Submission No 37

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: NSW Society of Labor Lawyers

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INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

SUBMISSION OF THE NSW SOCIETY OF LABOR LAWYERS TO THE INQUIRY BY THE STANDING COMMITTEE ON LAW AND JUSTICE

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Submitted By:

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I. EXECUTIVE SUMMARY

The NSW Society of Labor Lawyers ("the Society") supports the consolidation of NSW Tribunals where the outcome will increase access to justice. The Society, however, reserves its position on any wholesale mergers of NSW tribunals without proper analysis.

The Society recognises the important role of the NSW Industrial Relations Commission ("the IRC") and the IRC in Court Session and does not support the demise of the functions of the IRC or the IRC in Court Session.

The Society supports the IRC's jurisdiction extending to employment-related discrimination matters that are currently with the Anti-Discrimination Board (for conciliation), the Administrative Decisions Tribunals (Equal Opportunity Division), professional disciplinary matters and common law employment contract matters, so there is one specialist employment jurisdiction in NSW.

II. LIST OF RECOMMENDATIONS

Listed below are the key recommendations made by the Society within its Submission. These recommendations are discussed in greater detail at the identified Chapters within the Submission.

Recommendation 1 [refer to Chapter 3]

(a) The Society recommends any consolidation of the IRC to be treated separately to any recommendations made in the 2002 Report of the Committee on the Ombudsman and Police Integrity

(b) The Society recommends that the process of consolidation is properly investigated and considered before changes to the current structure are made given this current inquiry proposes changes that were not considered in the 2002 Report.

(c) The Society recommends that the process of consolidation of NSW Tribunals must not decrease access to justice to the NSW community

Recommendation 2 [refer to Chapter 4]

The Society recommends that the Inquiry acknowledges the extensive functions of the IRC and IRC in Court Session.

Recommendation 3 [refer to Chapter 4]

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.

Recommendation 4 [refer to Chapter 4]

The Society recommends that any process to consolidate functions between tribunals is taken with due care to ensure proper assessment of the medium and long term impact of the Fair Work Act and its interaction with the IR Act.

Recommendation 5 [refer to Chapter 5]

The Society recommends that the facilities (court rooms, Commissioners, judicial officers and administration) of the IRC could be utilised by a Super Tribunal, however, the IRC must remain autonomous.

Recommendation 6 [refer to Chapter 5]

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 such as the Anti-Discrimination Tribunal.

Recommendation 7 [refer to Chapter 5]

The Society recommends that the IRC maintain autonomy in regards to any consolidation of NSW tribunals for efficiency due to the specialist nature of the IRC.

Recommendation 8 [refer to Chapter 6]

The Society recommends that any decisions of the Inquiry must acknowledge the structural consequences if the IRC in Court Session is abolished

Recommendation 9 [refer to Chapter 6]

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.

Recommendation 10 [refer to Chapter 6]

The Society recommends proper analysis of access to justice before the jurisdiction of the IRC in Court Session is transferred to the Supreme Court.

Recommendation 11 [refer to Chapter 6]

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 the members of the NSW community.

III. About The NSW Society of Labor Lawyers

The Society aims, through scholarship and advocacy, to promote changes in the substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society. It provides a meeting ground for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community.

The Society makes this submission in line with its objectives and representative of its membership.

1. INTRODUCTION

1.1 This Inquiry's terms of references is in regards to the whole tribunal system in NSW, however, particular attention has been given to future of the NSW Industrial Relations Commission ('IRC') and the IRC in Court Session in the Issues Paper for this Inquiry.

1.2 Therefore the Society, whilst it has dealt with the overall terms of reference of this Inquiry, has concentrated its submission on exploring the structure, functions, workload, of the IRC and IRC in Court Session and putting forward recommendations in regards to the future of these structures given the overall consideration to consolidate tribunals across NSW.

1.3 The body of this submission responds to the following areas:

- The 2002 Report of the Committee on the Ombudsman and Police Integrity Commission;
- Functions and workload of the IRC and IRC in Court Session;
- Future of the IRC;
- The Operation of the IRC in Court Session if there are changes to the IRC; and
- The Consumer Trader and Tenancy Tribunal

1.4 The following comments have been canvassed from a variety of stakeholders and members who have provided valuable insight.

2. BACKGROUND

2.1 The Society is concerned that the present Inquiry into Opportunities to Consolidate Tribunal in NSW not result in the disassembly or under resourcing of industrial relations infrastructure in New South Wales. The Inquiry must not become a vehicle to reduce the resources, powers and infrastructure presently available to the IRC in addressing employment matters. The Society notes with concern the State Government's recent record in transferring the jurisdiction of the Industrial Court in relation to occupational health and safety prosecutions through the Work Health and Safety Bill 2011. These

amendments, taking effect from 1 January 2012, remove the jurisdiction relating to categories 1 and 2 occupational health and safety criminal prosecutions to the mainstream criminal courts. These changes occurred with little or no industry consultation. The Society remains concerned that the Work Health and Safety Bill 2011 was a precursor to what may now amount to an outright dismantlement of the specialist role of the NSW IRC.

2.2 The Society is also concerned that the present Inquiry not be associated with imposition of further restrictions on the powers of the IRC to make determinations with respect to awards and agreements. This is another area where the State government has an extremely poor recent record. On 17 June 2011 the Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 was assented to. The Act severely curtails the discretion of the Commission in varying or making awards. At s146C the Act requires that "the Commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees." The legislation provides that any award or order of the IRC "does not have effect to the extent that it is inconsistent with the obligation of the Commission to give effect to government policy." The legislation creates a process whereby government employment policy is promulgated by regulation after which such regulations then restrain members of the IRC in making determinations about awards and other matters. The Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 declares aspects of government policy that the IRC must give effect to when making or varying awards or orders. Through this combination of laws and regulations the Government has imposed an artificial 2.5% per annum cap on increases in employee related costs relating to remuneration and conditions of employment. This continues to disadvantage public sector workers across the state.

2.3 The amendments associated with Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 and Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 are completely inconsistent with the role of the IRC in operating as an independent tribunal charged with the responsibility of establishing fair and reasonable employment conditions. The Society is concerned that these amendments, regulations and associated government policy are a first step towards the dismantlement of independent industrial arbitration processes in New South Wales. The Society is concerned that the Government may seek to exploit the present Inquiry to further push state industrial policy and processes towards a tribunal model akin to an administrative Wages Board.

3. THE 2002 COMMITTEE REPORT

Term of Reference 1.
Outcomes of the 2002 Report on the Committee on the Ombudsman and Police Integrity Commission into the ADT

a. The introduction of the NSW Administrative Decisions Tribunal ('ADT') was a significant Law reform. It was originally intended to include a wide range of other Tribunals (including the wide variety of bodies which were subsequently amalgamated into the current CTTT) but this did not occur.

b. The Issues Paper makes reference to a 2002 report by the Committee on the Office of the Ombudsman and Police Integrity Commission in its review of the ADT legislation, which proposed the consolidation and rationalisation of tribunals in New South Wales. This consolidation, however, did not occur. It is observed that the IRC was not mentioned once in the report and the proposals made by the report did not deal with the IRC.

c. Consolidation of Tribunals can lead to greater benefits to the community, because of simpler access to justice. There can also be cost benefits for government. A possible risk is the use of generalist Tribunal Members in specialist areas, although this can be guarded against by proper structures and by properly assessing which Tribunals should be consolidated, and in which combinations

Recommendation 1

(a) The Society recommends any consolidation of the IRC to be treated separately to any recommendations made in the 2002 Report of the Committee on the Ombudsman and Police Integrity

(b) The Society recommends that the process of consolidation is properly investigated and considered before changes to the current structure are made given this current inquiry proposes changes that were not considered in the 2002 Report.

(c) The Society recommends that the process of consolidation of NSW Tribunals must not decrease access to justice to the NSW community.

4. FUNCTIONS AND WORKLOAD OF THE IRC

Term of Reference 2.(a)i.
The current and forecast workload for the Industrial Relations Commission (including the Commission in Court Session) as a result of recent changed such as National OHS legislation and the Commonwealth Fair Work Act)

a. This Inquiry is to consider the current and forecast workload of the Industrial Relations Commission ('IRC') and the IRC in Court Session to determine if there are opportunities to reform consolidate or transfer functions between tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters.

b. The Society provides this Inquiry with a summary of the non-judicial and judicial functions of the IRC with the corresponding current workload and forecasted workload of the IRC.

4.1 NON-JUDICIAL FUNCTIONS AND WORKLOAD

4.1.1 AWARDS, MINIMUM WAGE, ENTERPRISE AGREEMENTS

a. Following WorkChoices and the referral of the residue of legislative power over private sector employees to the Commonwealth, the IRC's award making and maintenance functions have been limited to public sector employees and employees employed by Local Councils.

b. The IRC previously set the minimum wage for the lowest paid employees in New South Wales, who fell outside award coverage in New South Wales. The annual State Wages Case was a major industrial case. 2010 was the first time since the referral of power that the IRC had conducted a State Wage Case. It issued a summons to show cause why it should not adopt the increase awarded by Fair Work Australia in its Annual Wage Review[1]. The IRC adopted the Annual Wage Review decision.[2] Given the IRC no longer has jurisdiction over the wages of employees in

[1] Annual Wage Review 2009-2010 [FWAFB] 4000.
[2] State Wage Case 2010 [2010] NSWIRComm 183.

the private sector, the significance of the annual State Wage Case is substantially diminished.

c. Enterprise agreements, being bargains reached between industrial parties, and establishing terms of conditions of employment determined by the IRC to be equal to or better than those prescribed by awards,[3] are approved by the IRC in accordance with principles enunciated by a Full Bench of the IRC.[4] Akin to the IRC's award making and maintenance functions, its workload in relation to enterprise agreements is now limited to public sector employees and persons employed by Local Councils.

d. There has been a steep decline in the IRC's functions of determining awards, enterprise agreements and a minimum wage.

Table 1: IRC workload for determining awards and enterprise agreements

Year / Type of Application	2005	2006	2007-09	2010
Making awards	194	62	45.5	13
Variation of awards	332			
Review function of awards exercised	67			5
Making enterprise agreements	359	224	40	

e. As the above illustrates, the IRC's workload in relation to awards and enterprise agreements has been drastically reduced. It is submitted that 2010 figures, post the referral of remaining power, are a likely representation of the IRC's future workload.

4.1.2 Conciliation and Arbitration of Industrial Disputes and the Growth of Section 146B of the Act.

a. The IRC has jurisdiction to resolve industrial disputes referred to it pursuant to s 130 of the Act. 'Industrial dispute' is a term of wide import and embraces a plethora of situations involving questions as to employment in an industry, regardless of whether the IRC has jurisdiction to arbitrate the dispute.[5] In resolving industrial disputes, the IRC must conduct a compulsory conference, and require the attendance of any

[3] Industrial Relations Act 1996 (NSW) s 32 and s 35.
[4] Industrial Relations Act 1996 (NSW) s 33.
[5] NSW Teachers Federation v Public Service Board [1968] AR (NSW) 507.

person who the IRC considers would assist in resolving the dispute.[6] In the event conciliation is unsuccessful, the IRC may arbitrate the dispute;[7] and make an order in the form of making or varying an award,[8] a dispute order (which may include an order that industrial action cease, or an order that a dismissed employee be reinstated),[9] or an interim order.[10]

b. Subsequent to the enactment of WorkChoices, s 146A was inserted into the Industrial Relations Act 1996 (NSW) ('the Act') to allow the IRC to exercise dispute resolution and arbitral powers conferred on it by agreements entered into by industrial parties. S 146A was repealed effective 1 January 2010, and s 146B inserted into the Act to allow the IRC to exercise dispute resolution functions conferred on it by federal workplace agreements, defined to be enterprise agreements made under the Fair Work Act and unexpired preserved State agreements.[11]

c. The steep decline in the number of industrial disputes dealt with by the IRC following WorkChoices and the referral of power is demonstrated by the following statistics:

Table 2: IRC workload for industrial disputes

	Year	2005	2006	2009	2010
Type of Application					
General		1001			
S 130			637	565	377
S 146A			8	22	n/a
S 146B			n/a	7	436

d. The decline in disputes filed since 2006 and 2009 reflects the continued constriction of the IRC's jurisdiction, whilst the almost doubling of disputes filed under s 146B in 2010 as compared to those filed under ss 146A and 146B in 2009, conveys that industrial parties to federal agreements are in fact utilising the IRC's expertise in dispute resolution.

[6] Industrial Relations Act 1996 (NSW) s 132.
[7] Industrial Relations Act 1996 (NSW) s 135.
[8] Industrial Relations Act 1996 (NSW) s 136(1).
[9] Industrial Relations Act 1996 (NSW) s 136(1), ss 137-138.
[10] Industrial Relations Act 1996 (NSW) s 136(1).
[11] For recent examples of use of the IRC's expertise in relation to industrial disputes arising under federal instruments see: Transport Workers' Union of New South Wales v Toll Transport Pty Limited, trading as AutoLogistics [2011] NSWIRComm 1050 and BlueScope Steel (AIS) Pty Ltd and the Australian Workers Union, New South Wales [2011] NSWIRComm 134.

e. It could be suggested that the IRC's dispute workload will plateau out in relation to disputes filed under s 130 now that New South Wales has referred its remaining power over private sector employees, but potentially increase in relation to disputes filed under s 146B as parties take advantage of the IRC as a conciliator and potential arbitrator of disputes arising under federal industrial instruments.

4.1.3 UNFAIR DISMISSALS AND RELIEF FROM VICTIMISATION

a. The IRC has jurisdiction to grant relief in relation to terminations of employment that are harsh, unjust or unreasonable,[12] and in regards to the victimisation of an employee where the employee has been injured in their employment in certain circumstances.[13]

Table 3: IRC workload for unfair dismissals

	Year	2005	2009	2010
Type of Application				
Unfair Dismissals		3708	673	227
Victimisation		45	16	4

b. The steep decline evinced by the above figures conveys that unfair dismissals no longer constitute a significant aspect of the IRC's workload. It is submitted that 2010 figures, post the referral of remaining power, are a likely representation of the IRC's future workload.

4.1.4 CONTRACTS OF CARRIAGE, TAXI DRIVERS, AND TRIBUNAL

a. The IRC exercises a discrete and specialised jurisdiction in relation to independent contractors who undertake contracts of carriage or contracts of bailment (taxi drivers) in circumstances specified by Chapter 6 of the Industrial Relations Act 1996 ('the Act'). Contract carriers are defined as workers who: trade either as sole traders, partnerships or incorporated entities; own one truck; perform work for one principal contractor; and perform this work themselves.[14] Contract carriers under Chapter 6 are distinguishable from common carriers – who own one vehicle but perform work

[12] Industrial Relations Act 1996 (NSW) s 84.
[13] Industrial Relations Act 1996 (NSW) s 210 and s 213.
[14] Industrial Relations Act 1996 (NSW) s309.

for multiple principal contractors,[15] and fleet owners – who own multiple vehicles and engage employees to perform work with these vehicles.[16]

b. The IRC has power, pursuant to s 313 of the Act to make a contract determination in relation to a contract of carriage. This power has been used to make award-like instruments known as 'contract determinations' that prescribe minimum terms and conditions of engagement for contract carriers operating in industries such as car carrying, quarried materials and couriers.[17] Contract Determinations provide minimum cost recovery rates of pay for contract carriers, reflective of capital, labour, fuel and repair and maintenance costs.[18] Contract determinations are a prominent feature of the New South Wales road transport industry, and were specifically preserved by the Independent Contractors Act 2006 (Cth), s 7(2)(b).

c. Additionally, contract agreements, which are akin to enterprise agreements, may be made under Chapter 6 of the Act. The IRC must approve such agreements,[19] and is duty bound to ensure they provide terms and conditions of engagement equal to or above any applicable contract determination.[20] Conciliation of disputes involving contracts of carriage is also conferred on the IRC.[21] The conciliation function of the IRC in regards to such disputes is akin to that conferred on it in relation to disputes involving employees.

Table 4: IRC workload in relation to Chapter 6 of IR Act

	Year	2005	2010
Type of Application			
Contract agreements		3	4
Contract determinations		17	8
Dispute conciliations		10	43

[15] James v Commonwealth (1939) 62 CLR 339.
[16] Transport Workers Union, Submission to Senate Employment, Workplace Relations and Education Legislation Committee: Inquiry into the provision of the Independent Contractors Bill 2006 and Workplace Relations Amendment (Independent Contractors) Bill 2006 (Parramatta: TWU, 2006) p 5.
[17] See for example: Transport Industry – (General Carriers) Contract Determination, Transport Industry Car Carriers Contract Determination, Transport Industry – Quarried Materials Contract Determination and the Transport Industry – Courier and Taxi Truck Contract Determination.
[18] See for example: Transport Industry – General Carriers Contract Determination [2008] NSWIRComm 1020, (at [4]), Connor C.
[19] Industrial Relations Act 1996 (NSW) s 323.
[20] Industrial Relations Act 1996 (NSW) s 325.
[21] Industrial Relations Act 1996 (NSW) s 332.

d. The IRC also has jurisdiction to reinstate terminated contracts of carriage and order compensation in relation to such termination.[22] These applications are similar to unfair dismissal applications, and principles applicable to unfair dismissals apply when exercising this jurisdiction.[23]

e. Chapter 6 also confers on the IRC jurisdiction to make orders in relation to contracts of carriage where previous contract carriers have paid a premium to an incoming carrier. A Contract of Carriage tribunal, consisting of a Presidential Member of the IRC and two members with industry experience, conciliate and arbitrate these matters.[24] No figures are available as to the number of applications made to the Contract of Carriage Tribunal.

f. It is submitted that the IRC's workload in relation to contracts of carriage and bailment will remain unaffected. The Society is unaware of any proposed legislative reforms to the Independent Contractors Act or other state or federal legislation that will affect the IRC's jurisdiction and workload under Chapter 6 of the Act.

4.1.5 Police

a. The IRC has the jurisdiction to review 'promotional' decisions made by the Commissioner of Police that have the effect of: decreasing the rank or grade of a police officer, reducing a police officer's seniority, failing to confer a salary increment on a police officer or any other action, on the grounds that such decision is ultra vires or harsh, unjust or unreasonable.[25]

b. When dealing with applications for review of such decisions, the IRC is constituted by a single judicial member (unless the President of the IRC directs otherwise),26 and must conciliate the claim before it can proceed to arbitration.27 An appeal lies to the Full Bench of the IRC from a decision of a single judicial member.28

c. Jurisdiction is afforded to the IRC, constituted by a single judicial member, to review 'disciplinary' decisions of the Commissioner of Police to remove police officers from

[22] Industrial Relations Act 1996 (NSW) s 314.
[23] K-Dan Pty Limited v Downer EDI Works Pty Limited [2009] NSWIRComm 1020, (at [7]-[9]) Connor C.
[24] Industrial Relations Act 1996 (NSW) s 347.
[25] Police Act 1990 (NSW), s 173(2) and s 174(1).
[26] Police Act 1990 (NSW), s 179(2).
[27] Police Act 1990 (NSW), s 176 and s 177.
[28] Police Act 1990 (NSW), s 181.

the New South Wales Police force, on the ground that such removal was harsh, unjust or unreasonable.[29] When exercising this jurisdiction, s 181G of the Police Act determines that, with certain exceptions, Part 6 of Chapter 2 of the Industrial Relations Act (which deals with unfair dismissals), applies.[30] On proceedings for review of the Commissioner of Police's decision, the IRC is not taken to be the IRC in Court Session.[31] An appeal against a decision of a single judicial member lies to a Full Bench of the IRC comprised of three judicial members.[32]

Table 5: IRC workload for the NSW Police

	Year	2005	2006	2009	2010
Type of Application					
S 173		9		24	13
S 181D *Police Act*		16		36	35

d. The IRC's workload in this regard is likely to remain unaffected in this area, given that there are no legislative reform proposals in relation to police disciplinary and promotional matters.

4.1.6 Transport Appeals

a. By amendment in mid 2010, the New South Wales Parliament determined that the Transport Appeals Board was to be constituted by the President of the IRC or their delegate.[33] The IRC, exercising its powers under Part 7 of Chapter 2 of the Act (which relates to public sector promotion and disciplinary appeals) now hears proceedings under the Transport Appeals Act 1980.[34] Such appeals relate to decisions made by State Rail Authority ('SRA') in imposing certain punishments on SRA officers within the meaning of the Transport Administration (Staff) Regulation 2005.[35] A new panel of the IRC was established to exercise this jurisdiction.[36] Appeals against decisions of the IRC may be made to the Full Bench of the IRC on a question of law alone.[37]

[29] Police Act 1990 (NSW), s 181E.
[30] For instance s 181G provides that an application must be made within 14 not 21 days and orders in relation to threats of dismissal under s 89(7) of the Industrial Relations Act cannot be made.
[31] Police Act 1990 (NSW), s 181K(3).
[32] Police Act 1990 (NSW), s 181E(2).
[33] Transport Appeal Boards Act 1980, s 5.
[34] Transport Appeal Boards Act 1980, s 11(2).
[35] (2005) see: s 12(1) and s 13 and s 16.
[36] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 23.
[37] Transport Appeal Boards Act 1980, s 23A.

b. In 2010, 802 promotional appeals were lodged, whilst 43 disciplinary appeals were lodged.[38]

c. The IRC's workload in this regard is likely to remain unaffected, given that there are no legislative reform proposals in relation to transport disciplinary matters.

4.1.7 Public Sector Promotion and Disciplinary Appeals

a. By amendment in mid 2010, insertion of a revamped Part 7 into Chapter 2 of the Act saw the IRC's jurisdiction include the Government and Related Employees Appeal Tribunal.[39] With this, public sector employees (namely those employed within the meaning of the Public Sector Employment and Management Act 2002) may appeal decisions on promotional grounds to the IRC,[40] and disciplinary type grounds specified in s 97 of the Act – which include decisions to dismiss the employee, impose a fine on the employee or defer the payments of increments to the employee.[41] A new panel of the IRC was created to deal with public sector appeals.[42]

b. In 2010, 636 promotional appeals, 38 disciplinary appeals and 81 appeals by police officers relating to leave when hurt or on duty were filed in the IRC.[43]

4.1.10 Conclusion

a. As shown, the non-judicial functions of the IRC are extensive. As noted in the Issues Paper, the effect of transferring transport appeals and public sector appeals to the IRC has resulted in a substantial increase in the non-judicial workload of the IRC, to the extent that it almost corresponds with pre WorkChoices and referral of powers levels,[44] with the result that during the first quarter of 2010 there was spare capacity of only .35 of one Commissioner.[45] The functions of the IRC under Chapter 6 of the IR Act for owner-drivers will also not diminish given the IRC's monopoly jurisdiction.

b. In conclusion, the IRC's 2010 non-judicial workload is unlikely to alter as no rumoured legislative changes will impact on its non-judicial functions. Indeed, the

[38] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 61.
[39] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 23.
[40] Industrial Relations Act 1996 (NSW) s 94.
[41] Industrial Relations Act 1996 (NSW) s 97.
[42] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 48.
[43] Industrial Relations Commission of New South Wales, 2010 Annual Report, p. 59.
[44] Issues Paper, pp 4-5.
[45] Issues Paper p 5.

scope for parties to nominate the IRC to conciliate and arbitrate industrial disputes under the Fair Work Act conveys that the non-judicial workload of the IRC may potentially increase.

4.2 JUDICIAL FUNCTIONS AND WORKLOAD OF THE IRC

4.2.1 ENFORCEMENT JURISDICTION

a. Under Chapter 7 of the Act, the IRC in Court Session is given power to enforce industrial instruments. Such instruments include awards, contract determinations, agreements, contract agreements and public sector instruments made under the Act.[46] When exercising its enforcement jurisdiction, the Commission in Court Session can impose civil penalties for breach of industrial instruments,[47] make orders for the recovery of moneys owing under industrial instruments[48] and grant injunctive relief to restrain further breaches of such instruments.[49] Industrial instruments can be enforced by the IRC in Court Session and the Local Court, constituted by an Industrial Magistrate.[50]

Table 6: IRC enforcement workload

	Year	2005	2006	2009	2010
Type of Application					
Originating enforcement application under s 365 of the Act		26			11
Appeals under s 197 of the Act		28	16	4	2 filed, 3 outstanding

b. It is pertinent to note that if a plaintiff elects to proceed under the smalls claims procedure provided by s 548 of the Fair Work Act, they may elect to bring such proceedings in a 'magistrates court'. 'Magistrates court' is defined by s 12 to include a court constituted by an industrial magistrate. Therefore, the Local Court, when constituted by an Industrial Magistrate, may hear small claims (being claims for not more than $20,000) arising from breach of federal industrial instruments. Such claims are currently heard by the NSW Chief Industrial Magistrate. The Commission in Court Session has appellate jurisdiction in relation to such decisions, being an

[46] Industrial Relations Act 1996 (NSW) s 8.
[47] Industrial Relations Act 1996 (NSW) s 357.
[48] Industrial Relations Act 1996 (NSW) s 358 and s 365.
[49] Industrial Relations Act 1996 (NSW) s 359.
[50] Industrial Relations Act 1996 (NSW) s 356.

'eligible court' within the meaning of the Fair Work Act[51] to which an appeal lies under s 565 of that Act. Therefore, if plaintiffs elect to file an application for a small claim under the Fair Work Act in the NSW Chief Industrial Magistrates Court, an appeal could lie to the IRC in Court Session.

c. It is noted that there are differences between the filing fees between the federal jurisdiction and the state jurisdiction for matters that seek the same remedies. Currently an application under s 548 of the Fair Work Act filed with the Federal Magistrates Court costs $150 for a claim less than $10,000 and $250 for a claim between $10,000 and $20,000.[52] An application under s 548 of the Fair Work Act but filed with the NSW Chief Industrial Magistrates Court costs $75.

d. As the above statistics elucidate, the Commission in Court Session's enforcement workload – in hearing applications for enforcement of such instruments and appeals from the Industrial Magistrate – has been greatly reduced, as awards and agreements have moved into the federal sphere, and is likely to remain at current levels. The only potential area for growth in workload may stem from parties appealing Industrial Magistrate decisions in regards to federal industrial instruments. However, the extent to which this may increase the Court's workload is debatable, given a mere 2 appeals were filed last year (with no indication that these concerned federal industrial instruments).

4.2.2 Unfair Contracts

a. The IRC in Court Session may declare void or vary contracts under which a person performs work in an industry, if the Commission considers the contract to be unfair at the time it was entered into or subsequent to entrance into the contract.[53] This function of the IRC was impacted by *WorkChoices* and the *Independent Contractors Act* (the later Act covering the field in relation to unfair contracts to which constitutional corporations were a party).[54]

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[51] Note that the Fair Work Act deems the 'Industrial Court' to be an 'eligible court' under that Act and s 151A of the Industrial Relations Act determines that the Commission in Court Session is to be known as the 'Industrial Court of New South Wales'.
[52] http://www.fmc.gov.au/html/fees_general.html as at 21 November 2011
[53] *Industrial Relations Act* 1996 (NSW) s 105 and s 106.
[54] *Independent Contractors Act* 2006 (Cth) s 7.

Table 7: IRC workload in relation to unfair contracts

Year Type of Application	2005[55]	2009[56]	2009[57]	2010[58]
Application for unfair contract	473	218	35	13
Outstanding Applications at the end of the year	725	314	55	33

b. The unfair contracts jurisdiction of the Commission in Court Session has been significantly pared back and it is submitted that the 2010 figures are likely to represent the continuing workload of the IRC in exercise of this jurisdiction.

4.2.3 Occupational Health and Safety

a. As noted in the Issues Paper, 54% of the Commission in Court Session's workload between 2006 and 2010 was taken up by prosecutions under the Occupational Health and Safety Act 2000. That Act prescribes certain duties for employers, employees, directors of companies, self employed people, and designers of plant and substances for use at work. Failure to comply with such duties may result in prosecution and the imposition of penalties, including fines and imprisonment.[59]

b. The Work Health and Safety Act repeals the Occupational Health and Safety Act effective from 1 January 2012. That Act is an Act corresponding with the Workplace Health and Safety Bill 2011 (Cth), which seeks to provide uniform national laws in relation to workplace health and safety.[60] The Commonwealth Bill is proposed to become law effective 1 January 2012. The Commonwealth Act applies to the Commonwealth and public authorities (such as body corporate established by the Commonwealth, Commonwealth companies and bodies prescribed by the regulations to be public authorities),[61] whilst the New South Wales Act regulates workplace health and safety in New South Wales.

c. As noted above, the Health and Safety Act circumscribes the jurisdiction of the IRC in Court Session in relation to occupational health and safety prosecutions. The new

[55] Industrial Relations Commission of New South Wales, *2005 Annual Report*, p 57.
[56] Industrial Relations Commission of New South Wales, *2006 Annual Report*, p 56.
[57] Industrial Relations Commission of New South Wales, *2009 Annual Report*, p 59.
[58] Industrial Relations Commission of New South Wales, *2010 Annual Report*, p 60.
[59] See generally Part 2 Division 1 and s 32B.
[60] Work Health and Safety Bill 2011 (Cth) s 3.
[61] Work Health and Safety Bill 2011 (Cth) s 12 and s 4.

Act creates three tiers of occupational health and safety offences. 'Category 1' offences are committed when a person has a health and safety duty, they engage in conduct without reasonable excuse that exposes an individual to risk of death or serious illness or injury, and are reckless as to the risk of death or serious injury or illness.[62] 'Category 2' offences are committed when a person has a duty, they fail to comply with that duty and such failure exposes an individual to risk of death serious injury or illness.[63] Finally, 'category 3' offences are committed when a person has a health and safety duty and they fail to comply with that duty.[64]

d. The Commission in Court Session has jurisdiction only in respect of category 3 offences, and shares this jurisdiction with the Local Court.[65] The Society believes the current government has irrationally and incongruously ripped away the Court's jurisdiction over OHS matters. The Court necessarily had significant expertise and experience in regard to such matters. Why the government believes it is necessary or beneficial to transfer this jurisdiction to non-specialist generalist courts is beyond the understanding of the Society. The government murmured that due to the 'seriousness' of such prosecutions, it was imperative that they be heard in general criminal courts. This ostensible rationale is specious and spurious. Anyone with a cursory understanding of the court system in New South Wales would be cognisant of the fact that the IRC in Court Session has the same status as the Supreme Court of New South Wales. In effect, the government has transferred what it considers to be 'serious' prosecutions to courts of inferior status to the Commission in Court Session. The Society also notes that the government has proposed not to increase funding or provide further judicial officers to Local and District Courts to deal with such matters.

e. The amendments to the Act will obviously have the effect of limiting the jurisdiction of the IRC in Court Session to only those health and safety infringements of the most minor kind and will have the ineluctable effect of significantly reducing its workload. Furthermore, as a prosecutor has the option of initiating proceedings in the Local Court, this will potentially further reduce the Commission in Court Session's occupational health and safety workload.

[62] Work Health and Safety Act 2011 (NSW) s 31.
[63] Work Health and Safety Act 2011 (NSW) s 32.
[64] Work Health and Safety Act 2011 (NSW) s 33.
[65] Work Health and Safety Act 2011 (NSW) s 229B(2).

f. In conclusion, the IRC in Court Session's workload is likely to reduce significantly in relation to occupational health and safety prosecutions, which constitute the core of its current workload.

4.2.4 CONCLUSION

a. The IRC in Court Session is set to face a significantly reduced workload given the changes introduced by the Health and Safety Act and the workload has further decreased in the area of unfair contracts given the referral of powers to the Commonwealth Government.

b. Yet, the IRC in Court Session is accessible under the Fair Work Act for appeals from the NSW Chief Industrial Magistrate. Given the lesser costs to proceeds with matters before the NSW Chief Industrial Magistrate, the option of the IRC in Court Session is therefore important for access to justice.

Recommendation 2

The Society recommends that the Inquiry acknowledges the extensive functions of the IRC and IRC in Court Session.

Recommendation 3

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.

Recommendation 4

The Society recommends that any process to consolidate functions between tribunals is taken with due care to ensure proper assessment of the medium and long term impact of the Fair Work Act and its interaction with the IR Act.

5. CONSIDERATION OF THE CONSOLIDATION OF THE IRC

Term of Reference 2.(a)
In conducting this inquiry, consider the following specific issues: opportunities to reform, consolidate, or transfer functions in relation to employment, workplace, occupational, professional or other related disputes or matters...

a. Whilst the Society does not believe that there is any reason to change the current structure of the IRC and IRC in Court Session, we provide discussion on some options that have been raised in the Issues Paper.

b. There is an advantage of using under-utilised IRC facilities by a 'Super Tribunal', the advantages of tribunals transferred to the IRC, but ultimately, we believe that in any consideration of the consolidation of the IRC, it is important for the IRC to remain autonomous.

5.1 ADVANTAGE IN USE OF UNDER-UTILISED IRC FACILITIES BY A 'SUPER TRIBUNAL'

a. A potential advantage that could flow from the consolidation of the IRC within a 'Super Tribunal' would be that underutilised IRC facilities could be used by the Super Tribunal, ensuring cost savings to taxpayers. This points to current inadequate utilisation of IRC facilities.

b. It should reiterated, however, that in exercise of its non-judicial functions, only .35 'spare capacity' of a Commissioner was found to exist in the first quarter of 2010.[66] It is, however, noted that the number of Commissioners has decreased (allegedly) from 12 to 7 since the advent of WorkChoices, and that 4 of these Commissioners hold dual appointments with Fair Work Australia.[67] Hence whilst there is very little 'unused' Commissioner service, it may well be conjectured that a number of IRC facilities are

[66] Issues Paper, p 5.
[67] Industrial Relations Commission of New South Wales, 2010 Annual Report, pp 8-9.

being under-utilised, given there are 5 fewer Commissioners than in 2006 and 4 of the remaining 7 also perform work for Fair Work Australia. The Society queries that the IRC in fact has 7 current Commissioners. The Society is aware that, notwithstanding the recent retirement of Commissioner Peter Connor, there are 5 current Commissioners, with Tabaa, Bishop and Ritchie CC holding full-time appointments and Macdonald and Stantan CC holding dual appointments with Fair Work Australia.

c. It is, however, noted that the number of Commissioners has decreased from 12 to 7 since the advent of WorkChoices, and that 4 of these Commissioners currently hold dual appointments with Fair Work Australia.[68] Hence whilst there is very little 'unused' Commissioner service, it may well be conjectured that a number of IRC facilities are being under-utilised, given there are 5 fewer Commissioners than in 2006 and 4 of the remaining 7 also perform work for Fair Work Australia.

5.2 Advantage of tribunals transferred to the IRC (Option 1 of Issues Paper)

a. Similar cost savings could be achieved if the jurisdiction of the Anti-Discrimination Division of the Administrative Decisions Tribunal and/or health professional tribunals were transferred to the IRC (or a rebadged 'Employment and Professional Services Tribunal'). As with the transfer of the Transport Appeals and Public Service disciplinary and promotional jurisdictions, this will likely see a substantial increase in the IRC's workload and greater use of currently under-utilised facilities like courtrooms and registries, providing greater efficiency in the use of resources and cost savings for taxpayers.

b. Transfer of Transport and Public Service disciplinary and promotional matters to the IRC may conceptualised as the transfer of a like jurisdiction to that historically exercised by the IRC, namely the conciliation and (if necessary) adjudication of employment and industrial matters. Such reviews could be classed as a 'merits review' of public sector employers' decisions, within an industrial law context. The expertise of the IRC in conciliating such disputes is reflected by the fact that 59.3% of transport disciplinary appeals, 84.6% of public sector disciplinary appeals, 43.1% of

[68] Industrial Relations Commission of New South Wales, 2010 Annual Report, pp 8-9.

transport promotional appeals and 33.4% of public sector promotional appeals were disposed of at conciliation.[69]

c. Transfer of the Equal Opportunity Division of the ADT to the IRC would result in the IRC dealing with employment complaints arising under the Anti Discrimination Act. Such matters are manifestly similar to the jurisdiction already exercised by the IRC, given they are employment related and akin to the victimisation provisions of the Act.[70] Given the success of the IRC in conciliating transport and public sector appeals, it would seem that the IRC would be an appropriate forum to transfer the Equal Opportunity Division of the ADT.

d. Transfer to the IRC of the professional the disciplinary functions of tribunals such as the Legal Services Tribunal and Medical Tribunal could also result in costs savings, by the utilisation of unused IRC facilities. The Issues Paper notes that a potential disadvantage of such a measure would be to draw focus away from the 'public protection' aspects of this jurisdiction. Exercise of 'professional misconduct' jurisdiction focuses on whether professionals are 'proper persons' to practice a particular profession. It is submitted that the IRC has experience in dealing with similar 'public interest' professional matters. In exercising its jurisdiction under the Police Act, the IRC has noted that public interest considerations, such as the imperative for the community to know that police officers are persons of integrity, are important factors in considering whether terminations of police officers are harsh, unjust or unreasonable.[71] Similar 'public interest' considerations have been taken into account in assessing applications for unfair dismissal remedies in regards to teachers.[72] On the basis of the IRC's experience in adjudicating such unfair dismissal claims, which have a focus on the public interest in ensuring that only 'appropriate' persons carry out certain professions, it should not be assumed that a transfer of professional disciplinary matters to the IRC, will result in a focus on 'public protection' being subsumed by employment and industrial issues.

e. There is merit in combining the tribunals regulating health professionals into a wider professional disciplinary jurisdiction, this step should be taken if at all only with great

[69] Industrial Relations Commission of New South Wales, 2010 Annual Report, pp 25-26.
[70] Industrial Relations Act 1996 (NSW) s 210 and s 213.
[71] Alexander v Commissioner of Police [2009] NSWIRComm 3 (at [45]-[47]), Van Huisstede v Commission of Police [2000] NSWIRComm 97 (at [249]), and Jessive Parfrey v Commission of Police [2010] NSWIRComm 19
[72] Bond v Department of Education of New South Wales [2010] NSWIRComm 1006.

care and after appropriate consultation. In the past, the Royal Colleges and other medical professional associations have opposed changes of this kind on the basis of maintaining the highest standards of clinical care and public safety.

5.3 Overall Requirement for the Autonomy of the IRC (Opposition to Option 2A, 2B and 3 of the Issues Paper)

a. As the above outline of the IRC's jurisdiction has made plain, the IRC exercises a very discrete and specialised jurisdiction, in resolving industrial disputes, making awards that are appropriate to particular industries and dealing with promotional and disciplinary matters that arise in specific public sector employment contexts, such as the police force. The jurisdiction to resolve industrial disputes, make awards, adjudicate unfair dismissal applications and oversee enterprise bargaining in New South Wales has been historically exercised solely by the IRC. Such jurisdiction does not simply involve reviewing the decisions of government decision makers, but prescribing new rights and obligations between industrial parties.

b. A hallmark of the New South Wales industrial relations system is the use of underlying principals of fairness and reasonableness in resolving both collective and individual employment matters. In Loty v Holloway and the Australian Workers Union [1971] AR (NSW) 336 the IRC established the principle of "a fair go all round" in unfair dismissal matters. The idea that industrial relations is about a fair go for both workers and employers is central to the operation of the Commission as a specialist jurisdiction. This is reflected in section 10 of the Industrial Relations Act 1996 which provides that the IRC may make awards "setting fair and reasonable conditions of employment for employees." The ability for the New South Wales Industrial Relations Commission to operate as a pragmatic tribunal ensuring that the concept of a "fair go" prevails in employment matters is dependent upon the IRC being both sufficiently resourced and appropriately empowered as a specialist tribunal.

c. Further, there is a high level of specialisation by IRC members and is reinforced by the fact that IRC members are often drawn from particular industries and come to the IRC with knowledge of these industries. The employment of industry panels also allows IRC members to develop expertise in particular industries. The advantage of having experienced IRC members adjudicate industrial matters is axiomatic. Recognition of the IRC's expertise is reinforced by the fact that in 2010, 59

applications were made to refer industrial disputes to the IRC under federal workplace agreements. The efficiency produced by the high degree of specialisation of the IRC is conveyed by the timely manner in which applications are determined by the IRC. In 2010, 55.9% of industrial disputes were first listed within 5 days of being filed, with 38.5% listed within 3 days.[73] 47.8% of unfair dismissals were finalised within 2 months of commencement, with 59.6% of unfair dismissals being finalised within 3 months.[74] 64% of award applications were finalised within 2 months and 62.5% of enterprise agreements were finalised within 1 month of being filed.[75]

d. A key feature distinguishing the manner of operation of the NSW IRC from other State tribunals is the role of the Commission in independently regulating collective employment concerns. The process of resolving disputes, approving agreements and making awards affecting large numbers of workers and employers requires the application of specialist industry knowledge about industrial processes. The efficient resolution of industrial disputes through adequately resourced conciliation and arbitration processes is central to the maintenance of harmonious workplace environments and industry productivity. These objects can only be met if sufficient judicial and non-judicial tribunal members are available to conciliate, arbitrate and supervise the arbitration of industrial matters.

e. Consolidation of the IRC with a Super Tribunal, or transfer of its jurisdiction to another tribunal will be disadvantageous if it is done in such a way that a separate list or division is not created to exercise the jurisdiction of the IRC. The specialisation of IRC members in industrial matters leads to efficiencies and IRC members ought to be retained in any multijurisdictional tribunal to deal with industrial matters on any list or division that is created.

Recommendation 5

The Society recommends that the facilities (court rooms, Commissioners, judicial officers and administration) of the IRC could be utilised by a Super Tribunal, however, the IRC must remain autonomous.

Recommendation 6

[73] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 54.
[74] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 54.
[75] Industrial Relations Commission of New South Wales, 2010 Annual Report, p 54.

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 such as the Anti-Discrimination Tribunal.

Recommendation 7

The Society recommends that the IRC maintain autonomy in regards to any consolidation of NSW tribunals for efficiency due to the specialist nature of the IRC.

6. FUTURE OF THE IRC IN COURT SESSION

Term of Reference 2.(b)

Options that would be available in relation to the to the Industrial Relations Commission in Court Session should the IRC's arbitral functions be consolidated with or transferred to other bodies.

a. The Society then provides this Inquiry with discussion on some options for the future of the IRC in Court Session on the premise that there is some sort of consolidation of the IRC with other tribunals in NSW. Firstly, we have provided this Inquiry with information on the structural consequences if the IRC in Court Session was to be abolished.

b. The Society, however, does not believe that there is any reason to change the current structure of the IRC and IRC in Court Session.

6.2 STRUCTURAL CONSEQUENCES IF IRC IN COURT SESSION ABOLISHED

a. Membership of the IRC consists of Presidential Members (the President, Vice-Presidents, and Deputy Presidents) and Commissioners.[76] Judicial members of the IRC, who exercise the Commission in Court Session's jurisdiction, are Presidential Members who have been appointed to the IRC in Court Session by the Governor.[77] Therefore, judicial members of the IRC exercise both non-judicial and judicial power in their dual roles as members of the IRC and Court. The IRC and the Commission in

[76] Industrial Relations Act 1996 (NSW) s 147.
[77] Industrial Relations Act 1996 (NSW) s 149.

Court Session (known as the 'Industrial Court')[78] are separate and distinct bodies performing separate and distinct functions.[79]

b. The Industrial Court is a superior court of record, with equivalent status to the Supreme Court.[80] Pursuant to Part 2 of the Constitution Act 1902 (NSW), parliament may abolish a judicial office, but a judge holding such an office must be appointed to and hold another judicial office in the same court or in a court of equivalent or higher status.[81] Hence 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, as these are courts of equivalent status,[82] or for 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.

c. In the event that the IRC's non-judicial functions are transferred to another tribunal or consolidated in a Super Tribunal, an issue arises as to what to do with the Industrial Court. As presently advised, there are no proposals to withdraw jurisdiction from the Industrial Court in relation to the enforcement of industrial instruments, superannuation, unfair contracts and appellate review of Industrial Magistrates' decisions. Furthermore, only judicial members of the IRC may exercise the disciplinary and promotional jurisdiction of the IRC in regards to police matters. The new Work Health and Safety Act also specifically reposes jurisdiction in the Industrial Court to deal with lower level health and safety offences.

d. Thus the Industrial Court will retain jurisdiction and a workload in the event that the arbitral functions of the IRC are transferred elsewhere or consolidated in a super tribunal.

6.3 MAINTAIN THE IRC IN COURT SESSION IN ITS CURRENT FORM AND INCREASE JURISDICTION TO HEAR APPEALS OF THE CONSOLIDATED JURISDICTION OF THE IRC

[78] Industrial Relations Act 1996 (NSW) s 151A.
[79] Public Services Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment [2011] NSWIRComm 143 (at [41]).
[80] Industrial Relations Act 1996 (NSW) s 152.
[81] Constitution Act 1902 (NSW) s 56.
[82] Constitution Act 1902 (NSW) s 52(2).

a. An option would be to 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. This option is not considered in the Issues Paper for this Inquiry.

b. It is highlighted in Option 1 in the Issues Paper that the IRC in Court Session would continue to be underutilised with the transfer of tribunals to the IRC as it would only increase quasi-judicial powers. At present, such appeals are dealt with by the IRC constituted as a Full Bench. Removal of appeals from a Full Bench of the IRC to the IRC in Court Session could ensure that the Court receives an increased amount of work and will allow the members of the Court to exercise their industrial and employment expertise in appellate review of such decisions. Increased appellate work could flow if the IRC's functions were transferred or consolidated in a tribunal dealing with anti-discrimination and professional matters (as envisaged by option 1 of the Issues Paper) and the Industrial Court was afforded appellate jurisdiction over such matters.

c. Presently, appeals from professional tribunals generally lie to the Supreme Court. For example, s 162 of the Health Practitioner Regulation National Law (NSW) No 86a NSW, provides that appeals from disciplinary tribunals in the health sector lie to the Supreme Court on points of law and in relation to the exercise of power by the reviewing tribunal.[83] Such appeals could be heard by the IRC in Court Session.

6.4 TRANSFER IRC IN COURT SESSION TO THE SUPREME COURT

a. An alternate proposal would be to transfer the current jurisdiction of the Commission in Court Session to the Supreme Court and appoint Judges of the IRC to oversee an 'employment and industrial list' of the Supreme Court and to exercise the Industrial Court's presently existing jurisdiction. This is considered in Option 2A of the Issues Paper.

b. This list could also deal with appellate review of anti-discrimination and professional matters. The Common Law Division of the Supreme Court already exercises appellate review functions in regards to professional matters. Additionally, as the

[83] See for example: Health Care Complaints Commission v Stoker [2011] NSWSC 960.

Issues Paper points out, Industrial Court Judges, if appointed to the Supreme Court, could be allocated work, as required, by the Chief Justice.

c. In considering this proposal, however, access to justice must be considered. See below for a discussion on this.

6.5 CREATION OF A COURT OF EQUIVALENT STATUS TO PRESIDE OVER ANY NEW TRIBUNAL

a. Another proposal would be to create a court of equivalent status to the Supreme Court to preside over any new tribunal. Such a court could exercise the Industrial Court's jurisdiction in relation to occupational and health matters and enforcement of industrial instruments and police matters. This option has not been considered by the Issues Paper for the Inquiry.

b. As per the above proposals, appeals from anti-discrimination and professional appeals could also be brought to the new court. Akin to the current constitution of the IRC and Industrial Court, members could receive dual appointments, allowing them to exercise the non-judicial powers of the new tribunal, ensuring that they had a sufficient workload and also allowing them to bring their expertise in industrial and employment matters to bear on suchlike matters.

c. In relation to the aforementioned proposal, it should be noted that the Industrial Court is a "court of a State" within s 77(iii) of the Commonwealth Constitution, and is able to be invested with federal jurisdiction under s 39(2) of the Judiciary Act 1903 (Cth).[84] The IRC in Court Session currently has jurisdiction vested in it under Part 4-1 of the Fair Work Act. Creation of a court of equivalent status will determine that it too is a "court of a State". Pursuant to the principle articulated by a majority of the High Court in Kable v Director of Public Prosecutions for the State of New South Wales[85] the New South Wales legislature could not enact a law that had the effect of impairing the characteristics of the new court in such a way that was incompatible with the role of the court as a repository or potential repository of federal jurisdiction.[86]

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[84] See Morrison v Chevalley [2010] NSWIRComm 116 (at [141]-[151]).
[85] (1996) 189 CLR 15
[86] See generally International Finance Trust Company Limited v NSW Crime Commission (2009) 240 CLR 319 and Wainohu v State of New South Wales (2011) 278 ALR 1.

d. In a recent decision in PSA v Director of Public Employment,[87] the Industrial Court, in exercise of its declaratory jurisdiction under s 154 of the Industrial Relations Act, dealt with a challenge to the constitutional validity of amendments to the Industrial Relations Act which 'directed' the IRC to give effect certain aspects of government policy – prescribed by regulation – when making or varying awards.[88] The PSA contended that this direction breached the Kable principle by enlisting the IRC as an instrument for the implementation of government policy, directed the IRC to exercise its jurisdiction in a particular way and conferred non-judicial functions on judicial members of the Industrial Court that were repugnant to the exercise of judicial power.[89] The Industrial Court rejected such arguments, noting that the direction pertained solely to the IRC in the exercise of non-judicial arbitral power and that the new s 146C of the Act provided that the 'direction' did not apply to the IRC in Court Session.[90]

e. Significantly, the Industrial Court noted that the IRC and Industrial Court were separate, albeit linked, bodies, with judges holding separate commissions for both bodies, and that the Industrial Court had not been invested with non-judicial functions that required the implementation of government policy.[91] If such reasoning is correct, then a new court created to oversee the exercise of arbitral power by the a tribunal, whose members also hold commissions in the new tribunal, will not infringe the Kable principle so long as it remains a separate and distinct body from the tribunal and does not have functions conferred on it, or on its judges in a personal capacity, that are repugnant to the judicial process.

6.6 Ensure no decrease to access to justice

a. With any of the options raised in this submission and that come before the Inquiry, attention must be given to whether or not access to justice is impacted upon by any decisions of this Inquiry. The Society provides areas of concern in regards to access to justice that the Inquiry should consider.

[87] [2011] NSWIRComm 143.
[88] Industrial Relations Act 1996 (NSW) s 146C.
[89] PSA v DPE[2011] NSWIRComm 143 (at [4]-[6]).
[90] PSA v DPE [2011] NSWIRComm 143 (at [28]).
[91] PSA v DPE [2011] NSWIRComm 143 (at [40]-[41]).

b. Firstly, any transfer of the IRC in Court Session's judicial function to the Supreme Court would decrease access to justice for members of the NSW community. Procedural rules, processes and costs vary dramatically between the Supreme Court, District Court and Local Court; and the current IRC in Court Session. The Supreme Court's processes are more legalistic, expensive, inflexible and formal compared to the IRC and IRC in Court Session. Where the IRC and IRC in Court Session is accessed by employees and contract carriers often opposing better resourced employers, the characteristics of the IRC and IRC in Court Session are better suited to promoting equal access to justice and increased access to justice compared to matters before the Supreme Court.

c. Secondly, the IRC in Court Session is accessible for many employees and contract carriers given the ability for industrial associations to bring matters on their members' behalf which is many cases is the only practical and cost-effective avenue for employees and contract carriers.

d. Thirdly, Commissioners and justices of the IRC have been elected given their expertise in the industrial relations. Their expertise goes to better access to justice where the extensive expertise of the members of the IRC and IRC in Court Session can reduce the scope of the proceedings and therefore costs.

e. Therefore, if there are any proposals to form a new court, the characteristics of the IRC in Court Session should be maintained to ensure there is no increase to barriers to accessing the current remedies available for members of the NSW Community before the IRC in Court Session.

6.6 Conclusion

a. The IRC in Court Session cannot simply be abolished. The IRC in Court Session has important responsibilities in our community to ensure industrial remedies for both employers and employees.

b. There are various ways to put forward in this submission to maintain the function and existence of the IRC in Court Session. The most important factor should be to ensure the access to industrial remedies is maintained or improved.

Recommendation 8

The Society recommends that any decisions of the Inquiry must acknowledge the structural consequences if the IRC in Court Session is abolished

Recommendation 9

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.

Recommendation 10

The Society recommends proper analysis of access to justice before the jurisdiction of the IRC in Court Session is transferred to the Supreme Court.

Recommendation 11

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 the members of the NSW community.

7. SUBMISSION CONCLUSION

a. The Issues Paper accompanying the Terms of Reference for the Inquiry focuses upon changes in the judicial and non-judicial workload associated with the transfer of employment matters relating to constitutional corporations arising from Workplace Relations Amendment (WorkChoices) Act 2005 and the referral of powers associated with the Fair Work Act 2009. While the last six years have seen significant changes in the jurisdictional framework for the NSW IRC, the Inquiry should not lose sight of the fact that the Commission continues to supervise industrial processes for the vast majority the New South Wales public and local government sector employees. Through the operation of section 146B the IRC also plays a significant dispute resolution function in relation to disputes referred to the State Commission in federal workplace agreements. Notably, the recent Government initiatives reducing the jurisdiction and powers of the IRC contrast with Labor's transfer of Government and Related Employees Appeal Tribunal (GREAT) matters to the State Commission.

b. The New South Wales Society of Labor Lawyers directs the Inquiry to these fundamental concerns about the role of the IRC in operating as a specialist tribunal providing a fair and equitable means of regulating industrial relations and New South Wales. The Society does not endorse any of options, 2A, 2B, or 3 outlined in the Issues Paper. The Society counsels the Government not to use the Inquiry to further diminish the effective administration of industrial relations in New South Wales.