Submission No 78

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Unions NSW

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Inquiry into Opportunities to Consolidate Tribunals in NSW

Submission of Unions NSW

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Definitions

"Commission"	Industrial Relations Commission of New South Wales
"Committee"	Legislative Council – Standing Committee on Law and Justice
"FWA"	Fair Work Australia
"Paper"	Inquiry into Opportunities to Consolidate Tribunals in NSW released 20th October 2011
"TAB"	Transport Appeal Boards
"WCC"	Workers Compensation Commission
"WHS"	Work Health and Safety Act 2011

Introduction

1. On the 20th October 2011, the NSW Government referred to the NSW Legislative Council Standing Committee on Law and Justice an Inquiry into Opportunities to Consolidate Tribunals in NSW. An Issues Paper ("the Paper") outlining a number of options for considerations was also released.

2. Unions NSW welcomes the Inquiry and the opportunity to comment given recent changes made to both the New South Wales and Federal industrial relations systems. While the Unions NSW submission responds to the Issues Paper, comments have not been confined to the options outlined in the Paper.

Unions NSW

3. Unions NSW is a State Peak Body as defined by section 215 of the *Industrial Relations Act 1996 (NSW)*. Unions NSW has over 60 affiliated unions representing members employed across a wide range of public and private sector industries including teaching, local government, retail, distribution, childcare, manufacturing, electrical, health, emergency services, agriculture, engineering, construction, administrative, the public sector and transport. Collectively Unions NSW and its affiliates represent over 600,000 workers employed across NSW.

The Need to Maintain an Independent Employment Tribunal

4. Unions NSW and its affiliates have supported the Industrial Relations Commission of New South Wales ("the Commission") because it has been independent and fair in its decisions and administration of the New South Wales industrial system.

5. Unions NSW does not support any further changes to the Commission, which would see a diminution of its role as an independent arbiter or as the key tribunal in NSW

dealing with employment and employment related matters more broadly. It is imperative NSW maintains a strong and independent employment tribunal which effectively conciliates and arbitrates industrial matters.

6. Any new proposals which seek to change the current structure of the Commission must ensure workers are able to access a body which is:

   - independent;
   - efficient;
   - accessible;
   - allows for the provision of fair and equitable outcomes;
   - provides certainty; and
   - can make enforceable and binding legal outcomes.

7. Any new consolidated tribunal currently being contemplated by the NSW Government should not be constituted with less powers or functions than those currently exercised by the Commission or the Industrial Court. The specialist knowledge of the judges, non-judicial members and commissioners of the Commission and Industrial Court in relation to industrial relations and employee related matters is an invaluable resource which should not be diluted or removed from the NSW judicial system.

8. Unions NSW is in favour of expanding and strengthening of the powers and functions of the Commission to deal with an expanded range of employment and employee related matters while ensuring the ability of industrial bodies, including trade unions, to appear both as a party and a representative in industrial relations matters should not be affected by any future consolidation initiative.

History

9. The NSW Industrial Relations System has a strong history of regulation dating back to 1901. Many of these measures have set a precedent in the regulation of working conditions in NSW which, in many cases, became national standards.

10. A brief summary of important changes in industrial regulation are as follows:

1901: *Industrial Arbitration Act 1901*, *first 'modern' industrial relations statute came into force in December 1901.*

1926: *Forty-four Hours Week Act 1926 reduced standard working week to 44 hours. Workmen's Compensation Act 1926 introduced NSW's first 'modern' compensation scheme for workers injured at work.*

1944: *Annual Holidays Act 1944 introduced a standard entitlement to 2 weeks holiday leave for each completed year of service. In 1958, this entitlement increased to three weeks leave per annum.*

1955: *Long Service Leave Act 1955 introduced a standard entitlement to 13 weeks long service leave after 20 years of service.*

1958: *Equal pay. NSW became one of the first Australian States to legislate for equal pay for male and female workers.*

1959: *Unfair contracts regulated. Amendments to the Industrial Arbitration Act 1940 enabled the NSW Industrial Relations Commission to alter or void any contracts involving work performed in any industry. These*

provisions then covered most forms of individual contracts for the performance of work, including franchise arrangements.

1979: *Transport industry workers covered. Amendments to the Industrial Arbitration Act 1940 enabled the Commission to regulate contracts of carriage (couriers) and contracts of bailment (taxi-drivers).*

1982: *Employment Protection Act 1982 created minimum redundancy entitlements for NSW workers under awards.*

1991: *Unfair dismissal laws reformed by amendments to the Industrial Arbitration Act 1940 introduced to allow individual access and compensation for NSW workers who were unfairly dismissed.*

1998: *Report of the Pay Equity Inquiry confirms that work in certain female dominated industries was undervalued.*

2002: *Crown Employees (Librarians, Library Assistants, Library technicians and Archivists) Interim Award made. It was found that Librarian's work was undervalued on a gender basis, compared with various other public sector professions.*

2002: *Industrial Relations (Ethical Clothing Trades) Act establishes landmark protections for outworkers and sets up Ethical Clothing Trades Council to advise on development of further protections within supply chains.*

2005: *Ethical Clothing Trades Extended Responsibility Scheme established*

the first Industrial regulation of retailer contracting practices to protect outworkers

2006: *28 February 2006: In the Secure Employment Test Case, the NSW Industrial Relations Commission establishes a right for casuals to convert to permanent employment after a period of six months of employment.*

March 2006: Workplace Relations Act 1996, WorkChoices Amendments commenced.

1 December 2006: Industrial Relations (Child Employment) Act 2006 commences to protect the employment and conditions of young people aged under 18 employed by constitutional corporations. NSW Industrial Relations Commission commences proceedings to set principles for establishing whether such a child has suffered a net detriment as compared to the state award that would apply to the child's work.

2009: *December 2009: Industrial Relations (Commonwealth Powers) Act 2009 (NSW) which transferred jurisdiction of the NSW private sector to the Federal jurisdiction.*

2010: *1 January 2010: Fair Work Act 2009 commenced.*

2011: *June 2011: Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 and the Work Health Safety Act 2011 introduced.*

Erosion of the Independence of the Commission

11. Unions NSW believes there has been a significant erosion of the independence, powers and jurisdiction of the Commission in the last 6 months as a result of the passing of legislation such as the:

    - *Work Health and Safety Act 2011;*
    - *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011; and*
    - *Transport Administration Act 2011*.

12. The industrial relation legislative agenda prosecuted by the current State Government has sought to reduce the powers and role of the Commission so it *'will no longer be in a position to deliver value for money to the taxpayers of New South Wales'*[1] and thus enabling the Government to prosecute a public campaign as to why it should be subsumed into an administrative "Super Tribunal".

[1] Review of Tribunals Issues Paper, Legislative Council Standing Committee on Law and Justice, November 2011

The Issues Paper - Overview

14. The detail provided by the Paper in relation to how each of the options would be implemented makes it very difficult to provide a comprehensive and detailed response. The lack of operational detail is overcompensated for in its attention to the construction and prosecution of an economic imperative for reform and economics of scale as a result of the Government's legislative dismembering of the Commission's role and function.

15. Unions NSW is concerned that the Paper identifies the Workers Compensation Commission ('WCC')[2] as one of the tribunals exercising quasi-judicial functions and presumably within the scope of consideration of the Paper, yet it is not mentioned again and it remains unclear as to whether the WCC is to be included in Option 3. Unions NSW can see no reason or long term benefit from having the WCC subsumed into a Super Tribunal or into the functions of another entity.

16. Unions NSW notes the Victorian Civil and Administrative Tribunal ('VCAT')[3] details a model that is not required to accommodate a jurisdiction/range of activities as that exercised by the Industrial Relations Commission of NSW ('the Commission'). The current role of the Commission as set out at page 3 of the Paper does not give an exhaustive list of its functions or operation. For example, matters not expressly recognised include; matters under Chapter 6 of the *Industrial Relations Act*; protection of injured employees; declaratory orders and freedom from victimisation.

17. Pages 4 and 5 of the Paper correctly identifies that the NSW Government has significantly contributed to the reduction in the workloads of the judicial members of

[2] Review of Tribunals Issues Paper, Legislative Council Standing Committee on Law and Justice, November 2011, p 2.

[3] Review of Tribunals Issues Paper, Legislative Council Standing Committee on Law and Justice, November 2011, p 2.

the Commission as a result of the legislative changes introduced by the *Work Health and Safety Act 2011*.

18. By deliberately 'redirecting' work from the Commission to *"mainstream criminal courts"* from 1 January 2012, the Government has created a situation whereby existing resources and expertise will remain underutilised whilst transferring a significant workload to an already overburdened court system. Unions NSW believes it is disingenuous of the Government to have removed a significant amount of work from the Commission and then seek to portray the need for a review arising out of a failure that it is no longer providing *"value for money"* to taxpayers. The unnecessary shifting of work from the Commission to the overburdened court system is fundamentally an ideological decision rather than an informed policy decision which seeks to improve services while also providing better value for money for NSW taxpayers.

Anti-Discrimination Board ('ADB') and Health Professional Tribunals

19. Page 6 of the Paper identified opportunities to consolidate some employment related functions including a number of matters dealt with currently by the Anti-Discrimination Board ('ADB') and by health professional tribunals ('health tribunals').

20. Unions NSW believes there may be some merit in reconsidering how discrimination matters are dealt with in the workplace and ensuring a better harmonisation of approaches, as suggested recently by Sydney University Emeritus Professor of Law Ron McCallum at the Australian Labour and Employment Relations Association (ALERA) ACT annual conference[4]. In his speech, McCallum argued labour law and discrimination law in Australia have been *"two separate spheres spinning*

[4] McCallum, R., Combating Harassment and Discrimination at Work, ALERA Annual Conference, The Australian Labour and Employment Relations Association, 2 November 2011.

independently" and need to be better integrated. Whilst that opinion may have been offered from a legislative perspective on the two areas of law, a convergence of these types of matters and jurisdictions under 'one administrative/tribunal roof' may have some benefits warranting further consideration.

21. However, the opportunities outlined in the Paper in relation to how health and professional tribunals, given their divergent approaches, fails to explain how they would co-exist and operate in a sustainable model that would provide long term tangible benefits and consistent decisions.

Consumer, Trader and Tenancy Tribunal

22. At page 7 the Paper appears to suggest there are concerns in relation to the quality of decision making flowing from the Consumer, Trader and Tenancy Tribunal ('CTTT'). It then goes on to suggest that improvements or efficiencies may flow from further consolidation. Unions NSW is unclear as to the logic behind this assumption.

23. Clearly the scope and jurisdiction of the CTTT and the matters it determines are considerably different to the issues dealt with on a day-to-day basis by the Commission or the ADB. Accordingly the benefits of consolidating the CTTT with the Commission and/or the ADB are unclear from a policy and operational perspective. Implementing such a change without proper consideration could result in outcomes which are less than satisfactory, as noted by the Paper at page 10.

The Options

25. Setting aside whether a compelling case has been made for the need for significant change to tribunals or more specifically the Commission, the following views are expressed in relation to each of the options proposed in the Paper.

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

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

26. This option would seem to hold some appeal and merit as it consolidates under one framework a variety of matters pertaining to the workplace and employment.

27. It is also the option that retains the integrity and activities of the Commission contemplated under the *Industrial Relations Act*. Specifically, this option would ensure New South Wales continues to have a strong, independent and effective tribunal which acts as the conciliator and arbiter of industrial relations matters.

28. Further, a dedicated employment specific tribunal is more likely to inspire public confidence as it operates on legal precedent developed by Judges and members with the relevant skills, knowledge and experience. It is also more likely to have the authority and reputation commensurate with the importance of the work it would perform. Finally, it will ensure that the specialised industrial relations knowledge of judges, non-judicial members and commissioners of the Commission and Industrial Court continues to be utilised in an industrial relations setting effectively and efficiently.

29. Unions NSW maintains the concerns previously expressed regarding health tribunals based on the belief that many of the processes affecting the ten professions under the national registration scheme require the direct involvement of, and assessment by, those with educational and clinical expertise reflecting the particular profession under investigation. The interaction of each health tribunal with the Health Care Complaints Commission ('HCCC') is also well established, and exists within a vigorous framework. Accordingly, it is unclear as to how this may be accommodated under a consolidation, unless retained as a separate Division as contemplated in Option 2A.

30. Unions NSW believes any proposal for an Employment and Professional Services Commission should maintain separate divisions or lists to ensure that industrial relations matters are dealt with separately from professional disciplinary matters. Although the Paper states this option may not *"capture the broader opportunities for tribunal consolidation"*[5], and as a result be short-term in its vision. However, Unions NSW believes such an approach should be considered and is a more effective approach as *"incrementalism"* in this area would be far more desirable. Measured and considered steps in tribunal consolidation would guard against any rushed or ill-conceived outcomes which provide bad policy outcomes for the community.

31. Of the options outlined in the Paper, and setting aside some of the concerns raised, Unions NSW believes this option to be the most effective avenue for change to the current structures in NSW.

[5] Review of Tribunals Issues Paper, Legislative Council Standing Committee on Law and Justice, November 2011, p 8

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

- **Create an Employment Division within the NEAT, headed by a former judge of the Industrial Commission in Court Session and consisting of the IRC Commissioners, to exercise the arbitral and conciliation functions allocated to the Industrial Relations Commission;**
- **Establish an employment list within the Supreme Court, and appoint the remaining judicial members of the IRC to the Court, who would undertake work in that jurisdiction (including hearing appeals from the Employment Division of the NEAT);**
- **Retain a separate Professional Discipline Division within the new NEAT.**

33. Unions NSW is unclear as how employment matters would be divided between the functions exercised by the 'NEAT' and by those judicial members appointed to the Supreme Court. For example, would the Supreme Court employment list solely deal with appeals pertaining to the decisions of NEAT members and how would all other functions under the *Industrial Relations Act* be dealt with by *"IRC Commissioners"*?

34. Unions NSW is concerned this option, and its reliance on the Supreme Court jurisdiction, would inevitably lead to a removal of the accessibility of the Commission by removing its capability to provide flexibility and informality in its processes. Inevitably, Unions NSW believes this will result in a more legalistic approach to employment matters which may not be desirable or effective.

35. Rather than a consolidation, Option 2A appears to seek to separate the existing Commission and its jurisdiction/activities in two, which has inherent difficulties although the creation of a separate division for health tribunals has some logic to it as discussed in Option 1.

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

36. This option simply appears to be a clumsy amalgam of Options 1 and 2A, and holds little prospect of delivering a more effective and efficient process, whilst exacerbating concerns regarding the consolidation of health tribunals.

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

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

38. Unions NSW believes Option 3 seeks to create a single Tribunal with little or no specialisation and seeking to provide all things to all people. It is inconceivable how such an eclectic "mix and match" approach of jurisdictions, responsibilities and activities could lead to a more efficient and effective framework for making timely decisions. A significant difference exists between disciplinary and industrial relations matters and many of the other matters dealt with by many of the tribunals which are intended to be consolidated into Option 3.

39. Further, there is a significant and justifiable concern that the specialised skill and knowledge of the judges, non-judicial members and Commissioners of the Commission and Industrial Court will be, over the longer term, be lost in such a structure. As the Commission's jurisdiction covers over 400,000 Award employees, the role of the Commission is substantially different to that of other tribunals which deal with more specialist complaints and issues which do not, in themselves, potentially affect substantial numbers of people every time a decision is made.

Industrial law, the decisions of the Commission and the impact those decision have on people's lives is not comparable to challenging a retailer on a faulty iPhone.

40. Unions NSW also notes the Issues Paper itself identifies what appears to be reasonable concerns and disadvantages with this proposal, especially those regarding the potential for the CTTT culture to dominate processes and outcomes.

Additional Matters

Interaction Between *FairWork Act* & NSW Industrial Relations System

42. The options proposed in the Paper, other than Option 1, will undermine the existing cooperation between the NSW industrial relations system and Fair Work Australia (FWA). In particular, these options will affect the practicality of maintaining the FWA system of dual appointments which makes industrial services accessible in regional and rural New South Wales.

43. Option 1 would result in limited, if any, change to the existing cooperation between the NSW industrial relations system and Fair Work Australia.

44. However, the options which propose to place the Commission's industrial function within a NSW Employment and Administrative Tribunal (NEAT), or creates a super tribunal could result in an incompatibility between the NSW system and FWA. Such options potentially abolish the Commission resulting in the present dual appointments being nullified by virtue of section 629(3)(b) of the *Fair Work Act 2009* as the individual may no longer be *"a member of the prescribed state industrial authority"*[6].

Case Study: The Hunter Region

45. Further, if the NSW Government pursues options, other than Option 1, they risk seriously disrupting several billions of dollars of coal chain infrastructure in the Hunter region by invalidating dispute settlement procedures contained within existing enterprise agreements.

[6] 629(3) *If a person is so appointed, the person holds office as Deputy President or Commissioner until the earliest of the following:*
(a) the specified period ends;
(b) the person ceases to be a member of the prescribed State industrial authority;
(c) the person resigns or the appointment is terminated under this Part.

46. In all cases, industrial relations on these major projects are regulated by collective agreements approved by FWA pursuant to the *Fair Work Act 2009*. These agreements have incorporated a dispute settlement procedure which retains the State system, via section 146B[7] of the *Industrial Relations Act 1996*.

47. The parties to these agreements have been forced to adopt this approach primarily because of the inability of the FWA system to recognise regionalism. This is a result of the rigidity and inflexibility of the panel system operating within FWA and the absences of any legislative prescription for regionalism within the Fair Work Act, Regulations or Rules.

48. In relation to unfair dismissals and general protections applications effective arrangements are in place for all regional matters to be allocated for hearing by locally based members. Although some dispute matters are allocated locally, anecdotally it appears many matters which the parties would prefer be dealt with locally remain with the national panel system requiring parties to travel substantial distances to attend venues in Sydney or elsewhere.

49. The recognition of regions are further limited in the Fair Work Act by:

- section 115(1a)(vi) *Fair Work Act*[8] which refers to a public holiday in a region; and

- in the notation to section 698 *Fair Work Act*[9] which refers to State and Territory employees being made available to assist the Fair Work Ombudsman in providing education in a particular region.

[7] 146B. Commission may exercise certain dispute resolution functions under federal enterprise agreements.

[8] ***Meaning of public holiday*** *The public holidays...(vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a* ***region*** *of a State or Territory);*

50. Regions are not defined nor is there any reference to the expressed intention of matters being handled locally on a region by region basis within the Fair Work structure.

51. The current dispute resolution model, supported by both Hunter businesses, industry groups and unions, has been particularly successfully in major infrastructure projects which are consistently being delivered ahead of schedule, under budget, with negligible industrial disruption and excellent safety outcomes.

52. The model has been so successful that the approach has been applied to other industries within the region, including electricity and some manufacturing.

53. Unions NSW believes the NSW Government needs to be cautious in pursuing changes beyond those proposed in Option 1, as this could potentially disrupt several billions of dollars of coal chain infrastructure in the Hunter region by invalidating dispute settlement procedures contained within existing enterprise agreements.

Chapter 6 of the *Industrial Relations Act 1996*

54. Whilst this submission has mainly focused on the overall role of the Commission, specific mention should be made regarding matters contained in Chapter 6 of the *Industrial Relations Act 1996*.

55. Chapter 6 establishes a regime for the regulation of *'contract carriers'* and *'contracts of carriage'*. Essentially this chapter deals with contracts entered into by owner drivers who own and operate a single vehicle and who are dedicated to a particular principle. Unions NSW believes any amendment or reduction in the scope of

[9] ***s.698 Persons assisting the Fair Work Ombudsman*** *Note: For example, State or Territory employees could be made available to assist the Fair Work Ombudsman in providing education in a particular* ***region****.*

Chapter 6 would significantly affect owner drivers leaving them without a safety net in terms of pay and conditions, and remove the mechanism by which they are able to resolve disputes in an efficient and cost-effective way. Unions NSW understands the Transport Workers Union of NSW (TWU) have also made a separate submission to the Inquiry on this matter and Unions NSW supports the conclusions and recommendations contained in that submission.

2002 Ombudsman & Police Integrity Commission Recommendation

56. The Paper discusses the 2002 recommendation by the Ombudsman and Police Integrity Commission that Tribunals in NSW be consolidated. Whilst the Options canvass the various health professional tribunals and Option 2A proposes "*Retaining a separate Professional Discipline Division within the new NEAT"*, Unions NSW is unclear as to whether the options are limited only to the various health professional tribunals or whether it is seeking to cover the NSW Police Officers.

57. For clarity, Unions NSW and the Police Association of NSW are both concerned that should the Commission be consolidated into any future generalist jurisdiction within a 'Super tribunal', there will be a diminution in the specific expertise and knowledge required to deal with police matters under the *Police Act 1990*.

58. The primary concern of Unions NSW is in relation to the unique circumstances which affect sworn police officers within an employment law context. Police officers are not employees in the strict, employment law sense; as they are public office holders exercising *'independent discretionary functions'*[10]. Police officers are subject to regulation of both their public and private lives through strict codes of conduct. Many aspects of their employment relationship are regulated by specific legislation and

[10] Carabetta, G "Fair Work and the Future of Police Industrial Relations in Australia" (2011)24AJLL 1

legislative requirements which subordinates, otherwise accepted industrial rights, to tests of *'operational requirements'*[11].

59. One particular aspect of employment law that differentiates police from other employees are the specific discipline and dismissal arrangements which are applied to police. The resulting industrial relations regime that covers police is *"probably more complex and varied than any other aspect of Australian public employment"*[12]. Thus the fundamental reason for the unique employment situation of police officers in industrial law is the unusual nature of the office of constable which requires specific knowledge and skill to understand and administer appropriately for all parties involved.

The Oath Of Office And The Independence Of The Office Of Constable

60. Police officers take an oath of office[13] which gives them enormous powers, while at the same, time places additional responsibilities on them. This means police officers are different from other employees in a number of respects. These differences are not only in the nature of their professional duties, but also in the way they are treated by the law.

61. The operational and legal reality of policing in Australia means police officers are autonomous in the exercise of their policing powers. While at the same time, police officers are also members of a tightly commanded, rank-based, paramilitary organisational structure whose discipline code is enforceable at law and subjects

[11] Ibid. at 4

[12] Smith, G *Public Employment law: The Role of the Contract of Employment in Australia and Britain* Butterworths, Sydney, 1987, p48

[13] I, do swear that I will well and truly serve our Sovereign Lady the Queen as a police officer without favour or affection, malice or ill-will until I am legally discharged, that I will cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences against that peace, and that while I continue to be a police officer I will to the best of my skill and knowledge discharge all my duties faithfully according to law. So help me God.

police officer to punitive sanctions for disobedience. Both individually and collectively, police are subject to the lawful orders of their superiors.[14]

62. The tension between individual legal responsibility flowing from discretion inherent in the office of constable and the obligation to obey the commands of senior officers is immediately apparent. There is a fine distinction between what constitutes a lawful direction and an impingement on the discretionary exercise of the original authority of the office of constable. The beginnings of this tension are to be found in the history of the establishment of modern policing in Britain.

63. In the middle of the nineteenth century, policing was a function of local government in the boroughs and funded through the rates. Police constables were accountable to a Watch Committee, comprised of half of the elected councillors. This committee was empowered to employ a Chief Constable to direct police activities. This officer was routinely directed by the Watch Committee, thus police at that time were in a direct master-servant relationship to their local government employer.[15]

64. From 1905 a series of decisions in the courts began to remove police from the master-servant relationship to their employer and to annul the law of agency with respect to police. The idea of the original authority of police was first aired in *Stanbury v Exeter Corporation [1905] 2 K.B. 838*, a case which involved the actions of a local government employee. Wills J found that police exercised an authority that was 'original', in that:

[14] Auten, J "The Paramilitary Model of Police and Police Professionalism" in Blundberg, AS and Niederhoffer, E (eds.) *The Ambivalent Force* (New York: Holt Rinehart and Winston, 1976).

[15] Elcock, H *Local Government* (London: Methuen, 1982) chapter 7

"...they are really a branch of the public administration for the purposes of general utility and security which affect the whole kingdom"[16].

65. The High Court of Australia supported this approach in *Enever v R [1906] 3 CLR 969*[17] where Griffith CJ said:

"…the powers of a constable qua *peace officer, whether conferred by common law or by statute law, are exercised by him by virtue of his office, and cannot on the responsibility of any person but himself…A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, and the law of agency has no application."*[18]

66. In *Attorney General for New South Wales v Perpetual Trustee Co. (Ltd) [1955] A.C. 457*[19] the Privy Council said per Viscount Simmonds:

"…there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State he is said to serve. The constable falls within the latter category. His authority is original, not delegated and is exercised at his own discretion by virtue of his office."[20]

67. This concept has been reiterated regularly and continues to cause problems in the identification of the rights of police to access to the beneficial aspects of legislation covering the employment relationships of the general population. Governments have introduced special statutory provisions deeming police officers to be employees for specifics purposes under relevant legislation to address many of these problems.

[16] [1905] 2 K.B. 838

[17] [1906] 3 CLR 969

[18] at 977

[19] [1955] A.C. 457

[20] at 489

68. *Attorney General for New South Wales v Perpetual Trustee Co. (Ltd)* is still the leading Australian case. The Act governing appointment and control of police in that case was the *Police Regulation Act* 1899 (NSW). After referring to the Act in question, Dixon J said:

> *"….when in the course of his duties as a servant of the Crown he is confronted with a situation involving the liberty or rights of the subject that the law places upon him a personal responsibility of judgement and action."*[21]

69. It is this personal responsibility that distinguishes the obligations of the police officer from other emergency services workers in three major respects:

(i) The oath of office obliges the police officer to place themselves into situations of physical or psychological danger where it is necessary to keep the peace or to protect the lives and property of members of the public. Other emergency services workers and workers in general, have no obligation to place themselves in danger in the course of their employment. Indeed, this is the philosophy underlying the *Occupational Health and Safety Act 2000* and the *Workers Compensation Act 1987*. Both these acts give rights to workers where they have been placed in dangerous situations because of their employment. General workers are paid to provide labour and skills, not to place their health and welfare at risk. A police officer's obligation to the law places everything else in a secondary position.

(ii) The oath obliges the officer to be on duty effectively twenty four hours a day, seven days a week. An officer is obliged to intervene in any situation where he or she perceives an offence being committed, regardless of whether the

[21] Note 36 at 252

officer is on rostered duty. There are well documented instances of disciplinary action being taken against officers who have not fulfilled this duty. An officer must be constantly alert to the needs of the community and his or her obligations under the law. Their office is one that is independently exercised and subject to no one's direction. Even though the powers of the constable are significant (including the power to take both liberty and life), the consequent obligations are heavy and under constant oversight. These obligations flow also to the officer's private life.

(iii) Police officers are subject to standards of conduct that are far more rigorous than those which would normally apply in other employment areas.[22] These standards apply not only when an officer is on duty, but in their private life. If these standards are at any time breached, they may result in disciplinary action or even dismissal. Officers may lose their employment and their career for behaviour, which in all other occupations would be considered private. In many ways, the police officer "sells" more than just their labour when taking the oath of office.

70. Therefore the uniqueness of police employment law, the nature of the office of constable and the restrictions on police accessing normally acceptable industrial relations processes, requires special expertise in those adjudicating police disputes. This is particularly so when considering the disciplinary and dismissal regime arising from sections 80, 173 and 181D of the *Police Act 1990* and the Hurt On Duty regime under the *Police Regulation (Superannuation) Act 1906.*

71. The current federal government has recognised the uniqueness of the employment conditions covering police and has provided in-principle support for possible future

[22] Carabetta, above at 6.

industrial relations arrangement for police who may come under the federal *Fair Work* regime.[23] The International Labour Organisation's (ILO) Convention 87 (article 9.1) also recognises the unique position of police and military personnel in respect to *'normal'* labour law conventions and the need to ensure that adequate safeguards are in place to protect these workers.

72. The special circumstances of police officers demand an expert tribunal with experience in dealing with the unique circumstances of police. Unions NSW does not believe a generalist public sector administrative decisions tribunal will satisfy that requirement. In any proposed future model there needs to be a specialist Police Employment division that retains the necessary expertise to deal with police matters.

Transport Appeals Board

73. The operation and function of the Transport Appeal Boards (TAB) were transferred to the NSW Industrial Relations Commission on 1 July 2010 as part of an earlier consolidation. The TAB exercises functions conferred on it by the *Transport Appeal Boards Act 1980* and the *Transport Administration Act 1988*. These Acts provide for two main functions of the TAB which are to:

(i) review certain promotional decisions made by Government owned operators in the NSW transport industry, such as RailCorp, State Transit Authority (STA) and Sydney Ferries.

(ii) review certain disciplinary decisions made by Government owned operators in the NSW transport industry, such as RailCorp, State Transit Authority and Sydney Ferries.

[23] Ibid, at 21

74. It is in the public interest for these functions to be retained and we believe that it is appropriate that they be retained in their current form at the Commission under the Acts cited above.

Promotional Appeals

75. Promotional appeals allow existing employees to lodge an appeal against another employee who has been selected for a job which both employees applied for. The purpose of the appeal is to test whether the chosen employee has the most "merit" for the position.

76. The process involves the relevant authority justifying the selection process and why they chose the recommended employee whilst also providing the recommended employee and any appellants the opportunity to give evidence to demonstrate their merit.

77. The TAB was significantly reformed when the function was transferred to the Commission in 2010. Previously, the hearing of a promotional appeal involved three Board members (two being employees of the relevant authority) and advocates representing the relevant authority and the applicant(s) within a relatively formal setting. Subsequent to the 2010 changes, promotional appeals are now heard by one Commissioner (sitting as the Board Member) in an informal hearing, without the use of advocates. This change has streamlined the process and reduced the resources required by the relevant authority and applicant(s), while still providing for an efficient and effective mechanism for ensuring promotional decisions are based on merit.

78. Unions NSW believes it is in the public interest to retain such a mechanism to oversee the promotional processes of organisations such as RailCorp, who operate

using tax-payer money and have a long and well documented history of being susceptible to inappropriate selection practices which do not adhere to the organisation's employment policies.

Disciplinary Appeals

79. Disciplinary appeals allow employees to appeal against a range of disciplinary decisions made against them. Unlike other organisations, RailCorp, State Transit Authority (STA) and Sydney Ferries have a number of disciplinary actions, other than dismissal, which they can apply to employees.

80. For example, the RailCorp Enterprise Agreement 2010, allows the employer to issue:

- fines;
- reductions in position, rank or pay; and
- suspensions from employment.

Each of these decisions may be appealed to the TAB where an informal Conciliation conference automatically occurs, followed by arbitration if necessary.

81. Unions NSW believes all parties to this process have experienced it as a constructive process for resolving disputes and minimising costs without the need to engage legal practitioners as occurs regularly in other jurisdictions.

82. The TAB has also developed and retained significant skills and knowledge specific to the NSW public transport industry and it is also required to have regard to the public interest in each case it hears. Further, very few decisions of the TAB are appealed as a result of the effectiveness of the current process.

83. Unions NSW believes it is in the interests of the employer and employees, as well as being good public policy, to retain this TAB in its current form as it enables the relevant employers to utilise a broader range of disciplinary options in managing their workforce, and provides for an appropriate mechanism to monitor the employment processes made by these public entities.

84. The TAB has consistently demonstrated its effectiveness and efficiency in providing a professional and comparatively inexpensive mechanism which provides a rigourous safeguard for employers and employees in relation to the decisions of public transport organisations.

Comments

86. Unions NSW believes the Options canvassed in the Paper do not effectively deal with array of issues which arise from any proposed consolidation of various employment and non-employment related tribunals. In particular, Unions NSW is extremely concerned that the Paper does not, in any detail, deal with how the proposed consolidation of tribunals would be supported with the necessary legislative reform of current Regulations, Acts and general practice.

87. Unions NSW has considerable concerns that the proposed consolidation options presented are done so in a bid by the Government to "be seen" to be reforming the current tribunals without significant consideration of ensuring the reforms provide efficient and effective policy outcomes.

88. The Committee will be at a significant disadvantage in trying to 'cover' all the necessary ground within the timeframe provided. Unions NSW is not opposed to reform in this area, however, the reforms need to be considered, measured and undertaken in a timeframe which ensure the effectiveness of outcomes can be measured and managed so as not to undermine the existing rights and entitlements of employees relying on this area of law.

89. The concept raised in Option 2A of dual appointment of judicial members of the Commission to the Supreme Court is one that Unions NSW considers to hold merit. The Commission sitting as the Industrial Court is a superior court of record with equivalent status to the Supreme Court. It would be highly inappropriate for any downgrading of status or diminution of the importance of work for Judges in the Industrial Court. With various Work Health and Safety matters being moved to the Supreme Court in particular, Judicial Members of the Commission should be given dual appointment to the Supreme Court, so such knowledge and experience is not

lost. Further we do not believe that the Judicial Members should be "undervalued" by the work they undertake.

90. Any consolidation of tribunals would possibly mean a number of employees being declared excess. Steps should be taken to redeploy effected employees within the public service.

Recommendations

1. Unions NSW believes the objectives of the inquiry should be broader than simply cost. Issues of quality of service to community and the quality of decision making must be taken into account by the members of the committee as they finalise their recommendations.

2. Accordingly, from the perspective of the current jurisdiction and scope of activities undertaken by the Commission, Unions NSW believes Option 1 is the most reasonable way to initiate a meaningful reform process, although it may be further improved by the consideration of how health tribunals will most effectively operate within the consolidated framework, including the possibility of separate divisions.

3. The Commission has an established, functional architecture which would accept and enhance decision making in all areas of employment and dispute resolution. Any consolidation of tribunals should be subsumed into the structure of the Commission. This would to maintain an effective employment tribunal in NSW while at the same time, provide the most efficient strategy for ensuring value for money for NSW taxpayers and maintaining the quality of decision making and service to the community.

4. Unions NSW believes the NSW Government needs to be cautious in pursuing changes beyond those proposed in Option 1, as this could potentially disrupt several billions of dollars of coal chain infrastructure in the Hunter region by invalidating dispute settlement procedures contained within existing enterprise agreements.

5. The special employment status of police officers requires an expert tribunal with experience in dealing with the unique circumstances of police. A generalist public sector administrative decisions tribunal alone would not satisfy that need. Within

whatever structure is eventually recommended, there needs to be a specialist Police Employment division that retains the necessary expertise to deal with police matters.

6. Judicial Members of the Commission should have dual appointment to the Supreme Court of NSW and Fair Work Australia.

7. Any consolidated tribunal must be made an eligible State or Territory Court for the purposes of the Fair Work Act 2009 (Cth).

8. Steps should be taken to redeploy within the public service an employee deemed to be excess by any consolidation of tribunals.

9. Alternatively, another consideration for the Committee is to recommend the Commission remains in its current form, with a number of additional tribunals to share its administrative functions and premises. At an administrative level this would allow for a consolidation of resources while the substantial functions of the Commission and other Tribunals remain.

10. Unions NSW thanks the Committee for the opportunity to make a submission to this Inquiry.

11. Unions NSW and representatives for affiliates unions would be pleased to appear as witnesses at the Inquiry to discuss the contents of this submission further.