken by the Committee, it is not intended by this Response to assess the pros and cons of each of the submissions. That function, with respect, lies with the Committee. However, arising out of the submissions and other evidence taken by the Committee, there are a number of matters the Commission wishes to address.

The Committee may also find the summary of evidence in **Table 1** helpful. **Table 1** is annexed (**Annexure A**) to the body of the Response and appears to reflect strong support for the retention of the Commission, by whatever name, and for the maintenance of the Commission's existing structure, powers and functions, regardless of which option identified in the Ministerial Issues Paper might be recommended by the Committee.

The body of the Response is attached. Please note the request for confidentiality in respect of Table 2.

Yours sincerely,

(The Honourable Justice) R P Boland
President

---

level of the commission to afford it the mix of skills, knowledge and experience to deal with a rapidly evolving and complex area of society.

[2] Commissioners are also judicial officers for the purpose of the *Judicial Officers Act*: see s 3.

ATTACHMENT

Response by President of the Industrial Relations Commission of New South Wales to a request for information by the Chair of the Inquiry into Opportunities to Consolidate Tribunals in NSW

A. WORK AND STRUCTURE OF THE COMMISSION

Brief history of the Commission

1 The Industrial Relations Commission came into existence over 100 years ago and has been an integral part of the mosaic of life of the citizens of the State of New South Wales since that time. A brief history of the Commission is set out in **Annexure B** to this Response.

Powers and functions of the Commission and the Industrial Court

2 The Commission is established by s 145(1) of the *Industrial Relations Act* 1996 ("IR Act"). The Commission (other than when sitting as the Industrial Court) exercises its jurisdiction in relation to:

- establishing and maintaining a system of enforceable awards which provide for fair minimum wages and conditions of employment[1];
- approving enterprise agreements[2];
- preventing and settling industrial disputes, initially by conciliation, but, if necessary, by arbitration[3];
- inquiring into, and reporting on, any industrial or other matter referred to it by the Minister[4];

[1] See Pt 1 of Ch 2 of the IR Act. However, the Commission's powers in this respect have been strongly circumscribed: see s 146C and the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.
[2] See Pt 2 of Ch 2 of the IR Act.
[3] See Ch 3 of the IR Act.
[4] See s 146(1)(d).

- determining unfair dismissal claims, by conciliation and, if necessary, by arbitration to determine if a termination is harsh, unreasonable or unjust[5];

- claims for reinstatement of injured workers[6];

- proceedings for relief from victimisation[7];

- dealing with matters relating to the registration, recognition and regulation of industrial organisations[8];

- dealing with major industrial proceedings, such as State Wage Cases[9];

- applications under the *Child Protection (Prohibited Employment) Act* 1998;

- proceedings relating to disciplinary and similar actions under the *Police Act* 1990;

- proceedings relating to promotional and disciplinary appeals arising in relation to public sector employees under the IR Act[10] and transport public sector employees under the *Transport Appeal Boards Act* 1980.

3 The Commission may also exercise certain dispute resolution functions under federal enterprise agreements[11].

4 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. The Industrial Court determines proceedings for avoidance and variation of unfair contracts (and may make consequential orders for the payment of money)[12]; prosecutions for breaches of occupational health and safety laws[13]; proceedings for the recovery of underpayments of statutory and award

---

[5] See Pt 6 of Ch 2.
[6] See Pt 8 of the *Workers Compensation Act* 1987.
[7] See Pt 1 of Ch 5 of the IR Act.
[8] See Ch 5 of the IR Act.
[9] See Pt 3 of Ch 2 of the IR Act.
[10] See Pt 7 of Ch 2 of the IR Act.
[11] See s 146B of the IR Act.
[12] See Pt 9 of Ch 2 of the IR Act.
[13] *Occupational Health and Safety Act* 2000.

entitlements[14]; superannuation appeals[15]; proceedings for the enforcement of union rules[16]; and challenges to the validity of union rules and to the acts of officials of registered organisations[17].

5 The Full Bench of the Commission has appellate jurisdiction in relation to decisions of single members of the Commission and the Industrial Registrar[18]. The Full Bench of the Industrial Court has jurisdiction in relation to decisions of single judges of the Court, industrial magistrates and certain other bodies. The Full Bench of the Industrial Court is constituted by at least three judicial members[19].

6 Specifically, the Industrial Court exercises jurisdiction in the following circumstances:

- proceedings for an offence which may be taken before the Court (including proceedings for contempt). The major area of jurisdiction exercised in this area relates to breaches of the *Occupational Health and Safety Act* 2000;
- proceedings for declarations of right under s 154;
- proceedings for unfair contract (Part 9 of Chapter 2);
- proceedings under s 139 for contravention of dispute orders;
- proceedings under Parts 3, 4 and 5 of Chapter 5 – Registration and regulation of industrial organisations;
- proceedings for breach of an industrial instrument;
- proceedings for the recovery of money payable under an industrial instrument other than small claims under s 380 (which are dealt with by the Chief Industrial Magistrate or an Industrial Magistrate);
- superannuation appeals under s 40 or s 88 of the *Superannuation Administration Act* 1996;

---

[14] See Ch 7 of IR Act.
[15] *Superannuation Administration Act* 1996.
[16] See Ch 5 of the IR Act.
[17] See Ch 5 of the IR Act.
[18] See Pt 7 of Ch 4 of the IR Act.
[19] See s 156 of the IR Act.

- proceedings on appeal from a Member of the Commission exercising the functions of the Industrial Court; and

- proceedings on appeal from an Industrial Magistrate or any other court.

7 The Commission consists of a President, Vice-President, Deputy Presidents (known as "Presidential Members") and Commissioners[20]. A Presidential Member of the Commission may be appointed as a member of the Commission in Court Session and is known as a "judicial member of the Commission"[21]. The Commission in Court Session is known as the "Industrial Court of New South Wales"[22].

8 Section 151 of the IR Act provides:

> (1) The Commission in Court Session is the Commission constituted by a judicial member or members only for the purposes of exercising the functions that are conferred or imposed on the Commission in Court Session by or under this or any other Act or law.
>
> (2) This section does not prevent the Commission from being constituted by judicial members when not exercising those functions.

9 The Commission when constituted as the Industrial Court is established as a superior court of record and is equal in status to the Supreme Court of New South Wales and the Land and Environment Court[23]. Currently, seven of the nine Presidential Members are also judicial members of the Industrial Court, including the President and Vice-President.

10 The IR Act requires that certain functions of the Commission may only be exercised by the Commission constituted as the Industrial Court[24]. The

---

[20] s 147.
[21] s 149(1) and (3).
[22] s 151A.
[23] s 152.
[24] s 153.

rules of evidence and other formal procedures of a superior court of record apply to the Industrial Court[25].

11 The Commission, when not constituted as the Industrial Court, is not required to act formally, is not bound by the rules of evidence and may inform itself in any way it considers just[26]. The Commission may exercise the powers of the Supreme Court with respect to the attendance and examination of witnesses or the production of documents[27] and may issue summonses[28]. Parties are entitled to be represented by a legal practitioner or by an agent[29]. The Commission may continue to deal with a matter arising in any proceedings that is within the jurisdiction of the Industrial Court and may reconstitute itself as the Court for that purpose[30].

12 The Committee may wish to note that by a decision given on 31 October 2011 in *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment* [2011] NSWIRComm 143 the Full Bench of the Industrial Court dismissed a Notice of Motion by the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales ("the PSA") for a declaration that the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011(which enacted s 146C of the IR Act) was invalid and, in the alternative, a declaration that the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 was invalid.

13 The legal premises upon which the PSA founded its application for a declaration of constitutional invalidity were as follows:

> 1. Any legislation which impairs the institutional integrity of the Court in a manner inconsistent with Chapter III

[25] s 163(2).
[26] s 163(1).
[27] s 164(1).
[28] s 165.
[29] s 166(1).
[30] s 176(3).

of the Constitution is invalid. Legislation which purports to direct courts as to manner and outcome of the exercise of their jurisdiction impermissibly impairs the character of the courts as independent and impartial tribunals.

2. The conferral of functions by legislation having the effect of impairing the institutional integrity of a State court or which are incompatible with the Court operating as a repository of federal jurisdiction will not only arise from interference in the judicial functions of the Court itself or its judges sitting in that capacity. Such incompatibility can also arise as a result of non-judicial functions being conferred on the Court or such functions being conferred upon individual judges of the Court. Thus, a function conferred upon a judge in his or her individual capacity or upon another body of which a judge is a member will give rise to repugnance or incompatibility for the purposes of Chapter III of the Constitution where the performance of the function would impair the defining characteristics of the court of which the judge is part.

14 At [49] of its decision the Full Bench stated in relation to the constitutional invalidity issue:

> [49] The Act provides for the creation of two related but distinct bodies. In this light, it is evident that s 146C(5) is a complete answer to the suggestion of constitutional invalidity. The provision does not apply to the Court, which is an entity separate from the Commission. The provisions in the Amendment Act do not confer new functions on members of the Court in their capacity as individuals. Nor do they confer any new functions on members of the Court in that capacity. The fact that "judicial members of the Commission", that is the persons who constitute the Court (s 149(3)), may also sit as members of the Commission, does not alter this conclusion. In contrast to the law in issue in *Wainohu*, the functions to which the Amendment Act relates are conferred on the Commission as a whole, not judges persona designata. That is, they are not conferred upon a person appointed to carry out a function by reference to his or her judicial office.

15 In relation to the issue of the invalidity of the Regulation, the Full Bench found:

> [63] The purpose of the regulation is clearly designed to declare the government's public sector policies for the purposes of s 146C of the Act.
>
> [64] We agree with Mr J V Agius SC, with whom Mr S Benson of counsel appeared for the Minister for Finance and Services, that it is the Act, by virtue of s 146C, rather than the regulation that directs the Commission to give effect to the government's policy on conditions of employment of public sector employees. The regulation sets out the matters which are, for the purposes of s 146C, to be aspects of government policy that are to given effect by the Commission when making or varying awards or orders on conditions of employment.
>
> [65] Again, it is the Act itself, by virtue of s 146C, that requires the Commission when exercising its award-making functions to give effect to the policies declared by the regulation. That requirement is not mandated by the regulation but by s 146C of the Act.
>
> [66] There is plainly a requisite connection between the subject matter in the regulation and s 146C of the Act. The section prescribes the field of operation of the Act to which the regulation needs to be connected to be valid.

16 The PSA has sought special leave in the High Court of Australia to appeal the decision of the Full Bench of the Industrial Court. The draft notice of appeal was filed on 16 December 2011. Amongst the grounds are that: the Industrial Court erred in failing to consider whether the requirement imposed upon judicial members of the Commission to give effect to government policy when sitting as the Commission undermines the institutional integrity of the Industrial Court having in mind the closely intertwined composition, operation and functions of the Commission and the Industrial Court; the Industrial Court erred in finding that the Industrial Relations Commission and the Industrial Court are constituted as two separate bodies rather than a single body constituted in different ways so as to exercise particular functions conferred upon the Commission.

17 If the High Court were to grant special leave, any decision of the High Court may have implications for any recommendations the Committee may

make in respect of the future of the Commission and for any legislation based on such recommendations.

18 Another matter the Committee should be aware of is that the Commonwealth has appointed a panel of three experts[31] to review the *Fair Work Act* 2009. The panel is to report by 31 May 2012. In light of the dual appointments held by a number of IRC members this may have implications for their work.

Work of the Commission

19 With the coming into effect of the Commonwealth Work Choices legislation in March 2006 and the *Industrial Relations (Commonwealth Powers) Act* 2009 from 1 January 2010, the IRC's jurisdiction was limited to the New South Wales public sector[32], the local government sector and contracts of carriage[33].

20 In addition, the *Fair Work Act* 2009 (Cth) details procedures about dispute resolution for modern awards, enterprise agreements or contracts of employment where matters arise under the instrument between the employer and the employees. The parties decide what kind of dispute resolution procedures they will include within the agreement where issues are unable to be resolved at a workplace level. Section 146B of the IR Act allows parties to federal enterprise agreements to nominate members of

---

[31] The panel is John Edwards, a Visiting Fellow at the Lowy Institute, an Adjunct Professor with the John Curtin Institute of Public Policy at Curtin University, and a member of the Board of the Reserve Bank of Australia, Michael Moore, a former judge of the Federal Court of Australia and Professor Ron McCallum.

[32] The *Industrial Relations (Commonwealth Powers) Act* 2009 defines a State public sector employee as follows:
(a) a member of the Government Service of New South Wales, the NSW Health Service, the Teaching Service of New South Wales or any other service of the Crown in right of the State (including an employee of any New South Wales government agency),
(b) an employee of a body established for a public purpose that is subject to control or direction by a Minister of the State or in which the State has a controlling interest,
but does not include an employee of the following:
(c) a State owned corporation or a subsidiary of a State owned corporation,
(d) a person or body declared by or under an Act not to be or not to represent the Crown in right of the State or not to be a New South Wales government agency.

[33] See Ch 6 of IR Act.

the IRC to perform dispute resolution services. If parties seek that a member or members of the IRC provide the forum for those services process they need to include a clause within the agreement to that effect. Under s 146B(2) the IRC may exercise such functions with respect to the resolution of the dispute as are conferred or imposed on it by or under the federal enterprise agreement concerned and the federal Act. Section 146B(7) provides that any order, determination or other decision of the Commission in respect of the dispute is not binding on the parties unless the federal workplace agreement concerned, federal model dispute resolution process or the federal Act (as the case may be) operates to make it so binding. Unless the parties agree, there is no right of appeal from any order, determination or decision of the Commission made about a dispute notified to the Commission under the dispute resolution procedures of an agreement.

(i) Industry Panels[34]

21 The IRC operates a system of industry panels to deal with applications relating to particular industries and awards. Consequent upon the transfer of the jurisdiction of the former *Government and Related Employees Appeals Tribunal* and an alteration to the manner in which *Transport Appeal Boards* are constituted, two new panels were created with effect from 1 July 2010. Six panels are now in operation, each comprising a number of Presidential Members and Commissioners. Each panel is chaired by a Presidential Member of the Commission who allocates or oversees the allocation of matters to the members of the panel. The panels deal with applications for awards or variations to awards, applications for the approval of enterprise agreements and dispute notifications arising in relevant industries together with disciplinary and promotional appeals brought by public sector employees (both general public sector and transport public sector employees).

[34] The material relating to industry panels is largely drawn from the Commission's 2010 Annual Report.

22 Two panels now deal essentially with metropolitan (or Sydney-based) matters (down from four in 2007), two panels specifically deal with applications from regional areas (down from three) and two panels deal specifically with appeals. The panel dealing with applications in the north of the State (including the Hunter region) is chaired by Deputy President Harrison. The panel dealing with applications from the southern areas of the State (including applications from the Illawarra-South Coast region) is chaired by the Vice-President.

(ii) Regional and Country sittings[35]

23 The Commission has its own dedicated court premises located in Newcastle and Wollongong[36]. The Registry has been staffed on a full-time basis at Newcastle for many years. During 2002 that situation was extended to Wollongong to assist the clients of the Commission and the sittings of the Commission that occur there.

24 In July 2004 the Commission entered into an arrangement with the Registrar of the Local Court at Parramatta to provide registry services for clients of the Commission at the Parramatta Court Complex, Cnr George and Marsden Streets, Parramatta. This was initially commenced as a pilot for three months designed, principally, to meet the needs of industrial organisations located in Western Sydney. In short, this initiative allows for any application that may be filed at the Sydney Registry to be filed at Parramatta with the exception of industrial disputes under s 130 of the IR Act.

25 The general policy of the Commission in relation to unfair dismissal applications (s 84 of the IR Act) and industrial disputes in rural and regional industries has been to sit in the country centre at or near where the events have occurred. Allocation of those matters is carried out by the Heads of the regional panels mentioned earlier. This requires substantial travel but the Commission's assessment is that it has a beneficial and

[35] This material is largely drawn from the Commission's 2010 Annual Report

moderating effect on parties to the industrial disputation and other proceedings who can often attend the proceedings and then better understand decisions or recommendations made. The cost to business of sending senior executives and employee representatives to Sydney for a whole day or longer to attend proceedings which may take only a couple of hours, is an unproductive waste of time and resources.

26 As allocation of those matters is carried out by the Heads of the regional panels, it avoids duplication of Commission representation in a regional centre at any one time or in the one week. Commission members have sat in adjoining regional centres on the same day - for example, fly out to Wagga Wagga to deal with matters in the morning and then self-drive to Albury to deal with matters in the afternoon before flying back from there to Sydney.

27 There were a total of 374 sitting days in a wide range of country courts and other country locations during 2011. There are two regional members based permanently in Newcastle - Deputy President Harrison and Commissioner Stanton. The Commission sat in Newcastle for 204 sitting days during 2011 and dealt with a wide range of industrial matters in Newcastle and the Hunter district[37].

28 The regional member for the Illawarra - South Coast region, the Honourable Justice Walton, Vice-President, together with Commissioner Tabbaa, deal with most Port Kembla steel matters and other members also sit regularly in Wollongong and environs. There were a total of 158 sitting days in Wollongong during 2011.

---

[36] These premises are now shared with Fair Work Australia.

[37] Note that a sitting day may involve multiple matters so that in 2011 the members in Newcastle dealt with parties (both at the State and federal level) on 533 occasions. It should be noted that Deputy President Harrison and Commissioner Stanton hold dual appointments with Fair Work Australia.

29 The Commission convened in over 23 other regional locations in 2011 including Armidale, Ballina, Bathurst, Coffs Harbour, Dubbo, Grafton, Griffith, Lismore, Murwillumbah, Tamworth, Taree and Tweed Heads.

30 Bearing in mind the urgency of most matters notified from regional centres, the Commission members have been known to sit in suitable premises if the Local Court house cannot accommodate them. For instance, the Commission members have arranged for conference facilities to be set up on site (eg Wagga Wagga Hospital, Junee Correctional Centre, Cargill Foods, etc.), at Council chambers (eg Wagga Wagga, Albury, Griffith, Young, etc.), at NSW Government Offices (eg Wagga Wagga), Education Centres (eg Wagga Wagga Education Centre), the Police Academy in Goulburn and at Motels (eg in Griffith).

Work of members

(i) Non-judicial

31 The major portion of the work of non-judicial members, all of who have strong backgrounds in industrial relations and proven capacity as conciliators and arbitrators[38], now consists of dealing with public sector and transport promotion and disciplinary appeals[39]. Unfair dismissal claims and industrial disputes (including contract of carriage matters) comprise most of the remainder of the work. This represents a significant change from a situation in 2006 when unfair dismissals constituted by far the main workload[40].

---

[38] The length of service of the Commissioners ranges from 7 to 21 years. Harrison DP has 25 years.

[39] See Charts 2 and 3 below. However, note that in Newcastle the IRC members' workload primarily involves industrial dispute work in the public sector, local government and the Hunter Valley Coal Chain as well as providing on site assistance (not necessarily involving a formal dispute notification) to parties in managing their industrial affairs where it is requested.

[40] See Chart 3 below.

(ii) Judicial

32 In relation to the judges of the IRC, 66 per cent of their work is dealing with prosecutions under the *Occupational Health and Safety Act* 2000[41]. Much of the remainder of their work involves sitting on appeals, industrial disputes[42], applications for relief under s 181E of the *Police Act* 1990[43], superannuation appeals[44], matters referred under s 146B of the IR Act[45], applications for declaratory relief[46], recovery of money applications[47], unfair contract claims[48] and major industrial cases[49].

33 The IRC has long been recognised as a very effective institution in exercising conciliation and arbitration powers to resolve disputes. All of its members have contributed to that reputation over time, but the distinguishing feature of the system is the role of judicial officers in the resolution of industrial disputes and the making of awards[50]. The failure to maintain that mix may detrimentally affect the dispute resolution function of the IRC.

---

[41] See Chart 1 below. There will be no new prosecution applications to be dealt with by the Industrial Court after 31 December 2011. Prosecutions that have already been filed in the Industrial Court will be dealt with by the Court and the great majority are expected to be finalised during 2012.

[42] See for example, *Notification under s130 by Director General, Department of Education and Communities of a Dispute with New South Wales Teachers Federation Re Schedule A* [2011] NSWIRComm 160.

[43] See for example, *Ross and Commissioner of NSW Police* [2011] NSWIRComm 92.

[44] See for example, *Cameron v SAS Trustee Corporation* [2011] NSWIRComm 69.

[45] See for example, *BlueScope Steel (AIS) Pty Ltd and the Australian Workers' Union, New South Wales* [2011] NSWIRComm 134.

[46] See for example, *Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v Director of Public Employment* [2011] NSWIRComm 100.

[47] For example, see *Liang v Xie* [2010] NSWIRComm 185.

[48] See for example, *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Director of Public Employment* [2011] NSWIRComm 152.

[49] See for example, *Health Employees Conditions of Employment (State) Award and other Awards* [2011] NSWIRComm 129; *Re Crown Employees (Public Sector - Salaries 2011) Award (No 3)* [2011] NSWIRComm 104. Note also the current claim for wage increases by the Police Association currently before a Full Bench of the Commission, which is not affected by the "cap" of 2.5 per cent imposed by s 146C and the relevant Regulation. One effect of s 146C and the Regulation is to eliminate claims for wage and salary adjustments under the Commission's Wage Fixing Principles (with the exception of the Police claim). But for these legislative provisions there would have been a number of Major Industrial Cases to be dealt with in 2011 that would probably have occupied judges sitting on Full Benches for 90 days or more during the year.

34 Why has the mix been so important?

(a) one important element of the functions of the IRC is arbitration. Some matters are complex, substantial and having underlying significance for the State economy. It makes eminent good sense for a judicial officer to handle such matters or preside on Full Benches, because of the skills they bring as lawyers with wide practice experience in that area;

(b) quite different considerations arise with dispute resolution or conciliation. However, the same principles apply. By dint of the background and experience of the judges of the Court gained over time, they possess mediation or conciliation skills in both an industrial and legal context, which are unique. When combined with the legislation's emphasis on dispute resolution and the long established convention in the Commission for a 'sleeves rolled up', expeditious and robust approach to conciliation, there has emerged a well-recognised and potent force for the resolution of both industrial and legal (such as contract) disputes. This has perhaps received less public attention, as the very nature of the process is that the resolution of disputes becomes somewhat invisible. The matters are often confidential and, hence, often not the subject of commentary. (An exception was the recent BlueScope dispute[51] concerning the loss of employment when the Company abandoned the export market. The Commission's wholly successful role in resolving a wide range of complex issues did receive some recognition);

(c) the judges have brought a broader perspective to the resolution of dispute management, not only important from the mind set of a

[50] The importance of the judicial function in the regulation of industrial relations in NSW is referred to in a number of the submissions (see particularly the NSW Bar Association) and hence the call for the maintenance of judges in any new arrangements.
[51] See Annexure D.

legal mediator, but in terms of an understanding of wider issues of contract and trade practice law and a judicial approach to problem solving;

(d) it is often said that the IRC's success in dispute resolution results from an ingrained culture of respect and trust for the authority of members of the Commission, which functions well in the resolution of disputes. That may seem a relatively hollow or shallow sentiment, except when understood in the context of the aforementioned factors.

(e) the IR Act is constructed upon a basis that a wide discretion is reposed in the members of the Commission in the management of industrial and employment issues. There can be no doubt that the foundation for that approach was that the discretion would invariably be exercised by judges in major and complex disputes and, in any event, be oversighted by them.

35 The Committee may wish to consider how any new industrial arrangements are able to continue to effectively utilise these judicial resources.

(iii) Dispute resolution

36 Whilst its success is rarely acknowledged, the role of the Commission in the conciliation and arbitration of industrial disputes remains a valuable aspect of the Commission's function and purpose. Given the essential services provided by public sector employees it is arguable the Commission's role in dispute resolution is indispensable[52]. Except for the

[52] See the example referred to by Mr Lillicrap regarding Westmead Hospital at pages 4-5 of the transcript of evidence taken by the Committee on 15 December 2011. But there are any number of other examples where the IRC has intervened and prevented industrial action occurring or halted industrial action or resolved the dispute and avoided any industrial action. Where orders of the Commission to cease industrial action have not been complied with the Commission has, on application, exercised its powers in respect of breach of an industrial instrument: see, for example, *Director General, NSW*

public sector and transport promotion and disciplinary appeals, the highest number of filings in the Commission in 2010 and 2011 were in relation to disputes[53], the majority of those being in the public sector. This is expected to continue to be the case in 2012 and 2013.

37 Recent examples of the IRC's involvement in industrial disputes notified to the Commission are set out in **Annexure C** to this Response. **Annexure C** also refers to work done by the Commission for National Employers under s 146B of the IR Act.

(iv) Unrepresented litigants

38 It may be noted that individual access to the Commission was not available prior to 1991. Since the IR Act provided access to self-represented litigants, parties frequently appear unrepresented. The task of conciliation in unfair dismissal matters has become more complex over the years as parties appear on their own behalf or are represented by advocates from unions or employer organisations, or agents operating generally within the jurisdiction, or solicitors and/or counsel.

39 Considerable training has been provided to members of the Commission by the Judicial Commission of NSW in relation to dealing with self-represented litigants and the members of the Commission have developed expertise in this area. In addition, the diverse approaches to conciliation proceedings require an extensive range of strategies to be implemented by

---

Department of Education and Training v NSW Teachers Federation [2009] NSWIRComm 147; *Director General, NSW Department of Education and Training and the Managing Director of TAFE v NSW Teachers Federation* [2010] NSWIRComm 77. It may also be noted that the Department of Premier and Cabinet has issued a Directive (D2011-006) that "Agencies should be prepared to seek the assistance of the Industrial Relations Commission (IRC) at the earliest opportunity and, where appropriate, seek Orders from the IRC to cease or refrain from taking industrial action. In particular, agencies should seek the IRC's urgent assistance where:

- the public interest is compromised
- there is a danger to the public
- the business of the agency is severely impacted either in performing services to the community or suffering financial loss."

[53] See Chart 3 below.

the presiding Commission member to achieve what is a very high rate of settlements.

Membership of the Commission

40 The Commission is presently comprised of seven judges (including the President and Vice-President), two non-judicial Deputy Presidents and six Commissioners[54]. The names of the members[55] and their mandatory retirement dates are set out below:

[54] This compares to ten judges, three non-judicial Deputy Presidents and 12 Commissioners in 2006, all full-time appointments.
[55] In addition to the members of the Commission, Mr M Grimson is the Industrial Registrar and Ms L Hourigan is the Acting Deputy Industrial Registrar.

41 It should be noted that by an agreement between the Commonwealth and New South Wales, a number of the members of the IRC hold dual appointments with Fair Work Australia:

- One non-judicial Deputy President (Harrison DP) is engaged for 50 per cent of his time as a member of Fair Work Australia;
- another non-judicial Deputy President (Sams DP) is engaged for 100 per cent of his time as a member of Fair Work Australia;
- two Commissioners (McKenna and Macdonald CC) are engaged for 100 per cent of their time as members of Fair Work Australia; and
- one Commissioner (Stanton C) is engaged for 50 per cent of his time as a member of Fair Work Australia.

42 Amongst the non-judicial members, therefore, the IRC has an active establishment of only four (being three and a half Commissioners[56] and half of one Deputy President[57]). All members are based in Sydney except Deputy President Harrison and Commissioner Stanton, who are based in Newcastle[58]. The Commission has offices and chambers in Wollongong. Members of the IRC are rostered to work in Wollongong. Fair Work Australia contributes to the rent of both the Newcastle and Wollongong premises (on the basis of the dual appointee arrangement and other members of the federal tribunal attending those centres from time to time). The IRC also services regional New South Wales generally utilising Local Court facilities.

43 In respect of the judges:

- four[59] hold dual appointments with the Medical Tribunal;
- one[60] with the Parliamentary Remuneration Tribunal;

---

[56] Tabbaa, Bishop, Stanton, Ritchie CC.
[57] Harrison DP.
[58] The office and Chambers in Newcastle are shared with Fair Work Australia. Because Harrison DP and Stanton C are dual members of Fair Work Australia those two members do most of the work, both Commonwealth and State, in Newcastle and the northern regions of NSW.
[59] Marks, Kavanagh, Staff and Backman JJ.
[60] Staff J.

- one[61] with the Racing Appeals Tribunal; and
- one[62] who is chair of the Legal Services Division of the Administrative Decisions Tribunal.

Budget of the Commission

44 The Commission is a business centre within the Department of Attorney General and Justice and sits within the Courts and Tribunal Services division. This division manages and supports the largest court and tribunal network in the country. The network is a significant and complex system that employs more than 2000 staff and has an overall operating budget of approximately $395 million[63]. There are 15 business centres within the Division including the major generalist courts (Supreme, District and Local), along with the Commission and the Administrative Decisions Tribunal.

45 The Commission has a head - the President, who is a judicial officer. There is a statutory requirement that the jurisdiction has a Registrar[64]. The Registrar has overall responsibility for the efficient operation of the organisation and reports directly to the President in terms of day to day operational issues and, as a business centre manager within the Courts and Tribunal Services division, in relation to reporting, budgetary and planning issues of the Department to the Assistant Director-General of that division.

46 The registry provides the administrative and quasi-judicial services for the operations of the Commission, such as:

- the filing and management of documents;
- the listing of matters;

[61] Kavanagh J.
[62] Haylen J.
[63] *Annual Report 2010/11* Department of Attorney General and Justice (p.27)
[64] See s 207 IR Act

- the determination of certain claims and legal costs; and
- general support to the judiciary.

47 In addition to the judicial and non-judicial members of the Commission there are **41** staff (being **24** registry and **17** ministerial) engaged in the jurisdiction.

48 The operating budget for the Financial Year 2011-12 is approximately **$11.2m**. Employee-related expenditure is the greatest component of the budget, with total employee-related expenditure for judiciary-related activities expected to be **$5.5m** or **50%** of the overall budget this financial year. The total employee-related expenditure for the Commission this year is expected to be **$7.9m** (69%).

49 The Commission will recoup $1.4m of employee-related expenditure for dual appointees and associated staff from Fair Work Australia this financial year.

50 The Commission has worked proactively with the Assistant Director General of the Courts and Tribunal Services division, Michael Talbot, over the past several years in an effort to rationalise resources to the decreasing workload. A number of steps were initiated which, together with natural attrition, has seen the membership of the Commission decrease substantially to the end of 2011. This included the:

- replacement of Wright J as President from within the current establishment;
- acceptance by McLeay C of voluntary redundancy;
- medical retirement of Staunton J;
- retirement of Murphy C, Grayson DP and Connor C;
- appointment of Schmidt J to the Supreme Court; and
- the appointment of Cambridge C to the federal tribunal.

51 Details regarding the Commission's Budget since 2005/2006[65] are set out in **Table 3** below. The Committee will note that the Commission has, overall, returned a surplus.

TABLE 3

Year	Actuals ($)	Budget ($)	Variance ($)	Variance (%)
2005/2006[66]	18,469,146.37	19,221,666.00	742,678.63	3.87
2006/2007	19,881,094.95	19,437,258.00	451,204.73	2.32
2007/2008	18,452,752.99	19,839,429.00	1,386,676.01	6.99
2008/2009	17,552,316.78	17,790,630.00	238,313.22	1.34
2009/2010	15,897,538.03	18,923,248.00	3,025,709.97	15.99
2010/2011	15,970,112.00	18,121,305.00	2,144,758.00	12
2011/2012[67]	11,427,612.00	11,188,094.00[68]	239,518.00[69]	2

Workload of the Commission

52 Since the commencement of the Work Choices legislation[70] in March 2006, the Industrial Relations Commission and, to a lesser extent (until recently at least), the Industrial Court, have been faced with a number of challenges, not the least of which was the perception that such legislation had created a national industrial relations system which had effectively reduced the State industrial tribunals to a very limited role with immediate effect.

53 There is no dispute that the Work Choices legislation had a material impact on the workload of the Commission. In the three years prior to 2006 the number of matters lodged averaged 7,250 per annum. This reduced to 2,300 in 2007 (-68%), remained relatively static in 2008 (2,438), fell to a low of 2,086 in 2009 before climbing to 3460 in 2011.

---

[65] Note that the Commonwealth's Work Choices legislation took effect in March 2006.
[66] All calculations for years ending 2006, 2007, 2008, 2009, 2010 & 2011 are Net Cost of Services **before** Depreciation & Crown Liabilities
[67] Actuals Estimate to 30 June 2012 based on Actuals as at 30 November 2011.
[68] Full Year Budget 2011/2012 for Net Cost of Services.
[69] Variance Estimate to 30 June 2012 based on Actuals as at 30 November 2011.

54 The effect was most pronounced in the work undertaken by commissioners. Unfair dismissals fell from just over 4,000 cases lodged in 2003 to fewer than 500 in 2007 (-87%), 693 in 2009 and, with the transfer of the balance of the private sector to the federal system from 1 January 2010, 190 last year.

55 Industrial disputes decreased from 1,200 to less than 600 (-50%) over the same period (638 in 2009; 488 in 2011).

56 Then there was the significant development in industrial relations throughout Australia with effect from 1 January 2010. From this date all State and Territory governments (with the exception of Western Australia) referred their powers relating to the private sector to the Commonwealth. Essentially, given that the Work Choices legislation enacted in 2006 effectively and arbitrarily transferred corporations to the Commonwealth system at that time, this meant the balance of the private sector (partnerships and sole traders) moved across to the national system. As noted earlier in this submission, the Commission retains jurisdiction in relation to the State public sector, the local government sector and contracts of carriage[71]. Importantly, and again as noted earlier, under both State and federal legislation, the Commission can continue to provide dispute resolution services to the private sector where the Commission has been nominated for that purpose

57 During the financial year 2010/11 the Government and Related Employees Appeal Tribunal was abolished and the jurisdiction in relation to public sector disciplinary and promotional appeals incorporated within the IR Act. Additionally, the Commission was granted jurisdiction in relation to reviewing Police Hurt on Duty appeals (s 186 of the *Police* Act 1990) and the President (or his delegate) now constitute the Transport Appeal Boards, which deal with public sector transport disciplinary and promotional appeals. The Commission worked closely with both current

---

[70] *Workplace Relations Amendment (Work Choices) Act* 2005 (Commonwealth)
[71] See Ch 6 of IR Act.

and new stakeholders and clients to ensure that any impact relating to the transfer was minimised and all matters continued to be disposed of in a timely manner.

58 The later part of the financial year 2010/11 saw some significant legislation pass through Parliament that will further impact on the operations of the Commission[72].

59 Charts 1 to 6, which are included in **Annexure D**, together with the explanatory notes show total filings by year, total filings by jurisdiction, filings by major types of matters, average caseload per member including a breakdown into judicial and non-judicial, and total filings pending since 2006 with estimates for 2012 and 2013 reflecting, as far as the Commission is able to determine, the further changes in the Commission's workload.

B. OPTIONS FOR THE COURT

60 Term of reference 2(b) states:

> 2(b) options that would be available in relation to the Industrial Relations Commission in Court Session, should the Commission's arbitral functions be consolidated with or transferred to other bodies.

61 The Committee has asked the Commission to provide factual information regarding this term of reference. This Response seeks to answer that request by reference to the four options identified in the Ministerial Issues Paper.

Option 1

62 Option 1 identified in the Ministerial Issues Paper envisages the transferring of functions of other tribunals *to the IRC* and renaming the IRC

[72] The *Work Health & Safety Act* 2011 and the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011.

the Employment and Professional Services Commission. If that were the preferred option, judges could remain part of a "hybrid"[73] arrangement such as the case at the present and continue to perform the judicial and non-judicial powers and functions as provided by the legislation. In that regard, it should be borne in mind the IRC derives its powers from a wide field of legislation and not just the IR Act. That legislation is as follows:

1. *Industrial Relations Act*[74],
2. *Police Act* 1990[75],
3. *Commission for Children and Young People Act* 1998[76],
4. *Annual Holidays Act* 1944[77],
5. *Apprenticeship and Traineeship Act* 2001[78],
6. *Bail Act* 1978[79],
7. *Building and Construction Industry Long Service Payments Act* 1986[80],
8. *Civil Procedure Act 2005*[81],
9. *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act* 2010[82],
10. *Energy and Utilities Administration Act* 1987[83],
11. *Essential Services Act* 1988[84],
12. *Explosives Act* 2003[85],
13. Fire Brigades Regulation 2008[86],
14. *Health Services Act* 1997[87],
15. *Industrial Relations (Child Employment) Act* 2006,
16. *Law Enforcement (Powers and Responsibilities) Act* 2002[88],
17. *Long Service Leave Act* 1955[89],
18. *Long Service Leave (Metalliferous Mining Industry) Act* 1963[90],
19. *Occupational Health and Safety Act* 2000,
20. *Parliamentary Remuneration Act* 1989[91],
21. *Rail Safety Act* 2008[92],
22. *Superannuation Administration Act* 1996[93],

---

[73] A term used by Mr I Taylor, barrister, representing the NSW Bar Association in transcript of 16 December 2011 at p 16.

[74] See also *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009, *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009, Industrial Relations (General) Regulation 2001, Industrial Relations Commission Rules 2009 and the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011.

[75] See Division 1D of Part 9. See also Police Regulation 2008.

[76] See subdivision 2 of Division 2 of Part 7.

[77] See ss 12, 13, 14.

[78] See s 55.

[79] See s 30B and s 44.

[80] See s 64.

[81] See also Uniform Civil Procedure Rules 2005.

[82] See s 103.

[83] See s 28.

[84] See ss 15, 16, 17, 19, 22, 23, 24 and 26.

[85] See s 32.

[86] See reg 47.

[87] See ss 90, 92, 96, 97, 121.

[88] See s 104.

[89] See ss 5, 5A, 6, 12, 14.

[90] See ss 5, 5A, 6, 12, 14.

[91] See ss 3, 4, Schedule 2.

[92] See s 132.

23. *Transport Appeals Board Act* 1980,
24. *Workers Compensation Act* 1987[94],
25. *Workplace Injury Management and Workers Compensation Act* 1998[95] and
26. *Workplace Surveillance Act* 2005[96].

63 It should also be noted that the Commission and the Industrial Court have functions under the *Work Health and Safety Act* 2011[97] and Work Health and Safety Regulation 2011 from 1 January 2012.

64 Option 1 proposes the transfer of functions to the IRC from the Administrative Decisions Tribunal (ADT) including the anti-discrimination division and professional discipline functions in relation to lawyers, and from the health professional tribunals including the Medical Tribunal[98]. As noted earlier, there are four judges of the Industrial Court (Marks, Kavanagh, Staff and Backman JJ) who hold appointments as Deputy Chairpersons of the Medical Tribunal and who sit from time to time as the Tribunal. Additionally, Justice Haylen, another judge of the IRC, heads the Legal Services Division of the ADT. Justice Staff is also the Parliamentary Remuneration Tribunal and Justice Kavanagh also holds an appointment to the Racing Appeals Tribunal.

65 Except for the difficulty these dual appointments cause in relation to work allocation[99] the appointments have proved quite successful. There would not appear to be any particular obstacle to merging these tribunals[100] with

---

[93] See s 88.
[94] See ss 242-246.
[95] See s 245.
[96] See ss 41, 45 and the Workplace Surveillance Regulation 2005.
[97] See ss 65, 229, 229B, 237 and 255.
[98] The functions of the Racing Appeals Tribunal, the Greyhound and Harness Racing Appeals Tribunal and the Local Government, Pecuniary Interest and Disciplinary Tribunal could also be transferred to the Commission or Court as well as the functions of the District Court regarding police who are hurt on duty: see *Police Act* 1990 and *Police Regulation (Superannuation) Act* 1906. In addition, assent has been given to the Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009, which proposes to confer on the Industrial Court the criminal and civil jurisdiction that is currently exercised by Industrial Magistrates under the IR Act. However, the Act has not been proclaimed.
[99] For example, the work of the Medical Tribunal is allocated by the Chief Judge of the District Court and that does conflict from time to time with the allocation of work by the President of the IRC.
[100] It would not be necessary to merge the Parliamentary Remuneration Tribunal with the IRC.

the IRC. Indeed, to do so would facilitate a more efficient arrangement than presently exists with the dual appointments. A merger of the health professional tribunals with the IRC would also not appear to present any particular difficulty given that judges of the IRC are already acting as the Medical Tribunal. Any suggestion that the IRC would lack expertise in matters that are essentially disciplinary in nature is not accepted, but it is understood the various health practitioner tribunals are constituted as a panel on which experts in the particular field sit, as is the case with the Medical Tribunal, and this system would be maintained if the jurisdiction was transferred to the Commission. Further, it should be noted that the IRC's jurisdiction is not confined to "collective" disputes; it deals with individual claims as well[101].

66 Merging the tribunals referred to in Option 1 would appear to present no more complex a task than the mergers of the Government and Related Employees Appeal Tribunal and the Transport Appeals Boards with the IRC in 2010, which were carried out seamlessly and which operate most satisfactorily. However, the merging with the IRC of those tribunals referred to in Option 1 is unlikely to mean that as a result the judges of the IRC would, as a consequence, be fully utilised[102]. On the other hand, the merging of the tribunals as envisaged in Option 1 would mean more work for the non-judicial members of the Commission. These members are presently working at full capacity.

67 The Law Society of NSW advocated in its submission the adoption of Option 2A and that such an Option would be even more effective if the

[101] See, for example, the Commission's unfair dismissal and unfair contracts jurisdiction.
[102] There are presently seven judges. Justice Marks is due to retire in December 2012, leaving six judges. The transfer of the occupational health and safety jurisdiction to the so called "mainstream" courts, as explained elsewhere in this Response, will mean that the remaining six judges will not be fully utilised even with the merging of the other tribunals identified in Option 1 with the IRC. The workload involved in these other tribunals is not high and, in any event, some of it (for example, health professionals and anti-discrimination) is work that, as the Ministerial Issues Paper appears to recognise, three of the four legally qualified Commissioners of the IRC could undertake. It would not be an appropriate or economic use of judicial resources to expect judges of Supreme Court status to undertake work that does not require the application of their skills and experience. The criterion for appointment as a Chairperson or Deputy Chairperson of those various Tribunals is "an Australian lawyer of at least 7 years' standing".

common law employment jurisdiction of the District Court was transferred to the "Employment Division" of NSW Employment and Administrative Tribunal ("NEAT"). The NSW Society of Labor Lawyers and the PSA also proposed the extension of the IRC's jurisdiction to common law employment contract matters. The Industrial Relations Society of NSW advocated the Industrial Court should have the capacity to hear and determine common law employment contract matters currently dealt with in the District and Supreme Courts. If this approach were to be adopted in respect of Option 1 it would assist in ensuring the judges were more fully utilised in respect of work more suited to their role. A further enhancement in this respect could be the expansion of the jurisdiction of the IRC to encompass "employment disputes" along the lines provided for in the *Industrial Relations Act* 1979 (WA)[103].

68 The New South Wales Young Lawyers proposed another alternative, namely, a new court of equivalent status to the Supreme Court could be created to preside over any consolidated tribunal. This court could exercise the residual jurisdiction of the Industrial Court in relation to work health and safety, enforcement of industrial instruments, local and NSW Government industrial matters and police matters. Appeals from employment and industrial type matters and other matters dealt with by the consolidated tribunal could be brought to the court. Furthermore, akin to the current constitution of the IRC and Industrial Court, members of the new court could receive dual appointments allowing them to exercise the non-judicial functions of the consolidated tribunal, ensuring a sufficient workload and allowing them to bring their expertise to bear in non-judicial employment and industrial matters.

[103] See submission by PSA at p 7-8; see s 29(1)(b)(ii) of the WA Act. See also the 2009 report by Arthur Moses SC "The future of the Industrial Relations Commission of NSW and/or the Industrial Court of NSW".

Options 2A and 2B

69 Options 2A and 2B, as described in the Ministerial Issues Paper, involve the abolition of the IRC and the transfer of its powers and functions to another tribunal.

70 Option 2A involves, in effect, merely renaming the ADT (as the NSW Employment and Administrative Tribunal – "NEAT") and adding another division, namely, the Employment Division, formerly the IRC. It is proposed that the Employment Division would be headed by a former judge of the IRC and would be constituted by former Commissioners who would undertake the conciliation and arbitration functions of the former IRC. It is proposed the remaining judges would be appointed to an Employment List in the Supreme Court.

71 Option 2B is a variation on 2A to the extent that the Employment Division would become the Employment and Professional Discipline Division, consolidating the employment functions of the IRC with the professional discipline functions of the ADT and the health professional tribunals.

72 Options 2A and 2B would seem to already answer the question posed in Term of Reference 2: if the non-judicial functions of the IRC are transferred to another tribunal, one judge will head a division of the tribunal to which the IRC functions have been transferred and the remaining judges will constitute an Employment List in the Supreme Court.

73 Presumably, these options envisage that the judge heading the Employment Division would undertake the work previously undertaken by the judges in the Industrial Court. The opinion is offered that one former IRC judge to head the Employment Division under 2A or the Employment and Professional Discipline Division under 2B would not be sufficient to meet the judicial workload if all of the judicial functions performed by the Industrial Court were transferred to either of the proposed Divisions of

NEAT. At least two and probably three judges would be required[104]. Presumably any appeal from the Employment Division (or the Employment and Professional Discipline Division) would be to the Supreme Court. It would not be expected that an internal Appeal Panel involving members of NEAT outside the Employment Division would have the necessary experience or expertise to sit on appeals from members in the Employment Division. Further, it would need to be kept in mind that any former judge or judges from the Industrial Court would be judges of Supreme Court rank and status. Therefore, unless the Employment Division retained the "hybrid" character of the IRC (a tribunal and a Court acting in tandem), the judge or judges in the Employment Division would need to be appointed as judges of the Supreme Court or the Land and Environment Court[105]. It may also be noted that contrary to what was stated in the Ministerial Issues Paper, the retirement age of the Industrial Court judges is 72, not 70[106].

Option 3

74 Option 3 proposes that a number of other tribunals be amalgamated with those in 2A (or 2B) including the Consumer, Trader and Tenancy Tribunal, Guardianship Tribunal, Mental Health Tribunal, Vocational Training Tribunal and Local Government and Pecuniary Interests Tribunal.

75 The observations regarding judges of the IRC in relation to Options 2A and 2B apply with equal force to Option 3.

C. RESPONSE TO EVIDENCE TAKEN BY THE COMMITTEE

76 The Inquiry's website indicates that it has received 85 submissions. Eighteen of the submissions directly addressed the IRC, consistent with

[104] Note the Law Society's support for this view.
[105] Part 9 of the *Constitution Act* 1902 applies to Judges of the Industrial Court. As a consequence of the abolition of the Industrial Court by the IR Act, that Part confers a right on the former Judges of that Court to be appointed to judicial office in a court of equivalent or higher status.
[106] See s 44(1) of the *Judicial Officers Act* 1986.

the terms of reference[107]. It may be assumed that only those persons or organisations that are users of the Commission and/or have an interest in the future of the IRC, made submissions to the Inquiry regarding the IRC, although it is notable that no government agency or department, amongst the heaviest users of the IRC, made any submission regarding the IRC unless such a submission was made on a confidential basis.

77 What is striking, however, about 17 of the 18 submissions is the strong support for a continuing role for the Commission and the maintenance of its current powers and functions[108]. This is reflected in **Table 1** annexed (**ANNEXURE A**) to this Response. Because of the Committee's particular interest in options in respect of the judges of the Industrial Court, **Table 1** includes reference to any submissions in that regard.

78 The fact that such strong support for the Commission exists would suggest that if the Committee was to proceed according to the views expressed regarding the IRC, it would recommend adoption of Option 1 in the Ministerial Issues Paper, but in such a way as to ensure that there was sufficient work for the judges of the Commission.

79 With respect to those who contended otherwise, there would not seem to be any real obstacle to merging professional disciplinary tribunals under the umbrella of the IRC. Judges of the IRC already constitute the Medical Tribunal, which sits as a panel headed by a judge with two members of the profession and a judge of the IRC heads the Legal Services Division of the Administrative Decisions Tribunal (ADT). Moreover, both the Government and Related Employees Appeal Tribunal and the Transport Appeals Board were merged into the IRC in 2010. This was done seamlessly and so the

[107] A few other submissions addressed the IRC, but only indirectly in the context of submissions that were of a general nature or that focused on tribunals other than the IRC. The submission by the Australian Industry Group may be ignored because it falls outside the terms of reference and, in any event, it is not evident what interest this body would have in any outcome. There were five submissions marked confidential so it is not known what matters they addressed.

[108] The Australian Road Transport Industrial Organisation, NSW Branch had nothing critical to say of the IRC. However, it submitted the functions of the IRC regarding

mechanics of merger of professional disciplinary tribunals and any other employment related tribunals into the IRC would also not appear to present a problem.

80 In light of submissions made by the Mental Health Review Tribunal and the Guardianship Tribunal, the question arises whether a merger with the IRC would be appropriate. The role and functions of these tribunals would seem to have little in common and the authors of the two submissions, with respect, make a good case for the two bodies to remain stand-alone tribunals. In relation to the Consumer Trader and Tenancy Tribunal (CTTT) it appears from a number of the submissions that the tribunal faces some challenges, not least of which is the volume of work that it is required to undertake. Perhaps, before any consideration is given to consolidating the CTTT with any other tribunal(s), attention will need to be given to the CTTT's structure and resources. The impression from the submissions is that the CTTT, a large multijurisdictional tribunal already, would not be a good fit with the IRC.

81 The question of whether the IRC should be absorbed into some kind of super tribunal is, of course, a matter for the New South Wales Parliament. If that is the course to be recommended by the Committee on the basis of savings to be made in costs[109] the submissions dealing directly with the Commission suggest that the best way of doing so would be to, in effect, transplant the existing IRC onto the super tribunal as a separate division and in so doing maintain the hybrid nature of the IRC[110]. In this regard, the Committee may also wish to note the following characteristics of the IRC which tend to set it apart from tribunals that are essentially civil or administrative in nature (as distinct from a tribunal/court that applies

---

contract of carriage determinations be transferred to the proposed federal Road Safety Remuneration Tribunal.

[109] It is difficult to see on what other basis such a recommendation could be made because whilst the establishment of a super tribunal involving the IRC is certainly superficially attractive, when one has regard to the evidence before the Committee there seems to be no other worthwhile synergy to be achieved by merging the IRC with the CTTT, Guardianship Tribunal or Mental Health Review Tribunal, for example.

[110] See submission of the NSW Bar Association and the reference to "hybrid" nature, i.e., a tribunal and court working in tandem.

industrial, civil and criminal law) and which tend to favour the maintenance of a separate identity for the IRC, whether as a stand-alone tribunal, a tribunal that is enhanced by the transfer of other employment related/professional discipline tribunals under the IRC umbrella, or a separate division of a super tribunal:

- the IRC operates as a combination of a court and a tribunal. It can transform easily from one to the other;
- the judges of the IRC have Supreme Court rank and status;
- the IRC has jurisdiction over 400,000[111] to 500,000[112] employees in the public sector and local government as well as jurisdiction over contract carriers and those parties that have chosen to utilise the IRC as the dispute resolution provider (see s 146C of the IR Act);
- the IRC deals with both individual and collective disputes, with industrial organisations having standing in a representative capacity as well as in their own right;
- the IRC exercises powers under 27 pieces of State legislation[113];
- the IRC has a strong regional presence in Wollongong and Newcastle and in respect of Newcastle in particular, submissions from interested parties[114] in that region have called for the IRC to be retained;
- several members of the IRC hold dual appointments with Fair Work Australia;
- the IRC has an internal appeal mechanism that ensures consistency of approach and also hears appeals from the Chief Industrial Magistrate;
- the IRC has a conciliation and arbitration function, with the vast majority of matters being resolved by conciliation;
- the IRC is able to and does act quickly and flexibly; and
- the IRC regulates the affairs of industrial organisations in New South Wales.

[111] See Unions NSW submission.
[112] See Transport Workers' Union submission.
[113] See "B. Options for the Court" in this Response.
[114] Hunter Business Chamber; Industrial Relations Society, Newcastle Branch; AWU, Newcastle Branch.

82 The question of "specialisation" was raised during the taking of evidence by the Committee, with reference to the judgment of Heydon J in *Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; (2010) 239 CLR 531. The difficulty with any literal adoption of Heydon J's views is that they speak against any of the options proposed in the terms of reference before the Committee. Heydon J (expressing a view not shared by the majority) argued for the resolution of legal and other disputes by the general courts. Further, it stands oddly against the whole system of specialisation in courts and the establishment of tribunals expressly to deal with special issues[115]. The reason why specialisation has such a widespread adoption is not only because it provides for a timely and cost effective resolution of disputes, but because in many areas the body of law has grown so large and is so dense as to warrant specialist attention rather than dabbling by courts of general jurisdiction.

83 Professor Ron McCallum has recently, in a speech to the 2011 Colloquium of the Judicial Conference of Australia, argued in favour of this position and contradicted the views expressed by Heydon J (he also argued that the views expressed by Heydon J were unfair to the Industrial Court). Professor McCallum contended that the march to specialisation was both inevitable and desirable.

84 Specialisation is addressed in this Response in case the view is harboured that, in some way, industrial relations might not be seen as a specialist field requiring specialisation by a body established to administer laws in that area. Such a view is quite unsustainable. It sits uncomfortably against the whole federal industrial system in Australia (past and present) and over 100 years of experience in this State and in other States. Moreover, no opinion was expressed to the Committee that the IRC, as a specialist tribunal, constituted as it is, was other than wholly successful in the

[115] Whilst the NSW Parliament transferred the Industrial Court's occupational health and safety jurisdiction to the so-called "mainstream courts" in 2011, it remains unclear why this was done. See the criticism of the move in the submission by the NSW Society of Labor Lawyers.

resolution of industrial disputes and the carrying out of its other functions. Indeed, **Table 1** is testimony of quite the opposite. The IRC has been so successful that, even after the transfer of powers to the federal system, major corporations and their employees have elected to use the system for their industrial dispute resolution by referral arrangements under federal agreements.

Annexure A

Matters addressed in Submissions received by Inquiry into Consolidation of Tribunals in NSW regarding the Industrial Relations Commission of New South Wales

TABLE 1

Organisation making submission	Preferred option	Industrial Court/Judges	Comments/observations
10. Industrial Relations Society of NSW	**Option 1** (by implication)	"If there were to be a tribunal that incorporated the current role of the IRC, such that there was no longer a Commission in Court Session, steps would need to be taken to maintain the status of the Judges of the Commission. That could be done by appointing them Judges of the Supreme Court but seconding them to the Tribunal."	"It is important that there remains an effective body to deal with [major] disputes quickly and effectively." "[I]t is important there remains a body that is either stand-alone or an identified division of a 'super-tribunal' that retains as far as possible the current structure of the IRC, that includes the current Judges of the IRC who have the specialised conciliation and arbitration skills to carry out the important role of conciliation and arbitration of industrial disputes"

15. Public Service Association and Professional Officers Amalgamated Union of NSW	**Option 1**- by incorporating with the IRC: the discrimination functions of the Anti-Discrimination Board, & Equal Opportunity Division of the ADT; underpayment of wages and breaches of industrial instruments functions of CIM; breach of contract of employment claims; Vocational Training Tribunal; professional disciplinary functions of health professionals tribunals, Medical tribunal and Legal Services Division of ADT; compulsory mediation of all disputes arising out of employment.	Judges to be appointed to Supreme Court and seconded to any new employment tribunal.	"The PSA supports the retention of the IRC and the system under which it operates for a number of reasons: • fairness and justice is a primary object of the system; • the NSW System is based on an underlying system of common rule and enterprise award that provide a safety net of minimum wages and conditions that are based on the principle of "fair and reasonable conditions"; • unlike the Fair Work Act regime the NSW system places an emphasis on conflict resolution without recourse to industrial action; • the NSW system is flexible and equitably balances the rights of unions, employers and employees; • its preparedness and ability to move quickly to determine any application before it; and • unlike the Fair Work Act regime which places an emphasis on disputation and court based enforcement the NSW system is

			accessible and rights are capable of being enforced without encountering prohibitive costs".
32. Transport Workers' Union	**Option 1** "If the Government decides not to adopt Option 1 we make these further observations about Options 2A and 2B: (a) it is imperative that any alternative tribunal encompasses a separate employment/industrial division administered by members of the current IRC. Any new appointments should be made specifically to the employment/industrial stream based on specialized expertise and knowledge; (b) any employment/industrial division of a tribunal must exercise precisely the current powers and functions as the IRC in relation to Chapter 6 [of the IR Act]; (c) any transfer of judicial power from the Commission in		The Industrial Court, although bound by the rules of evidence and legal formality, is far more accessible to employees compared to the general court system. The reasons for that relative accessibility include: (a) the extensive specialized expertise of the members of the Industrial Court, which tends to reduce the scope of proceedings and, therefore, costs (for example it reduces or avoids the need to explain the history and context of awards in award enforcement proceedings); (b) a flexible and relatively informal approach to matters, which tends to reduce costs and improve accessibility; (c) specific procedures and regulations (including lower filing costs) designed for dealing with industrial matters, as compared to uniform procedure rules designed to deal generally with commercial litigation; (d) the capacity to conduct proceedings

	Court Session to the general courts will reduce access to justice and should be avoided. A specialist court must therefore remain in order to provide access to justice; (d) any changes to the operation of the IRC and the Industrial Court will necessarily involve legislative change. Any new legislation must preserve the totality of Chapter 6..."		via industrial associations, which in many cases is the only practical and cost effective avenue for employees" "Having regard to: (a) the need for a dedicated body with the knowledge experience and resources necessary to properly administer the industrial affairs of some 500,000 employees; (b) the need for a body with the specialized knowledge necessary to properly administer Chapter 6 of the Act; (c) concerns regarding the current quality of CTTT decision making, and the potentially aggravating effect of the expansion of its jurisdiction in this regard; (d) the lack of any clearly identified financial efficiencies which would offset those concerns; there is no compelling case for the absorption of the IRC into a consumer tribunal. There is, in our view, no case for change."

37. NSW Society of Labor Lawyers	**Option 1**	"Any attempt to abolish the Industrial Court would result in the parliament having to appoint the seven current Industrial Court members to either the Supreme Court or Land and Environment Court ... or for the parliament to create a new court of equivalent status to the Industrial Court and appoint the current judicial members of the Industrial Court to that court." Maintain the Industrial Court in its current form and allow it to hear appeals from employment and industrial matters in the transferred or consolidated jurisdiction of the IRC.	"The Society recommends that the Inquiry acknowledges the extensive functions of the IRC and IRC in Court Session." "The Society recommends that the current functions of the IRC and IRC in Court Session are not decreased given the expertise of the IRC and IRC in Court Session." "The Society recommends that the facilities of the IRC (court rooms, Commissioners, judicial officers and administration) of the IRC could be utilized by a Super Tribunal, however the IRC must remain autonomous." "The Society recommends that the IRC is capable of extending its jurisdiction to include the current professional disciplinary tribunals in NSW and any other employment related legislation of other tribunals including the Anti-Discrimination Tribunal." "The Society recommends that the IRC maintains autonomy in regards to any consolidation of NSW tribunals for efficiency due to the specialist nature of the IRC." "The Society recommends that any decisions of the Inquiry must acknowledge the structural consequences if the IRC in

			Court Session is abolished." "The Society recommends that if the consolidation of the IRC with other NSW tribunals occurs, the IRC in Court Session can be maintained but allowed to hear appeals from employment and industrial matters of the transferred or consolidated jurisdiction of the IRC." "The Society submits that the abolishment or transfer of the jurisdiction of the IRC in Court Session will cause an increase to the barriers of access to industrial remedies available to members of the NSW community."
40. NSW Bar Association	**Option 1** – if Options 2A, 2B or 3 be preferred, it is important that the current structure of the IRC be retained in any Industrial Relations Division of any new tribunal as far as possible. In particular it would be important that the Judges of the IRC are appointed to that Division.	"The Association believes the loss of the specialized conciliation and arbitration skills of the Judges, which would occur if the Judges were appointed to the Supreme Court as contemplated by one aspect of Options 2A and 2B and Option 3 would seriously undermine the effectiveness of the tribunal." "[I]f an option such as 2A or 2B is adopted so that the IRC	"Option 1 is supported because it would retain the unique nature of the IRC as both a tribunal and a court. Its hybrid nature has been one of the main reasons for its success. The tribunal/court is in effect a one-stop shop for industrial and employment related matters. 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 a practical approach to industrial relations and ready access to more formal legal processes. There is no delay incurred if matters arising in

		loses its status as a court, it will be necessary to take steps to maintain the status and protections of the Judges of the IRC. One way to do that would be to appoint them judges of the Supreme Court and have them seconded to the relevant tribunal or division of the tribunal."	proceedings before the tribunal are required to be dealt with by the court … That would not be the case under an option that required certain matters to be referred to a court of general jurisdiction, even if likely to be allocated to a particular 'employment list' within that court."
46. NSW Nurses Association	**Option 1** subject to any new tribunal having separate divisions or lists that ensure industrial relations matters are dealt with separately from professional disciplinary matters.	The Court should be retained	"In relation to the proposal to consolidate the IRCNSW and the Industrial Court with other tribunals, the Association urges the Committee to consider the following matters as important: • It is crucial that the State of New South Wales continues to have a strong, independent and effective tribunal which acts as the conciliator and arbiter of industrial relations matters within the scope of the existing jurisdiction • The tribunal which acts as the conciliator and arbiter of industrial relations matters in New South Wales should inspire public confidence and respect. It should have the authority and reputation

			commensurate with the important work that it performs. • Consolidation should not result in any new tribunal having less powers and functions than those of the present IRCNSW or the Industrial Court (save for those embodied in s 146C of the IR Act which the Association believes should be repealed for its manifest unfairness). Indeed, the Association is generally in favour of a strengthening of the powers and functions of the industrial umpire. • The ability of a trade union to appear both as a party and a representative in industrial relations matters should be unaffected by any consolidation. • The specialized industrial relations knowledge of the judges, non-judicial members and commissioners of the IRCNSW and Industrial Court is a valuable resource for the people of NSW which should not be lost sight of or derogated from. Indeed, it is a resource that should be used to the maximum extent possible.

			• Those hearing industrial relations matters before any consolidated tribunal should possess specialized industrial relations knowledge. As such, any industrial relations matters after any consolidation should continue to be heard by commissioners, non-judicial members and judges of the current IRCNSW and Industrial Court."
50. Amalgamated Manufacturing Workers' Union	Not stated, however the AMWU proposed that: "It would be reasonable to consolidate the NSWIRC with the WCC [Workers Compensation Commission] in order to provide access to the specialist resources of the NSWIRC to the WCC..." It was also proposed to consolidate the Vocational Training Tribunal and Appeals Panel with the IRC.	Not stated	
55. Hunter Business Chamber	**Option 1**	Not stated	"It is critical for the maintenance of good industrial relations and economic prosperity in the Hunter Region (and by extension the State and national economies), that any restructured tribunal make provision for retention of the statutory powers and

			functions of the IRC which should also: • Ensure retention of the delegated authority from Fair Work Australia; • Continue to provide these functions through a permanent presence in Newcastle."
58. Australian Workers' Union, Newcastle, Central Coast and Northern Regions Branch	Not stated	Not stated except indirectly to the effect that the IRC should be retained	"The Branch opposes the suggestion to merge the IRC and other tribunal/s or to transfer the IRC's arbitral powers to another entity. The branch fears the skill and expertise demonstrated by the IRC members will be diluted and if they are required to devote their attention to other matters, or members who are not drawn from an employment law background are required to determine these matters ..." "The Branch is also concerned that moves to merge or transfer the IRC's powers may place the continuing existence of the Newcastle IRC at risk. The advantages of having premises in Newcastle devoted to State employment issues are numerous and include ease of access, local and industry-specific knowledge and expediency. Deputy President Harrison and Commissioner Stanton have developed very strong working relationships with employers and unions in the greater Newcastle and Hunter

			region and it is those relationships which allow for the speedy resolution of disputes ..."
64. NSW Local Government, Clerical Administrative, Energy, Airlines and Utilities Union	**Option 1** (by implication)	Retain the IRC (and by implication the Industrial Court)	"[T]he Union does not support any diminution or reduction in the service levels of the Industrial Relations Commission. If there is to be any change we would support a fully resourced integration of employment related and discrimination matters and the responsibilities of the Chief Industrial Magistrate being brought into the current Industrial Relations Commission. The structure and architecture of the current Industrial Relations Commission could allow for a 'one stop shop' for employment related matters in NSW. However, this could only be achieved through an appropriate and adequately resourced and funded Industrial Relations Commission."
66.Development and Environmental Professionals' Association	**Option 1**	Not stated	"The Commission has a proud history, inspirational to both the Commonwealth and the other states. In local government members of the Commission have managed and overseen predominantly consensual changes to industrial instruments over at least two decades and managed industrial

			disputes with a primary focus on conciliation that has been to the benefit of the industry. The Commission is user-friendly and is supported by employee and employer organizations in the industry."
67. Hon Paul Lynch MP	A variation on **Option 1**	Retain the Industrial Court	"As to the IRC I propose the following: A specialist tribunal and court should be retained. This would mean retaining the IRC and adding to it appropriate allied jurisdiction: • Employment-related discrimination matters that are currently with the Anti-Discrimination Board (for conciliation) and the ADT (Equal Employment Division) for contested hearing; • Professional disciplinary matters (other than the regulation of doctors and nurses) currently in a range of tribunals; and • Conferring on the Industrial Relations Court parallel jurisdiction in common law employment contract matters. This would result in one specialist employment jurisdiction in New South

			Wales".
68. Local Government Association NSW; Shires Association NSW	**Option 1**	Retain the Industrial Court (by implication)	The Associations support a single employment jurisdiction. "That is, all industrial relations and employment related matters should be dealt with by a specialist 'one stop shop' tribunal." In that regard, the Associations indicated general agreement with the concept proposed by Arthur Moses SC in his 2009 Report, "The future of the Industrial Relations Commission of NSW and/or the Industrial Court of NSW".
72. Australian Road Transport Industrial Organisation, NSW Branch	N/A	N/A	The Australian Road Transport Industrial Organisation, NSW Branch had nothing critical to say of the IRC. However, it submitted the functions of the IRC regarding contract of carriage determinations be transferred to the proposed federal Road Safety Remuneration Tribunal.
74. Industrial Relations Society, Newcastle Branch	**Option 1** if the present arrangement regarding the IRC is not maintained	Retain the Industrial Court (by implication)	**"Recommendation 1**: Retain the existing tribunal arrangements for the Industrial Relations Commission. If change and consolidation is considered necessary, then a specialist employment/industrial relations tribunal is essential, so the Issue's Paper Option No 1 is recommended.

			Option No 3 is totally unacceptable." A regionally based specialist industrial relations tribunal is essential for the Hunter: "The Society draws the Committee's attention to the highly effective regional tribunal system that exists in the Hunter. It therefore follows that the NSW tribunal system must not be changed in any way that undermines the regional focus it has developed over recent years."
78. Unions NSW	**Option 1**	"Judicial members of the Commission should have dual appointments to the Supreme Court of NSW and to Fair Work Australia."	"Any consolidation of tribunals should be subsumed into the structure of the Commission." Alternatively, the Commission could be maintained in its current form with a number of additional tribunals to share its administrative functions and premises." "The special employment status of police officers requires an expert tribunal with experience in dealing with the unique circumstances of police." "Judicial members of the Commission should have dual appointments to the Supreme Court of NSW and to Fair Work Australia." "Any consolidated tribunal must be made an eligible State or Territory court for the

			purposes of the *Fair Work Act* 2009."
82. NSW Young Lawyers, Law Society of NSW	No particular preference between options 1 and 2	The Industrial Court could be maintained in its current form and vested with appellate jurisdiction in relation to employment and industrial type matters heard by the consolidated tribunal or an IRC with an expanded jurisdiction ... The Industrial Court could also be vested with appellate jurisdiction over anti-discrimination employment matters and professional discipline matters dealt with by any Super Tribunal or IRC with expanded jurisdiction. A new court of equivalent status to the Supreme Court could be created to preside over any consolidated tribunal. This court could exercise the residual jurisdiction of the Industrial Court in relation to work health and safety,	"Consolidation of the IRC with other tribunals, or a transfer of its jurisdiction to another tribunal, will be disadvantageous if a separate list or division of that tribunal is not created to exercise the jurisdiction of the IRC. IRC members should be appointed to any such list or division of a multijurisdictional tribunal to enable them to bring to bear their industrial expertise in resolving industrial matters and to maintain consistency in the determination of legal rights and duties."

		enforcement of industrial instruments, local and NSW Government industrial matters and police matters. Appeals from employment and industrial type matters and other matters dealt with by the consolidated tribunal could be brought to the court ... Furthermore, akin to the current constitution of the IRC and Industrial Court, members of the new court could receive dual appointments allowing them to exercise the non-judicial functions of the consolidated tribunal, ensuring a sufficient workload and allowing them to bring their expertise to bear in non-judicial employment and industrial matters.	
84. The Law Society of NSW	The Employment Law Committee expressed a preference for Option 2A	Create an employment Division of NEAT (see Option 2A) to be headed by a former Industrial Court judge. Establish an employment list within the Supreme Court	Adopt Option 2A as described in the Ministerial Issues Paper except that the common law employment jurisdiction of the District Court be transferred to the "Workplace and Employment Division" of NEAT.

		and appoint remaining judicial members of the IRC to the Supreme Court.	

ANNEXURE B

Brief History of the Industrial Relations Commission of New South Wales[1]

1. The Court of Arbitration, established by the *Industrial Arbitration Act* 1901, was a court of record constituted by a President (a Supreme Court judge) and two members representing employers and employees respectively. The Court came about as a result of the failure of employers and unions to use a system of voluntary arbitration. The Court had jurisdiction to hear and determine any industrial dispute or matter referred to it by an industrial union or the Registrar, prescribe a minimum wage and make orders or awards pursuant to such hearing or determination. This Court and its registry, the Industrial Arbitration Office, came under the administration of the Department of Attorney-General and of Justice from 12 December 1901.

2. The Industrial Court, established by the *Industrial Disputes Act* 1908, was constituted by a Supreme Court or District Court Judge appointed for a period of seven years. The Court did not require the existence of a dispute to ground its jurisdiction and had power to arbitrate on conditions of employment and could hear prosecutions. Together with its registry, known during 1911 as the Industrial Registrar's Office, the Court remained under the administration of the Department of Attorney-General and of Justice. The Act also established a system of Industrial Boards that consisted of representatives of employers and employees sitting under a chairman. The Industrial Court heard appeals from the Industrial Boards.

3. The Court of Industrial Arbitration was established by the *Industrial Arbitration Act* 1912. It was constituted by judges, not exceeding three, with the status of judges of the District Court. The Court was vested with all the powers conferred on all industrial tribunals and the chairman thereof. The Act

[1] The material under this heading is taken largely from the Industrial Relations Commission's Annual Report 2010

empowered the Minister to establish Conciliation Committees with powers of conciliation but not arbitration. They fell into disuse after about 12 months and a Special Commissioner (later known as the Industrial Commissioner) was appointed on 1 July 1912. This Court and its registry were placed under the jurisdiction of the Department of Labour and Industry, which administered the Act from 17 April 1912.

4. A Royal Commission on Industrial Arbitration in 1913 led to some major changes under the *Industrial Arbitration (Amendment) Act* 1916, which resulted in an increase in the membership of the Court and the transfer of powers of the Industrial Boards to the Court.

5. The Board of Trade was established by the *Industrial Arbitration (Amendment) Act* 1918. It functioned concurrently with the Court of Industrial Arbitration and was constituted by a President (a Judge of the Court), a Vice-President and representatives of employers and employees. The Board's functions were to conduct a public inquiry into the cost of living and declare an adult male and female living wage each year for industry generally and for employees engaged in rural occupations. In addition, it was to investigate and report on conditions in industry and the welfare of workers. The Board was in practice particularly concerned with matters relating to apprenticeships.

6. The *Industrial Arbitration (Amendment) Act* 1926 abolished the Court of Industrial Arbitration and the Board of Trade and set up an Industrial Commission constituted by a Commissioner and a Deputy Commissioner. The Commissioner or Deputy Commissioner sat with employer and employee representatives selected from a panel. On any reference or application to it the Commission could make awards fixing rates of pay and working conditions and determine the standard hours to be worked in industries within its jurisdiction and had power to determine any "industrial matter". The Commission had authority to adjudicate in cases of illegal strikes, lockouts or unlawful dismissals, and could summon persons to a compulsory conference

and hear appeals from determinations of the subsidiary industrial tribunals. The former boards, which had not exercised jurisdiction since 1918, continued in existence but as Conciliation Committees with exclusive new jurisdiction in arbitration proceedings.

7. A number of controversial decisions by the Industrial Commission led to the proclamation of the *Industrial Arbitration (Amendment) Act* 1927, which abolished the position of Industrial Commissioner (but not Deputy Industrial Commissioner) and the constitution of the Commission was altered to that of three members with the status of Supreme Court Judge. The Committees were still the tribunals of first instance and their decisions were to be the majority of members other than the chairman, whose decision could be accepted by agreement if the members were equally divided. Otherwise the chairman had no vote and no part in the decision. Where a matter remained unresolved in committee it passed to the Commission for determination.

8. In 1932, under the *Industrial Arbitration (Amendment)* Act, the emphasis fell on conciliation. The offices of Deputy Industrial Commissioner and Chairman of Conciliation Committees were abolished and a Conciliation Commissioner was appointed to fill the latter position. This Act also provided for the appointment of an Apprenticeship Commissioner and for the establishment of Apprenticeship Councils. The Conciliation Commissioner could call compulsory conferences in industrial disputes to effect an agreement between the parties when sitting alone or between the members of the committee when sitting as chairman. Any such agreement, when reduced to writing, took effect as an Award but was subject to appeal to the Industrial Commission. In addition, the Conciliation Commissioner or a Conciliation Committee could not call witnesses or take evidence except as directed by the Industrial Commission. Unresolved matters were referred to the Commission.

9. In 1938 the number of members of the Commission was increased to no less than five and no more than six and the Act, the *Industrial Arbitration and*

Workers Compensation (Amendment) Act, made provisions regarding investigation of rents and certain price fixing. The Act was again amended in 1939 mainly to address the fixing of maximum prices.

10. The *Industrial Arbitration Act* 1940 consolidated all previous Acts and an attempt was made to refine and rationalise the procedures and operation of the Industrial Commission. The Act provided for the establishment of an Industrial Commission, Conciliation Committees, Conciliation Commissioners, Special Commissioners, Industrial Magistrates Courts and the Industrial Registrar.

11. The *Industrial Arbitration (Amendment) Act* 1943 empowered the chairman, with the agreement of the members or by special authorisation of the Industrial Commission, to decide matters where there was division. The number of commissioners who might be appointed was also increased to five. The *Industrial Arbitration (Amendment) Act* 1948 allowed the commissioners to decide matters upon which the members were equally divided as well as make an Award where the disputing parties had been called into a compulsory conference.

12. In 1955 the maximum number of members of the Industrial Commission was increased to 12 and the next raft of significant changes came with the *Industrial Arbitration (Amendment) Act* 1959. These changes included defining the wage fixing powers of industrial committees and appeal provisions were also reformed.

13. In 1979 the Act was again amended to make provision for the establishment of Contract Regulation Tribunals. Generally, this gave the Commission jurisdiction over contracts for the bailment of taxi cabs and private hire cars and over contracts for the transportation by motor lorry of loads other than passengers.

14. In 1981 and again in 1989 the Commission's powers in relation to dealing with apprentices were clarified. In 1989 the *Industrial and Commercial Training Act* was passed and apprentices were treated as other employees for all industrial purposes.

15. By 1989 the Act provided that the Industrial Commission consisted of not more than 12 members, one of whom was the President and one of whom was the Vice-President. The Act also provided for the appointment of "non judicial" members who did not have to be legally qualified as well as "judicial" members. There were certain jurisdictional limitations for "non judicial" appointees. The Act reserved certain matters to be dealt with by judicial members only

16. In 1988 the then coalition government commissioned a comprehensive review of the State's industrial laws and procedures. The subsequent report, the Niland Report, had far reaching recommendations and became the basis for the *Industrial Relations Act* 1991. The former Commission was reconstituted as the Industrial Relations Commission and a separate Industrial Court. All existing members were appointed to the IRC. Two of the key features of the report were the introduction of enterprise bargaining outside the formal industrial relations system with agreements specifically tailored to individual workplaces or businesses and the provisions relating to unfair dismissal. Individuals could access the Commission if they believed they had been unfairly dismissed. Their remedy was reinstatement and/or compensation.

17. On 2 September 1996, the *Industrial Relations Act* 1996 ("the IR Act") came into force. It repealed and replaced the 1991 Act and is an example of plain English statute law. Chapter 4 of the IR Act established a new Industrial Relations Commission. Unlike the federal approach the States have not separated judicial and administrative functions in relation to the Commission's powers. The 1991 Act, for the first time, sought to adopt the federal approach

and established the Industrial Relations Commission and the Industrial Relations Court (although the judges' remained members of the Commission at all times). The IR Act restored the traditional arrangement by merging these two bodies. When the Commission was dealing with judicial matters it was called the Industrial Relations Commission of New South Wales in Court Session and was a superior court of record of equivalent status to the Supreme Court.

18. On 9 December 2005 the *Industrial Relations Amendment Act* 2005 was proclaimed to commence. This Act enables the Industrial Relations Commission of New South Wales in Court Session to be called the Industrial Court of New South Wales.

19. In March 2006, the *Workplace Relations Act* 1996 (Cth), as amended by the *Workplace Relations Amendment Act* 2005 (Cth), (known as Work Choices) came into effect. Relevantly, the effect of Work Choices was to extend the coverage of the federal industrial relations system to an estimated 85 per cent of Australian employees, that is those employees employed by "constitutional corporations" (i.e. trading, financial, and foreign corporations). By virtue of s 109 of the Australian Constitution, State industrial laws that had previously applied to employees of constitutional corporations no longer had any application to such employees. A High Court challenge to the validity of the Work Choices legislation was unsuccessful[2]. Consequently, the IRC no longer had jurisdiction in respect of constitutional corporations and their employees.

20. On 1 January 2010, the *Industrial Relations (Commonwealth Powers) Act* 2009 was proclaimed to commence. This Act referred certain matters relating to industrial relations to the Commonwealth for the purpose of s 51(37) of the Australian Constitution and to amend the IR Act. The primary role of the Act was to refer to the Commonwealth sufficient power to enable the creation of a national industrial relations system for the private sector. Essentially, this Act

[2] *New South Wales v The Commonwealth* [2006] HCA 52; (2006) 81 ALJR 34

transferred the residue of the private sector to the national industrial relations system and made clear that the Industrial Relations Commission retained jurisdiction in relation to State public sector employees and Local Government employees. Additionally, s 146B of the IR Act was amended to make clear Members of the Industrial Relations Commission of New South Wales could continue to be nominated as dispute resolution providers in federal enterprise agreements. This was designed to ensure that the many companies who continue to use the expertise of the Industrial Relations Commission would be able to continue those arrangements.

21. On 17 June 2011, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 commenced. This Act requires the Industrial Relations Commission to give effect to aspects of government policy declared by the regulations relating to public sector conditions of employment (s 146C) (this aspect is discussed in more detail in the Response).

22. On 1 January 2012, the *Work Health and Safety Act* 2011 commenced. This Act removes the jurisdiction of the Industrial Court to deal with Category 1 or 2 occupational health or safety offences arising under that Act or under the previous legislation[3]. The Industrial Court retains jurisdiction to deal with prosecutions for offences arising under the previous legislation filed with the Court prior to 31 December 2011[4].

---

[3] *Occupational Health and Safety Act* 2000.
[4] Work Health and Safety (Savings and Transitional) Regulation 2011 excepting matters in which the offence is alleged to have been committed after 7 June 2011.

ANNEXURE C

Examples of Industrial Disputes dealt with by the Industrial Relations Commission of New South Wales and Matters dealt with under s 146B of the Industrial Relations Act 1996

Examples of industrial disputes dealt with by the IRC

In order to give the Committee the flavour of the type of diverse issues that give rise to industrial disputes and the Commission's different approaches to resolving these disputes, set out below are some recent examples. Note that the vast majority of disputes are resolved by conciliation. However, occasionally arbitration is called for (see the first dispute below) and on rare occasions failure to comply with the Commission's orders may result in a civil penalty being imposed on the contravener.

Public Sector

(1) **Teachers in Schools** (Matter No IRC 1658 of 2011)

In October 2011 an industrial dispute occurred involving teachers in schools. The dispute related to increases in teachers' salaries and involved industrial action by the Teachers' Federation and its members. The dispute came before the Commission on three separate occasions in conciliation. On 11 November 2011, the last conciliation hearing, the Commission issued a Recommendation as to a process to resolve the dispute by the negotiation of new award terms including cessation of industrial action. The parties were unable to resolve the dispute.

The Commission issued a certificate of attempted conciliation and proceeded to arbitrate the issues in dispute[1]. After hearing the parties, on

[1] A refusal to accept a Recommendation or a failure by the parties to resolve the dispute may lead to arbitration, which is what occurred in this case. The dispute was resolved quickly and efficiently by a combined process of conciliation and arbitration and avoided ongoing industrial action in a critical public service, namely, schools.
A Dispute Order may be made (s 137) to require any industrial action to cease. Contravention of a Dispute Order may lead to a civil penalty (s 139). This process is relatively seamless and is all undertaken within the IRC. This contrasts with the federal process, which allows industrial action during a bargaining process, limits severely any access to arbitration and requires a separate

1 December 2012 the Commission issued a decision and made orders resolving the dispute: *Notification under s130 by Director General, Department of Education and Communities of a Dispute with New South Wales Teachers Federation Re Schedule A* [2011] NSWIRComm 160.

(2) **Casuarina Grove** (Matter No IRC 1695 of 2011)

The Peat Island Centre was closed by the Government due to the age of the facility and cost of renovating it to modern standards. The island, in the Hawkesbury River, is now for sale. The facility was replaced by Casuarina Grove, a modern, state of the art facility at Wyong, specifically designed for people with intellectual and age related support needs associated with concurrent health, mobility, and behavioural support needs.

The facility consists of 10 separate houses and can accommodate 96 permanent clients and four respite clients.

The opening of the facility was preceded by a staffing agreement with the NSW Nurses' Association.

On occupying the facility a number of building faults were revealed which posed serious risk to the safety of nursing staff and restricted the efficiency of the facility.

The parties were unable to resolve the matters between them and nurses imposed a range of work bans which included refusal to accept new residents. At the time 10 people were awaiting the opportunity to move in.

---

proceeding to be undertaken in the Federal Court to enforce FWA orders, which may involve lengthy delay.

A dispute was notified to the Commission in accordance with the disputes resolution procedure. The bans were removed and in an inspection of the facility by the Commission a plan was developed to solve all of the issues in an efficient and cost effective way.

The parties jointly reported progress each week to ensure that the focus remained on a swift and co-operative resolution and will make a final report on 1 February 2012.

(3) **Bellingen Hospital** (Matter No IRC 123 of 2010)

The dispute at Bellingen Hospital concerned a restructure of health services in the Coffs Harbour area, including the de-coupling of Bellingen and Dorrigo Hospitals, and a re-alignment of Bellingen Hospital with the Macksville Hospital.

The matter was notified by the NSW Nurses' Association which sought conciliation on behalf of members affected. Recommendations were made by teleconference proceedings that the parties confer.

The parties found that they were unable to engage on the issues.

Conference proceedings were convened at Bellingen Hospital on 3 May 2011, resulting in a Statement and Recommendation to guide the parties in further discussion. A further conference was held at Bellingen Hospital on 4 August 2011, the result of which is recorded in a further Statement.

It was essential to hold the proceedings on site at Bellingen to ensure that the relevant participants could attend without taking medical staff away from the hospital for a whole day or more to attend proceedings in Newcastle or Sydney to the obvious detriment to patient care arising from the absence of staff, or the failure of the dispute resolution

process due to the absence of key participants or information held at the site.

The matter was successfully concluded by agreement between the parties without expensive and time consuming arbitration proceedings.

(4) **Ambulance Service of NSW** - dispute re north coast race meetings (Matter Nos IRC 1769 and 1799 of 2011):

The NSW Ambulance Service and the Health Services Union (HSU) negotiated a new industrial instrument which, in part, cancelled an agreement that all northern NSW race meetings would be staffed with officers on overtime.

Specific replacement arrangements were not identified. Race meetings were then staffed by deployment of officers rostered to work at ambulance stations in reasonable proximity.

This reduced the operations manning and caused difficulty in response times, particularly in one case of major motor vehicle accident on the Pacific Highway.

Ambulance officers imposed bans on paperwork which meant that medical records were not being completed and billing of charges to clients could not occur.

Ultimately, the withdrawal of ambulance crews from race meetings or the inability to provide crews could result in the cancellation of race meetings with attendant community disruption and loss of State revenue.

The matter was notified by the Ambulance Service on Monday 21 November 2011 and heard that afternoon, resulting in bans being lifted.

Further proceedings on 28 November and 2 December 2011 resulted in settlement of the matter by a trial arrangement which is operationally sound and commercially constructive and is recorded in a Recommendation published on 2 December 2011. The parties will report the results of the trial and seek further assistance with any difficulties emerging at proceedings on 16 February 2012.

Paperwork build-ups were completed and there was no disruption to the racing community or State revenue.

(5) **Corrective Services** (Matter No IRC 759 of 2009)

By correspondence from the Minister for Corrective Services, dated 20 May 2009, there was notified, pursuant to s 130 of the *Industrial Relations Act* 1996, the existence of an industrial dispute as to a range of industrial issues surrounding the prisoner escort and court security functions undertaken by the Department of Corrective Services.

The Minister requested the Department of Corrective Services and the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales identify and implement strategies that would realise savings of $5 million per annum in relation to the Department's inmate escort and court security functions within six months. He further advised that, should the savings through efficiencies not be identified and implemented within six months, the Government intended to outsource inmate escort and court security service functions to the private sector.

Over several conciliation conferences through to December 2009 involving a number of Recommendations to the parties the Commission assisted the parties in identifying the required cost savings. See *Department of Corrective Services and Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales* [2009] NSWIRComm 121; *Department of Corrective Services and Public Service*

Association and Professional Officers' Association Amalgamated Union of New South Wales [2009] NSWIRComm 149; *Department of Corrective Services and Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales* [2009] NSWIRComm 212.

(6) **Muswellbrook Hospital** - New South Wales Nurses' Association threat to close 10 hospital beds from 31 October 2011 (Matter No IRC 1682 of 2011)

This dispute was notified to the Industrial Registrar at 11.00am on 31 October 2011 by the Hunter New England Local Health District (the Local Health District) following the announced intention of the New South Wales Nurses' Association (the Nurses' Association) to immediately close 10 Emergency Department hospital beds at Muswellbrook Hospital "*in the interest of safe patient* care" as part of a workloads grievance campaign to increase nursing resources.

Shortly after the lodgement of the dispute notification, the Commission was informed the relevant Nurses' Association official was, at the time, travelling between Sydney and Muswellbrook. The official was subsequently contacted by registry staff and the matter was listed for urgent compulsory conference proceedings before Commissioner Stanton in Newcastle at 11.45am that day. The Local Health District and the Nurses' Association representatives appeared before the Commission in Newcastle. Registry staff arranged for Muswellbrook Hospital management and Nurses' Association site representatives to participate in conference proceedings by telephone link. At the conclusion of those proceedings, the Commission issued the following Statement and Recommendation:

1. The respective positions of the parties were extensively canvassed in conference proceedings today. Having considered those views and obligations of the parties under the *Industrial Relations Act 1996* and

the Nurses' Award, the Commission makes the following strong recommendation:

(a) Members of the Association employed at Muswellbrook Hospital shall meet at the earliest opportunity this afternoon to seriously reconsider their threatened action concerning Emergency Department bed closures;

(b) The parties shall meet at 10.00am tomorrow, Tuesday, 1 November 2011 at Muswellbrook Hospital to further discuss the current dispute issues and the current position identified by HNE Health; and

(c) The Award disputes procedures *status quo* provisions shall apply.

2. The Commission will convene a further Conference at 12.00 Noon tomorrow, 1 November 2011 by telephone link to determine progress of this matter.

On 1 November 2011, the Commission was informed the above recommendation had been accepted by the Nurses' Association members and all threats to close hospital beds had been averted pending further discussions between the parties. Further Conferences convened on 4 and 23 November 2011 provided an opportunity for the parties to further consider issues related to staffing levels, patient care, staff safety and roster arrangements in a rational and orderly way. Subsequent Commission recommendations concerning communication, consultation and trust were adopted by the parties. Much goodwill was also generated.

The dispute was resolved in early December 2011 following an agreement by the Local Health District to apply additional nursing resources to accommodate identified peak periods within the Muswellbrook Hospital Emergency Department.

The threatened action by the Nurses' Association coincided with the annual two day Muswellbrook Race Club Cup Carnival.

Local Government

The primary industrial instrument in the NSW Local Government Sector is the *Local Government (State) Award* ("the Award") which was made on 28 October 2010 by agreement of the parties, resulting from an assisted bargaining process (see Decision of Grayson DP dated 28 October 2010 in *USU v LGA and SA* [2010] NSWIRComm 146).

A unique feature of the Award is the capacity for individual councils to make Local Area Workplace Agreements to meet their particular circumstances.

There is a strong adherence to the dispute resolution procedures within Local Government which provides stability to what in the past has been a volatile industrial environment.

The Award applies to all councils other than those of sufficient critical mass and desire to negotiate an agreement of specific application. In those cases the Award provides a benchmark for negotiation.

Port Stephens Council has negotiated two such agreements. The first in 2007 to apply to 31 August 2011 and again from 1 September 2011 to apply for three years. On each occasion this was achieved by an assisted bargaining process described in Statements issued (see *Notification under section 130 by New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union of a dispute with Port Stephens Council re Collective Agreement* [2008] NSWIRComm 178) and *Port Stephens Council Enterprise Agreement 2011* [2011] NSWIRComm151).

Port Stephens is a Local Government area with a strong tourism base; contains a rural component; includes a major airport and military establishment; and has fast growing residential areas and a diverse socio economic spectrum.

There are 538 employees providing a range of community services from library, childcare, community policing, road construction and maintenance, parks and gardens, tourist facilities, engineering and planning responsibilities.

There are three unions involved:

- United Services Union - most employees;
- Local Government Engineers' Association; and
- Development and Environmental Professionals' Association

At the commencement of negotiations for a new industrial agreement the parties sought the assistance of the Commission prior to coming into conflict. A process of inclusion was developed.

A Workplace Agreement Committee was established which was supported by functional sub committees and broadly based communication.

The outcomes are recorded in a Decision published in 2008 in the following terms [2008] NSWIRComm 178:

> [8] A separate professional unit of Council undertook an in-depth review of the salary administration system within Council with periodic progress reports to the WAC.
>
> [9] The WAC considered a vast range of issues, opportunities, and options in a constructive and cooperative manner. Some options were accepted and some discarded in reaching consensus at its meeting of 27 June 2008 on a draft of a new industrial agreement to cover employees of the Council.
>
> [10] The centrepiece of the proposed agreement is a revised salary administration system which will better recognise, reward, and encourage skills development to the mutual benefit of Council and its employees.
>
> [11] This is supported by a range of flexible working conditions, rights and obligations designed to attract and retain employees and improve efficiency of Council's operations to the benefit of the community at large.

...

> [26] The Enterprise Agreement is a well balanced, mutually beneficial arrangement, consistent with industry and community standards. It has been constructed as an indivisible package, having regard to affordability by Council, security of employment, and earnings and career opportunities for employees. "

The process and outcomes were recognised by the industry body which presented the Council with an award of excellence.

Newcastle City Council took advantage of the assisted bargaining process in the making of a new agreement and revision of a Local Area Workplace Agreement to introduce technological change and remove job and finish from the waste services area.

Wagga Wagga City Council (Matter No IRC 5533 of 2005) commenced to undertake a major restructure at the same time as it was introducing a new salary system. Both matters were extremely controversial and caused employees a great deal of angst resulting in a great deal of local publicity with reports being published that hundreds of positions were in jeopardy.

The Commission intervened at the request of the parties and programmed a series of local conferences with an agreement that a statement would be made at the conclusion of each conference and released to local media to ensure that there was no publication of any misleading or provocative reports that would create unrest amongst the employees or local community. These were very complex inter-related disputes that took approximately two years to bring to a final conclusion, however, all parties acknowledged that the assistance of the Commission was invaluable in reaching agreement without industrial disruption.

Broken Hill (Matter No IRC 1654 and 1990 of 2009) the NSW Department of Health notified in December 2009 of a dispute with the Barrier Industrial Council (BIC) regarding withdrawal of security labour. Bans and limitations had been imposed by the BIC. A teleconference was immediately convened

during which a direction was issued for the lifting of such bans and limitations and this occurred, thus avoiding significant disruption to important health services in the Far-West of the State.

In February 2010, as the Commission was assisting in these proceedings, the parties sought the further assistance of the Commission in relation to an impasse in negotiations over a new Enterprise Agreement. As the matter was not urgent it proceeded by way of teleconference on various occasions through the balance of that year until June 2011 when issues in dispute were crystallised and agreed and these outstanding matters were set down for a 3-day arbitrated hearing in Broken Hill. The Union alone had 28 witnesses to call in relation to the outstanding matters.

Further conciliation was undertaken by the Commission with all parties sitting around the table at Broken Hill Court House prior to the commencement of the arbitration proceedings. The outstanding issues were able to be resolved settlement was recorded. Again the parties acknowledged the invaluable assistance of the Commission in negotiating, over a prolonged period, arrangements that will result in continuing industrial peace in an area once renowned for high levels of industrial disputation.

Other Notable Disputes

Referred to below are a number of other disputes dealt with by the Commission that either involved industrial action in key areas of the public sector, or threatened industrial action. The Commission's involvement was critical to the ultimate resolution or finalisation of the industrial dispute.

1. *Director General, NSW Department of Education and Training v NSW Teachers Federation* [2010] NSWIRComm 10. Dispute involving TAFE teachers; industrial action in connection with the Federation's opposition to the implementation of the variations to the Crown Employees (Teachers in TAFE and Related Employees, Bradfield College and Teachers in TAFE Children's Centres) Salaries and Conditions Award 2009 flowing from the decision of the

Full Bench in *Crown Employees (Teachers in TAFE and Related Employees, Bradfield College and Teachers in TAFE Children's Centres) Salaries and Conditions Award 2009* [2009] NSWIRComm 169. Dispute orders were ultimately made and a civil penalty imposed for contravention of the dispute orders.

2. *Director General, NSW Department of Health v New South Wales Nurses Association* [2010] NSWIRComm 160; *Director General, NSW Department of Health v New South Wales Nurses Association (No 2)* [2010] NSWIRComm 163; *Director General, NSW Department of Health and New South Wales Nurses Association (No 3)* [2010] NSWIRComm 190. Dispute concerning proposed bans by the NSW Nurses Association in connection with the Association's claim for increased wages and improved working conditions in the Public Health System Nurses and Midwives (State) Award and in connection with the Association's claims regarding Nurse Ratios and Skill Mix. The proposed bans involved bed closures and service restrictions. The dispute was eventually resolved by agreement between the parties with the assistance of the Commission.

3. *State Transit Authority of NSW v Rail Tram and Bus Union (NSW Branch)* [2010] NSWIRComm 9. Dispute over wages and employment conditions for bus operators. Strike action. Commission member returned after hours to deal with urgent notification of impending 24 hour strike by Sydney and Newcastle bus drivers. Dispute resolved.

4. *Construction, Forestry, Mining and Energy Union (New South Wales Branch) and Macquarie Generation* [2009] NSWIRComm 160. Dispute over appointment of operators and other issues. In its decision the Full Bench referred to the "Bluescope" process developed in the Commission. The Full Bench stated:

> 1. It may seem somewhat unusual to commence this Statement by the announcement of the successful resolution of a complex industrial dispute, but that slightly different approach fits neatly with the

unconventional method used to resolve the dispute, namely, the 'BlueScope model'.

2. There has now been substantial discussion and usage of the 'BlueScope model' in decisions of the Commission: *Operational Ambulance Officers (State) Award* [2008] NSWIRComm 168; *BHP Billiton and The Australian Workers' Union (Notification by the Minister for Industrial Relations)* [2002] NSWIRComm 378; *Crown Employees (NSW Fire Brigades' Permanent Firefighting Staff) Award* 2008 [2008] NSWIRComm 174 and *Crown Employees (Public Sector - Salaries 2008) Award* [2008] NSWIRComm 193.

3. The model was applied in this case, as it typically is, by means of proceedings before a Full Bench of the Commission. It involved the use of alternative preparatory procedures and a detailed investigation of the full scope of the industrial issues which had attracted attention in a variety of proceedings before the Commission, which we will describe below. The ultimate resolution of those issues is to be found in an agreement between the parties which is annexed to this Statement and described as the 'Macquarie Generation Production Technician Restructuring Agreement'.

4. It is suffice to say, at this point, that we agree with the submissions received from the parties at the conclusion of the proceedings that the adoption of the 'BlueScope model' made a material difference to the resolution of the industrial dispute. Indeed, it was submitted that there was very little prospect that the ultimate resolution may have been achieved by the utilization of traditional dispute resolution procedures or other processes before the Commission. This is not to disparage those other procedures but, simply, to acknowledge that the 'BlueScope model' procedure may be very valuable in the resolution of particular industrial disputes, most notably ones involving multiple, longstanding and complex issues or issues which are not comprehensively resolved by a normal *inter parte* contest in relation to a particular application.

5. *Notification under section 130 by the NSW Department of Health of a Dispute with Health Services Union re Threatened Industrial Action by Ambulance Crews* [2009] NSWIRComm 16. Industrial action proposed to be taken against a decision of the Minister for Emergency Services to approve a recommendation of the State Rescue Board regarding the deployment of ambulance paramedic rescue units. Dispute orders made by Full Bench of Commission.

6. *2008 Public sector wages round.* A number of significant wages agreements in the public sector expired in 2008 generating claims by unions for new agreements. The negotiations were drawn out and difficult in the face of union opposition to a government wages policy, which provided that any increase beyond 2.5 per cent had to be offset by employee related cost savings. In a number of benchmark proceedings the Commission assisted the parties through a process of conciliation and "Bluescope arbitration" (whereby the parties agreed to accept any outcome recommended by the Commission) to achieve outcomes consistent with the wages policy so that savings were achieved. It was unnecessary to impose any outcome by a formal arbitration process. Industrial action across a large number of departments and agencies was negligible. Notable examples include the following:

    a. *Crown Employees (NSW Fire Brigades Permanent Firefighting Staff) Award 2008 and another* [2008] NSWIRComm 174;

    b. *Crown Employees (Public Sector - Salaries 2008) Award and another* [2008] NSWIRComm 193; *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director General, Department of Premier and Cabinet* [2010] NSWIRComm 59;

    c. *Operational Ambulance Officers (State) Award and others* [2008] NSWIRComm 156; *Operational Ambulance Officers (State) Award and others* [2008] NSWIRComm 168.

SECTION 146B - NATIONAL EMPLOYERS

National Employers and the bargaining agents on behalf of employees in a range of industries have elected to nominate the IRC as their dispute resolution provider in accordance with s 146B of the IR Act. There are no records kept of the agreements which nominate the Commission as the dispute resolution provider. In many cases the Commission will not be aware of such an arrangement between the parties in agreements approved by Fair Work Australia until a dispute arises and the assistance of the Commission is sought.

There are estimated to be approximately 200 agreements across a range of projects in the Hunter Valley. The actual number may be in excess of this, but they include agreements made by such notable corporations as Bechtel Australia, Daracon Engineering Pty Ltd, Downer EDI Engineering, Sandvik Australia Pty Ltd, Laing O'Rourke and John Holland Pty Ltd. A most significant referral agreement[2] also exists at Bluescope Steel's Port Kembla plant.

The reason for choosing the IRC as the dispute resolution provider may differ for each corporation. However, it would seem to include at least the following:

- access to quick response dispute resolution processes. The procedure for notifying and listing of a dispute in the NSW system is extremely efficient, with the capacity for matters to be dealt with on the day of lodgement;

- a focus on resolution through a conciliation process;

- confidence in the experience and expertise of IRC members;

- pro-active industrial relations. Parties may seek the assistance of the Commission in a pro-active role to assist the effectiveness of productivity and workplace safety programs. The administrative authority of the Presidential Members as Panel Heads allows for listing of matters on the initiative of the Panel Head and a process of co-operative inclusion to be created, without the parties being in dispute. In this manner disputes are avoided or resolved at an early stage preventing the cost of lengthy proceedings.

[2] Agreements conferring on the IRC dispute resolution powers, pursuant to the relevant provisions under the *Fair Work Act* 2009 (Cth) and s 146B of the *Industrial Relations Act* 1996.

Bluescope Steel

Reference was made to the Bluescope referral agreement at Port Kembla. In August 2011, Bluescope Steel announced to the Australian Stock Exchange its decision to undertake an extraordinary restructure of its steelmaking operations. The company confirmed it would close one of its two blast furnaces and abandon its export business with the loss of 1000 jobs. The potential for major industrial disruption at the plants was very high.

With the IRC assuming powers under the referral agreement, the matter was allocated to the Vice-President of the Commission, Justice Walton. There followed an exhaustive conciliation process punctuated by issues requiring arbitration concerning such matters as manning (department by department), redundancies, severance payments, rostering issues and the like. In a Statement issued by the Vice-President on 7 December 2011 (*BlueScope Steel (AIS) Pty Ltd and The Australian Workers' Union, New South Wales* [2011] NSWIRComm 162), his Honour stated:

> [5] In terms of the overall restructuring, I should record my congratulations to the parties on ultimately effecting the restructure within a very short timeframe and without industrial disruption. This is not to depreciate the hardships caused by the withdrawal of the company from the export market but to recognise the significant effort and mature judgment exercised by the parties in managing the difficulties arising from the changes to the operations.

As all parties would readily acknowledge, the Commission's involvement was critical to the success of the outcome and the handling of the dispute stands in stark contrast to the recent Qantas dispute. Undoubtedly, Bluescope's Port Kembla plants have a far more volatile industrial history than Qantas.

NSW Power Industry

There is a high incidence of referral agreements[3] in the NSW power industry and in turn, strong involvement of the IRC.

Delta Electricity

There has been a significant reduction in industrial disputes and positive work practice change arising from a consultative model facilitated by the Commission. Work practice changes include the introduction of a sixth shift, re-organisation of operational factors and integration of plant both in the Central Coast and Western operations.

Eraring Energy

Ongoing proceedings are dealing with positive work practice changes within the Operator group which has been encouraged to engage in an interest based process under the supervision of the Commission.

Macquarie Generation

This organisation has achieved the introduction of more efficient work practices as a result of proceedings in the Commission, including dual unit operation (one Operator for two production units) and new classifications which provide greater workplace flexibility. A statement by a Full Bench of the Commission records the success of applying the Bluescope process to a work practice change dispute (*Construction, Forestry, Mining and Energy Union (New South Wales Branch) and Macquarie Generation* [2009] NSWIRComm 160).

Ausgrid

The Commission has facilitated the network capital expenditure program and the introduction of a drug and alcohol policy, as well as assisting the parties to engage and resolve a number of operational and behavioural issues.

[3] Agreements conferring on the IRC dispute resolution powers, pursuant to the relevant provisions under the *Fair Work Act* 2009 (Cth) and s 146B of the *Industrial Relations Act* 1996.

Essential Energy

The Commission has facilitated the integration of several organisations into Country Energy, now known as Essential Energy. This organisation has a large footprint which at times creates problems, simply arising from the tyranny of distance and disparate regional attributes.

Proceedings in Broken Hill, where the organisation provides both electricity and water, resolved long standing industrial issues.

The organisation has used the offices of the Commission to facilitate various organisational changes, including the restructure of positions and duties in all depots, as well as resolving conduct and behavioural issues.

Hunter Valley Coal Chain

The Hunter Valley Coal Chain is a significant source of revenue for the NSW Government and referral agreements have played a significant role in achieving and maintaining a stable industrial relations environment.

The Auditor General's Report - Performance Audit on Coal Mining Royalties, November 2010 - identified that in 2008-2009 the Government received $1.28 billion in mining royalties, representing 2.6% of total revenue. The majority of royalties derive from the Hunter Valley Coal Chain.

This amount will continue to increase as the Hunter Valley Coal Chain expands from its current capacity of 100 million tonnes per annum (mtpa) towards the intended target of 250 mtpa.

Royalty rates are: 8.2% of value of open cut coal;
7.2% of value of underground coal;
6.2% of value of deep underground coal.

On average coal to the value of $50m is dispatched through the Port of Newcastle every 24 hours.

On an average royalty of 7.2% (which is conservative as the majority of coal leaving Newcastle is open cut with very little deep underground coal) the daily value of industrial stability in the coal chain is $3.6m. A day lost to industrial action cannot be recovered as the system is running at maximum capacity.

Expansion of production and associated infrastructure adds further revenue to the State. For example, the recent two million tonne per annum expansion of the Wilpinjong Washery on schedule will, at current market rates, add royalty revenue of $20 million per annum. The fact that there were no delays to the project brings this revenue in much earlier than could otherwise be expected: see *Request by Unions NSW and Newcastle Trades Hall Council for the assistance of the Industrial Relations Commission of New South Wales re Taggarts Wilpinjong Project* [2011] NSWIRComm 164

Coal chain expansion

The Hunter is presently experiencing an expansion in the coal chain. Two significant examples are:

- Expansion of Kooragang Coal Loader for Port Waratah Coal services managed by Rio Tinto on behalf of shareholders.

- Construction of coal loader for the Newcastle Coal Infrastructure Group (NCIG).

NCIG is a consortium of BHP Billiton, Centennial Coal, Donaldson Coal, Peabody Energy, Yancoal Australia and Whitehaven Coal, managed by Aurecon Hatch.

Commenced in 2008, the final development of this facility will add 66 million tonnes per annum capacity to the Hunter Valley Coal Chain. The project is on schedule and within budget.

There has been only one industrial incident on the site occasioned by asbestos contamination found in recycled building material used as road base on site. Consistent with the dispute resolution procedures and arrangements in place pursuant to s 146B of the IR Act, Unions NSW sought the assistance of the Commission to resolve a range of employee, contractor and Union concerns regarding the discovery of asbestos fragments (Matter No IRC 1466 of 2010).

The Commission convened urgent compulsory conference proceedings in Newcastle at 11am on 7 September 2010. The Commission chaired joint and separate conferences of the parties throughout the day to establish whether there was a capacity for the parties to reach a consensus on a range of proposals and action plans in support of an orderly resolution of the dispute.

During the course of proceedings the legal representatives of NCIG informed the Commission that the cost of closing the site was in excess of $2 million per day.

At 7.30pm on 7 September 2010 the Commission issued a Statement and Recommendation for endorsement by the parties in the following terms:

> 4. The issues involved in this dispute are complex. However, the Heads of Agreement proposal developed today is a most welcome initiative. The proposal contains the following elements:
>
> (1) An audit is to be undertaken to identify areas of site where the relevant material is located.
>
> (2) An air and soil testing regime is to be established, including sampling of crib rooms and other work rooms.
>
> (3) Notice will be provided to relevant contractors and Unions and testing results will be made available, which are to then be communicated to employees when areas have been remediated, material removed or testing in rooms returned negative.
>
> (4) No contractors' employees will be required to work in areas where material is located until it is capped/remediated or removed. Alternate work may be found in areas where the material is not located, or on other subcontractor project

sites. Employees who are not engaged on alternate work or remediation work will be paid their ordinary hours for the day.

(5) Employees may be engaged to perform remediation work. For remediation work; employees will be given appropriate information, training, briefings and personal protective equipment prior to work commencing. Appropriate amenities will be provided to employees involved in remediation work.

(6) Contractors, Unions and employees will be advised of the timing and progress of the application for and approval of a removal license with WorkCover NSW for Crocketts. All efforts are to be made to have this application, and the removal of the materials, occur as soon as possible with the aim that the removal work be completed within 3 weeks.

(7) Risk assessments will be prepared in consultation with employees and signed off by Aurecon Hatch.

(8) Discussions will continue to take place with Boral about the Recycling Plant, to review Boral's quality assurance and testing systems. The matter has been reported to WorkCover NSW who have undertaken an inspection of the Recycling Plant. Discussions will continue to take place with WorkCover NSW to ensure all appropriate steps have been taken and site concerns addressed.

(9) Each contracting company will communicate separately with their respective employees about health monitoring in respect of exposure to the material, which will be dealt with in accordance with each company's policy.

5. The Heads of Agreement proposed provides a plan to resolve this dispute. Accordingly, the Commission strongly recommends that the Unions, contractors and employees give this proposal serious consideration and endorse it as a major step towards resolving this dispute in a rational and orderly way. In the interim, the Commission stands ready to further assist the parties if required at short notice.

The above proposal was endorsed by meetings of contractors and employees concerned on 8 September 2010. NCIG subsequently agreed to close the site and utilise planned roster days and the weekend to effect site remediation. Normal site operations resumed on Monday 12 September 2010.

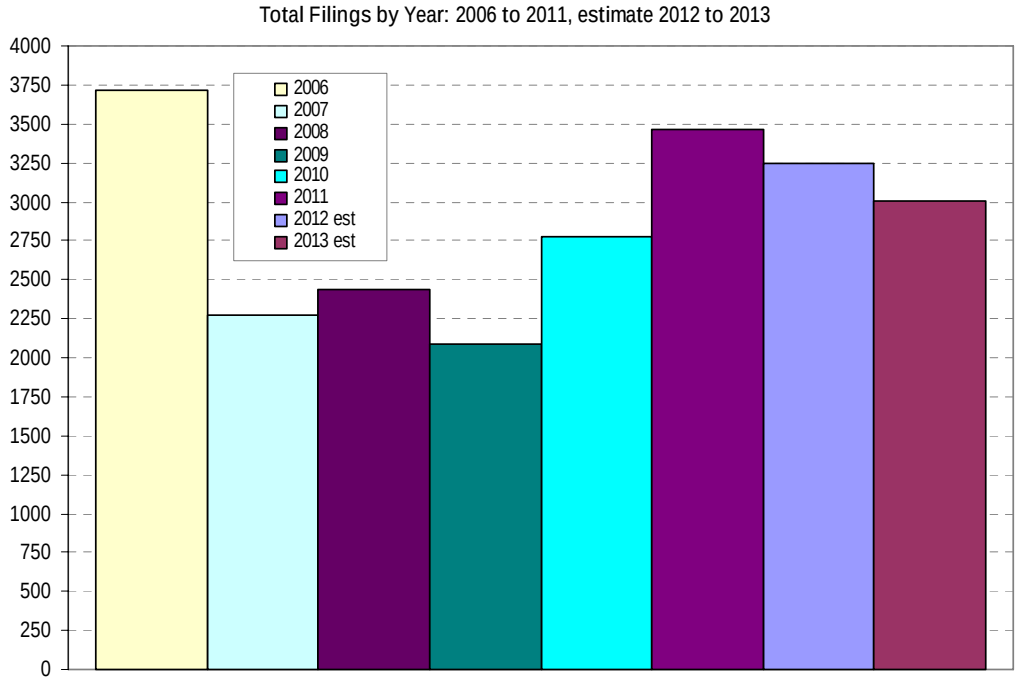
Other notable projects

A number of Decisions and Statements published by the IRC over the past two decades record the progress and success of the pro-active model of industrial relations applied on major projects. At the time it was unnecessary to rely on a provision such as s 146B of the IR Act because the Commission's jurisdiction was not limited in the way it now is. These projects included the Sydney Harbour Tunnel Project, Sydney Airport Link Tunnel Project and development of the Homebush Olympic Site.

ANNEXURE D

Industrial Relations Commission of New South Wales – Filings and Caseload 2006 to 2013

CHART 1



Description:

Total filings by year between 2006 to 2011 with estimates for 2012 to 2013. Includes PS & TAB appeal filings from 1 July 2010.

Notes:

•For 2010
Public Sector and TAB Appeals filings are included from 1 July 2010.

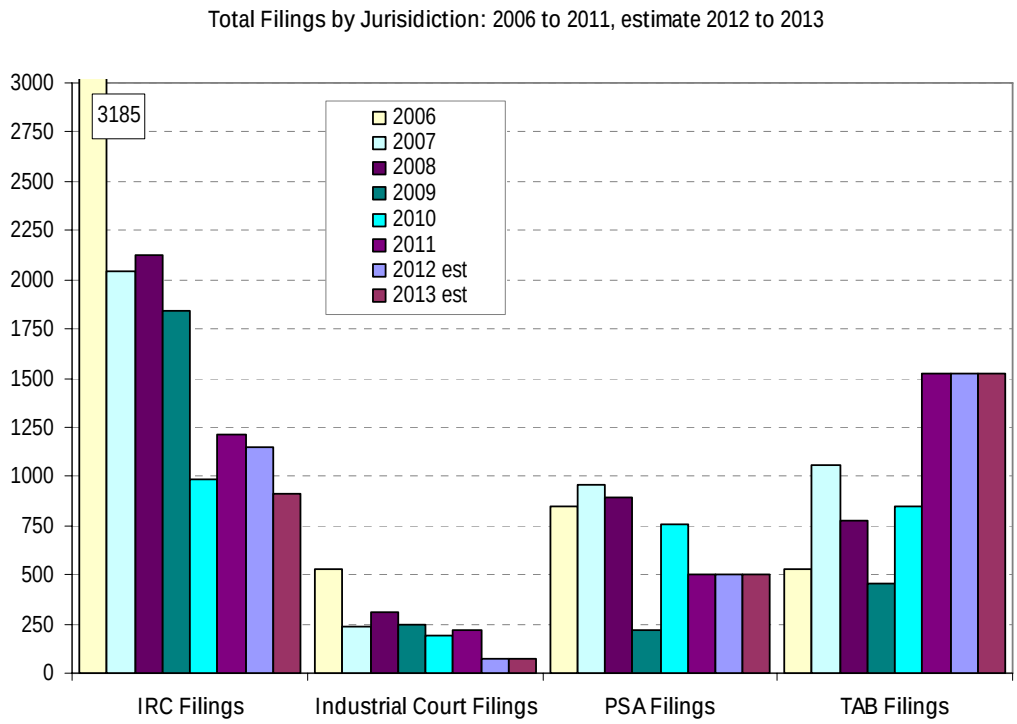
•For 2011
General increase due to filings in:
TAB - 1520
Public Sector Appeals - 506
Awards – 401 (spike due to 306 non-operative awards arising out of the Award Review Initiating Proceedings)
OHS - 144 made up over 66% of Court filings (60%, 53%, & 68% in 2008, 2009 and 2010)
Filings in 2008, 2009 & 2010 were 185, 131 & 131.

•For 2012 and 2013
Based on 2011 filings, excepting:
OHS filings are nil.
Awards filings in 2012 increase due to 235 reviews to commence, otherwise expect 95 in 2013.
Disputes 488 (486, 488 in 2010 & 2011).
PS and TAB appeals, 506 and 1520.
Dismissals 190 (227, 190 in 2010 & 2011)

Data:

Year	2006	2007	2008	2009	2010	2011	2012 est	2013 est
Total Filings	3717	2273	2434	2086	2775	3460	3245	3010

CHART 2



Description:

Total filings by jurisdiction between 2006 to 2011 with estimates for 2012 to 2013.

Notes:

Includes, for comparative purposes, data from the former GREAT and TAB bodies.

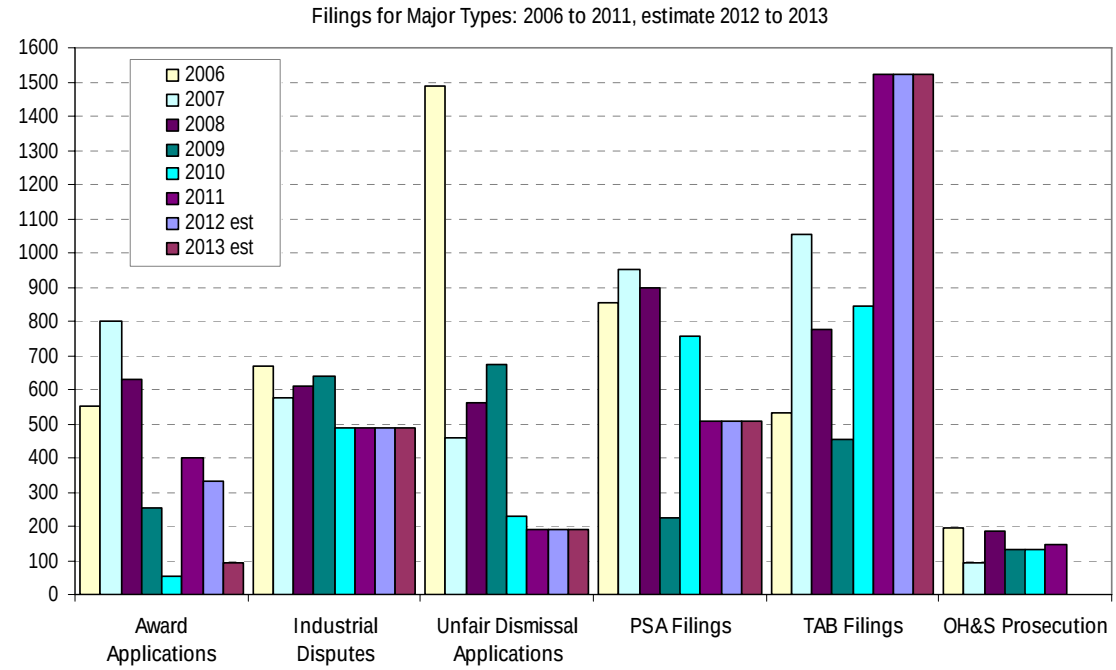
Public Sector and TAB Appeals filings prior to 2010 are filings to the former GREAT and TAB bodies.

PSA filings separated from IRC to contrast filings.

Data:

Filings	2006	2007	2008	2009	2010	2011	2012 est	2013 est
IRC	3185	2038	2124	1840	981	1216	1145	910
Court	532	235	310	246	194	218	74	74
PSA	852	953	898	222	755	506	506	506
TAB	532	1055	777	453	845	1520	1520	1520

CHART 3



Description:

Filings for major types of matters between 2006 to 2011 with estimates for 2012 to 2013.

Notes:

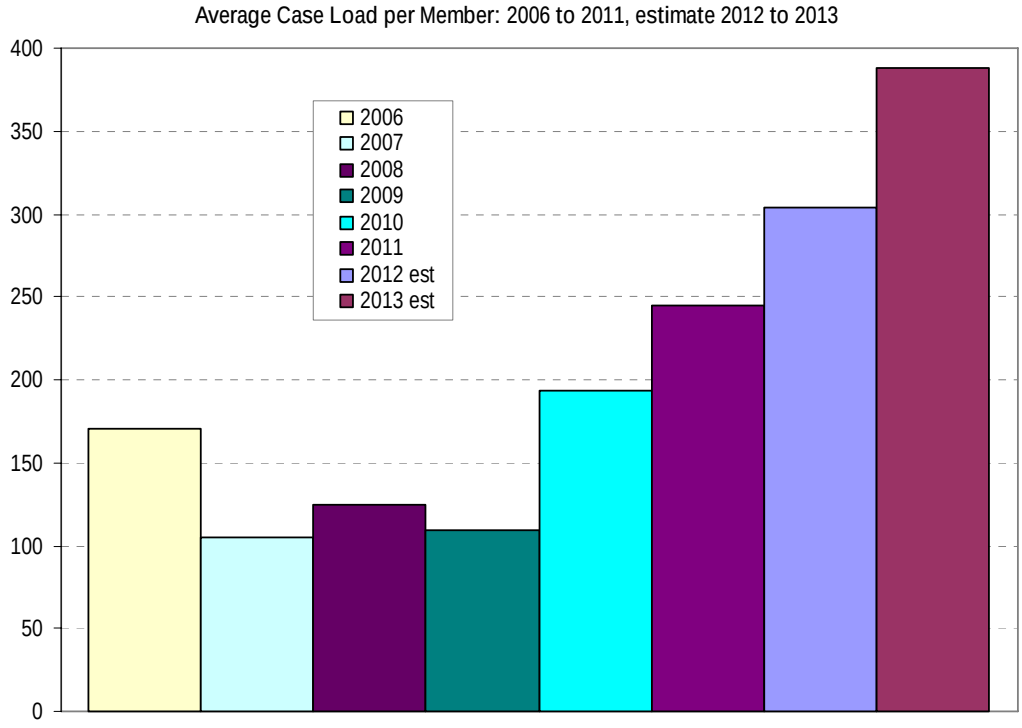
Includes, for comparative purposes, data from the former GREAT and TAB bodies.

Public Sector and TAB Appeals filings prior to 2010 are filings to the former GREAT and TAB bodies.

Data:

Filings	2006	2007	2008	2009	2010	2011	2012est	2013est
Awards	553	802	628	254	52	401	330	95
Disputes	668	574	609	638	486	488	488	488
Dismissals	1490	458	560	673	227	190	190	190
PSA	892	953	898	222	755	506	506	506
TAB	532	1055	777	453	845	1520	1520	1520
OHS	193	93	185	131	131	144	0	0

CHART 4



Description:

Average case load for members between 2006 to 2011 with estimates for 2012 to 2013.

Notes:

Case load is a factor of the distribution of actual filings to members – for example the distribution of an appeal to all the members comprising the appeal bench.

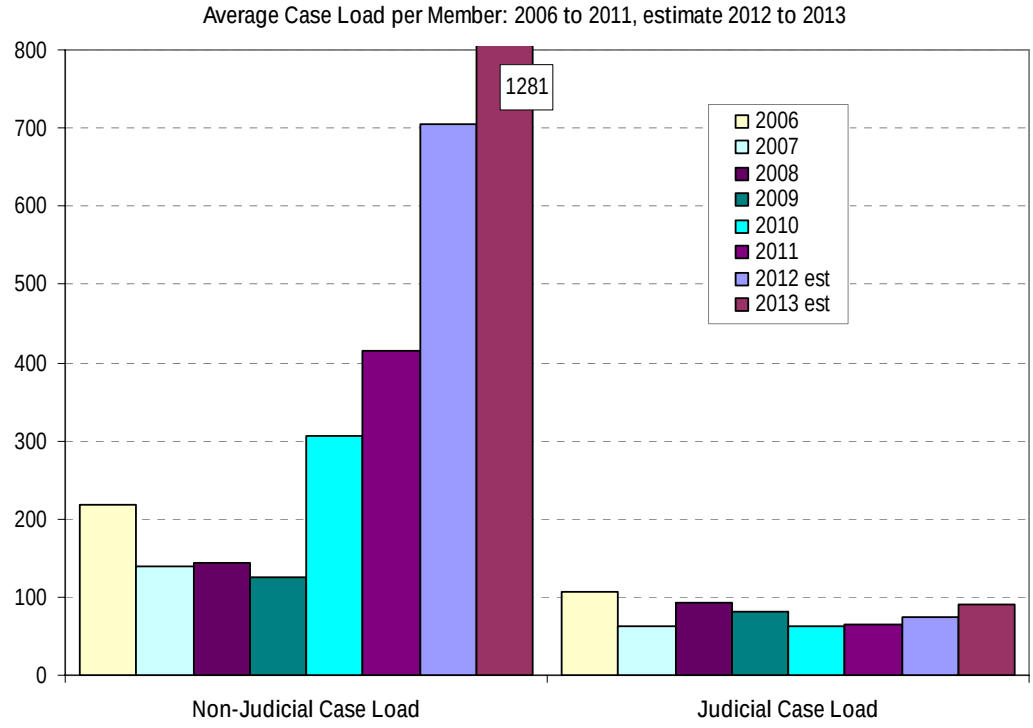
The number of members, from 2010 onwards in relation to FWA commitments, is represented as an average of the full-time equivalent over the year.

Additionally the change in the number of non-judicial members during 2010 and 2011 was:

Data:

	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012 est**	**2013 est**
Members (FTE)	23	23	21	20	15	14.5	11	8
Judicial	10	10	8	7	7	7	7	6
Non-Judicial	13	13	13	13	8	7.5	4	2
Total case load	3921	2423	2620	2196	2895	3554	3339	3104
Average case load	170	105	125	110	193	245	304	388

CHART 5



Description:

Average case load for Non-Judicial and Judicial members between 2006 to 2011 with estimates for 2012 to 2013.

Notes:

Case load is a factor of the distribution of actual filings, and the type of case load dealt with between the Judicial and Non-Judicial members – for example the distribution of an appeal to all the members comprising the appeal bench, and the allocation of public sector and transport promotion appeals to Non-Judicial members. Cases allocated to judicial members obviously involve judicial work, which is generally more complex than the non-judicial work and where non-judicial work is allocated to judges it is usually of a more complex or more significant nature than the work allocated to non-judicial members.

The number of members, from 2010 onwards in relation to FWA commitments, is represented as an average of the full-time equivalent over the year.

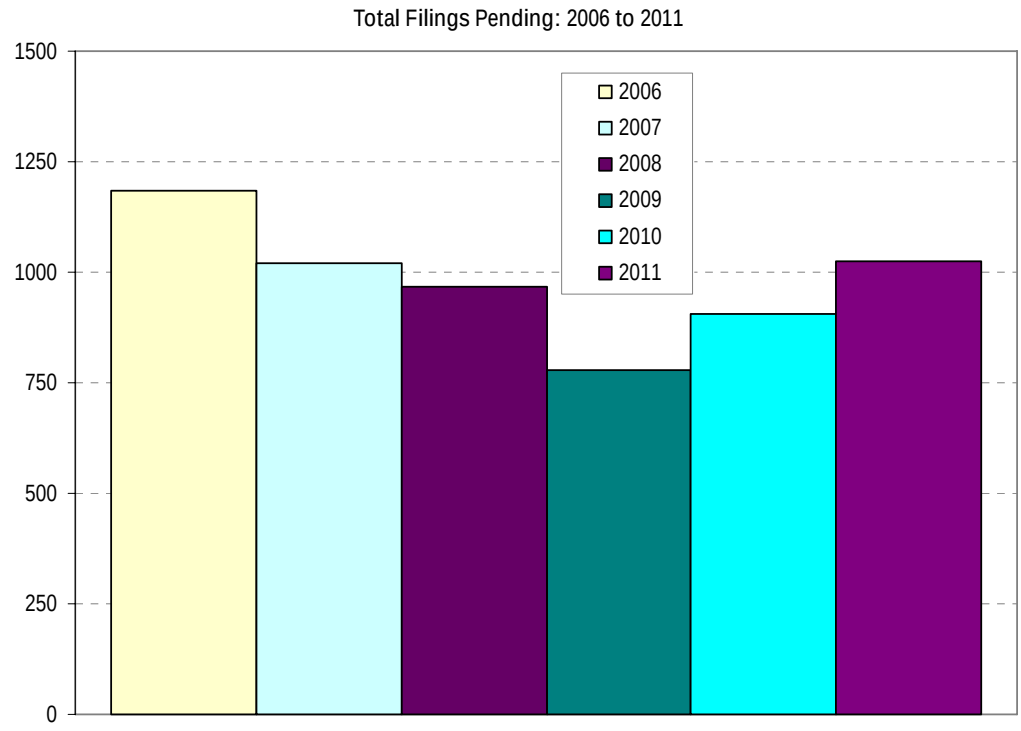
Additionally the change in the number of non-judicial members during 2010 and 2011 was:

	2010 Jan to Jun	2010 Jul to Dec	2011 Jan to Jun	2011 Jul to Dec
Non-Judicial	7	9	9	6

Data:

	2006	2007	2008	2009	2010	2011	2012 est	2013 est
Judicial Members	10	10	8	7	7	7	7	6
Average case load	107	63	94	82	63	64	75	90
Non-Judicial Members	13	13	13	13	8	7.5	4	2
Average case load	219	138	144	125	306	414	704	1281

CHART 6



Description:

Total of the filings pending at the end of each year between 2006 to 2011.

Notes:

Pending filings are those matters that remain undisposed and are carried forward into the next period. They are a product of the effect of the disposal rate and time to disposal on new filings.

Data:

Year	2006	2007	2008	2009	2010	2011
Total Filings	1184	1019	966	777	907	1025