Submission No 41

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

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Inquiry into opportunities to consolidate Tribunals in New South Wales

Submission to the Standing Committee for Law & Justice

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Terms of reference

On 21 October 2011, the NSW Attorney General, Hon Greg Smith MP, and the Minister for Finance and Services, Hon Greg Pearce MLC, and the Minister for Fair Trading, Hon Anthony Roberts MP, asked the Standing Committee on Law and Justice of the NSW Parliament to conduct an inquiry into opportunities to consolidate Tribunals in NSW.

The Terms of Reference requested the Committee to conduct such an inquiry, and to report by 29 February 2012. In particular, the Committee was instructed as follows.

1) To have regard to the following.
    a. The 2002 Report of the Committee on the Ombudsman and Police Integrity Commission into the Administrative Decisions Tribunal.
    b. Arrangements in place in other jurisdictions, such as the Victorian Civil and Administrative Tribunal ('VCAT')

2) To consider the following:

    a. 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, having regard to:
        i. the current and forecast workload for the Industrial Relations Commission, as a result of recent changes such as National OHS legislation and the Fair Work Act (Cth);

ii. the current and forecast workload of other Tribunals, including the Administrative Decisions Tribunal of New South Wales and health disciplinary tribunals; and

iii. opportunities to make tribunals quicker, cheaper and more effective.

b. Options with regard to the IRC in Court Session, should the IRC's arbitral functions be consolidated with or transferred to other bodies.

c. The jurisdiction and operation of the Consumer Trader and Tenancy Tribunal ('CTTT'), with particular regard to:

i. its effectiveness in providing a fast, informal, flexible process for resolving consumer disputes;

ii. the appropriateness of matters within its jurisdiction, having regard to he quantum and type of claim and the CTTT's procedures; and

iii. rights of appeal available from CTTT decisions.

d. Any consequential changes.

Issues paper

With the Terms of Reference, the Ministers published an issues paper, which described the reason for the inquiry, and the options under consideration. In summary, they indicated as follows.

1. In 2002, the Parliamentary Commission on the Ombudsman and Police Integrity Commission had recommended the consolidation of tribunals in NSW.

2. The recommendation had not been implemented.

3. The judicial resources of the Industrial Relations Commission were likely to be under-utilised, because:
    a. much of the IRC's jurisdiction has now been transferred to Fair Work Australia, and
    b. from 1 January 2012, jurisdiction over more serious OH&S prosecutions (categories 1 and 2) will be transferred to the criminal courts of NSW.

4. The availability of the IRC's judicial and quasi-judicial officers for transfer to other bodies:
    a. necessitated a consideration of their ultimate destination, and
    b. merited a reconsideration of the 2002 proposals for consolidation of tribunals generally.

The Ministers proposed the following three options for consideration by the Committee conducting the inquiry.

Option 1

To Retain the IRC and re-name it, 'Employment and Professional Services Commission'.

The jurisdiction of the Industrial Relations Commission would be enlarged, by transferring to it the following jurisdictions:

1. Equal Opportunity Division of the ADT (referred to in the paper as the 'Anti-Discrimination Division').
2. Legal Services Division of the ADT.
3. Jurisdictions of the ten existing health professional tribunals - ie, disciplinary jurisdictions with regard to medical practitioners, nurses, chiropractors, osteopaths, physiotherapists, psychologists, optometrists, podiatrists, dentists and pharmacists.

Option 2

To transfer the judges of the IRC to an employment list within the Supreme Court, and the Commissioners to an employment division within the Administrative Decisions Tribunal.

This would involve abolishing the IRC, and enlargement of the jurisdictions of the Supreme Court and Administrative Decisions Tribunal, by attracting to each the work now associated with the judges or commissioners of the IRC ('Option 2A').

Appeals from the Commissioners' decisions would lie, not to the Appeal Panel of the Administrative Decisions Tribunal, but to the former IRC judges in the employment list of the Supreme Court.

The newly-created employment division of the Administrative Decisions Tribunal could be merged ('Option 2B') with:

1. its existing Legal Services Division, and
2. the jurisdictions of the ten health professional tribunals, thus abolishing those tribunals as separate entities and enlarging the jurisdiction of the Administrative Decisions Tribunal.

Option 3

To transfer to the Administrative Decisions Tribunal (re-named 'NCAT') the jurisdictions of the following bodies:

1. CTTT.
2. Guardianship Tribunal.
3. Mental Health Tribunal.
4. The ten health professional tribunals.
5. Vocational Training Tribunal.
6. Local Government and Pecuniary Interests Tribunal.

This might be implemented at once, or in a staged process.

The issues paper does not expressly deal with the consequences of this Option for the IRC. Presumably it is envisaged that its judges and commissioners will be transferred to the Supreme Court and Administrative Decisions Tribunal, as for Option 2.

If so, Option 3 constitutes a possible addition to Option 2, rather than a substitute for it.

Scope of submission

The purpose of this submission is to consider each of the three proposed options, for the assistance of the Committee. No other option will be considered here.

Consideration

Option 1

This is the least ambitious, and perhaps the least costly, of the options under consideration.

It has the advantage of preserving an institution of considerable antiquity and reputation within the juridical system of NSW, of present and historic importance to workers and their families, while averting at least to some degree the potential for under-utilisation of judicial resources within the IRC.

However, it has a number of disadvantages. The efficacy of this option rests entirely on the successful transfer to the IRC of:

1. the Equal Opportunity jurisdiction of the ADT, and
2. the professional disciplinary jurisdiction of its Legal Services Division and the ten health tribunals.

The Equal Opportunity Division of the Tribunal administers the *Anti-Discrimination Act* 1977. That Act prohibits unlawful discrimination in employment.

It also prohibits unlawful discrimination in a number of other contexts, including without limitation:

1. provision of education (discriminating against students or prospective students),
2. provision of goods and services;
3. provision of accommodation, and
4. provision of membership and its benefits by registered clubs.[1]

These involve neither employment, nor any aspect of employment.

Part 2 Division 3A of the Act prohibits racial vilification. This is an important prohibition. It has no necessary connection with employment.

The Act also prohibits sexual harassment in educational institutions, in the provision of goods and services, in sport, and in the administration of State Acts and programs. Likewise, these are socially important prohibitions, which are not confined to the employment context.[2]

The administration of these important, non-employment related, prohibitions does not sit readily with the function of a specialist 'industrial' court or tribunal. There can be

[1] See, for instance, in the context of racial discrimination, sections 17-20A of the Act.
[2] Sections 22E, and the following sections in Part 2A

little justification in principle for transferring these functions to an industrial jurisdiction.

There is good reason for not doing so.

Anti-discrimination legislation in Australia - State and Commonwealth - is designed to protect the 'human rights' of its citizens. It gives effect to Australia's commitment to international conventions[3]. At the Commonwealth level, it is administered by a body styled, the 'Human Rights and Equal Opportunity Commission'. In NSW, the case law commonly refers to this jurisdiction as a 'human rights' jurisdiction: *Tu v University of Sydney (No. 2)* [2002] NSWADTAP 25; *ACE v State of NSW (TAFE Commission and DET) (No 3)* [2011] NSWADT 154.

Its purpose can be described as one of 'public protection'.

The transfer of such a jurisdiction to an industrial tribunal whose main or sole focus is employment would risk the public perception that the focus on human rights is subsumed by a focus on industrial equity. It has the potential to reduce public confidence in the outcome of the majority of applications for relief under the anti-discrimination legislation, which have no nexus with employment.

[3] For a history of the legislation in Australia, see Ronalds, *Discrimination Law and Practice*, 3rd edition, pp 3-6.

This could be overcome, in part, by splitting the jurisdiction into employment-related discrimination, as opposed to other forms of discrimination, sexual harassment and racial vilification. That would entail splitting the pool of judicial expertise in this area between the IRC (however named) and the ADT. That would be an administratively cumbersome arrangement. It would risk the emergence of different lines of authority in the separate juridical arenas, contrary to the fundamental principle of equal justice for all, and reducing confidence in the judicial system. Splitting judicial resources in that way also militates against economies of scale.

For those reasons, the advantages of splitting this human rights jurisdiction between two bodies are probably outweighed by the potential disadvantages.

If the Equal Opportunity jurisdiction of the Administrative Decisions Tribunal is retained by that Tribunal, there is less attraction in transferring the disciplinary jurisdiction over legal and health professionals to the IRC, because its remaining judicial and quasi-judicial resources would be less effectively utilised.

As a matter of principle, it would be difficult to justify in any event. The disciplinary jurisdiction over legal and health professionals is not, properly speaking, an 'industrial' issue. The term 'professional' distinguishes between persons who owe each other rights of a contractual nature – including but not limited to contracts of employment – and

those who owe duties to their clients and others which go well beyond mere contractual duties.

Lawyers are perhaps the most obvious example. They owe duties, not only to their clients with whom they have a contract, but also to the judges before whom they appear, the tribunal members before whom they appear, their opponents, and to the public generally. Lawyers owe duties to their clients also, above and beyond any contractual obligations. These duties are enshrined, in detail, in the *Solicitors Rules* and the *Barristers Rules*. The breach of such duties regularly forms the basis for decisions made in the Legal Services Division of the Administrative Decisions Tribunal.

The enforcement of these duties is a matter, not of industrial equity between contractors, but of public protection. To that extent, this jurisdiction is similar to the human rights jurisdiction of the Equal Opportunity Division. Its transfer to a specialised industrial jurisdiction, whose focus is employment, carries a risk that the 'public protection' character of the jurisdiction would be subsumed in an industrial focus, and that public confidence in the administration of such a jurisdiction would be diminished.

That is so, despite the undoubted expertise which members of the IRC would bring to any decision, including decisions in this context. Their expertise, however, would more appropriately be exercised within a Tribunal which has traditionally administered the regulations of professional bodies, such as the Administrative Decisions Tribunal.

For the reasons expressed above, I would counsel against Option 1.

However, the expertise of the Tribunal in its disciplinary jurisdiction makes it ideally suited for the attraction of similar jurisdiction in relation to health and related professionals. If economies of scale and other advantages attend such a course, as seems likely, the enlargement of its jurisdiction in that way would seem to be in the public interest.

Option 2

There seems to be no reason in principle why the jurisdiction currently conferred on Commissioners of the IRC could not equally be exercised by them as members of the Administrative Decisions Tribunal, as part of an industrial or employment list in that Tribunal.

As much of their industrial jurisdiction now relates to public sector employees, this sits well with a jurisdiction whose function consists largely, though by no means exclusively, of review of decisions made by government instrumentalities.

However, the maintenance of a right of appeal to an external body – namely, the IRC judges sitting in the Supreme Court – is likely to be controversial. The Administrative

Decisions Tribunal has for many years enjoyed the services of an Appeal Panel. The Leggatt Report (UK, 2001) recommended:

> 'There should be a single route of appeal for all tribunals, to a single appellate Division.'[4]

I do not propose to list the many considerations to which Sir Andrew Leggatt had regard in reaching that conclusion[5], save to say that his report is probably the most comprehensive of its kind in the world, and that these reasons should be given weight in the current context.

The NSW Parliament has similarly implemented a single Appeal Panel in the Administrative Decisions Tribunal[6]. It benefits from a rotating membership, determined by the Chief Judge, and allows appeals to the Court of Appeal of the Supreme Court[7]. This arrangement has worked well over the years, and should not lightly be disturbed. Appeals from any employment list should lie to the Appeal Panel in the first instance, and thereafter to the Court of Appeal, consistently with other Divisions.

The option of merging the employment list with the professional discipline jurisdiction of the Tribunal is not attractive, for the reasons enunciated above in relation to the possible transfer of the latter jurisdiction to the IRC.

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[4] *Report of the Review of Tribunals* by Sir Andrew Leggatt, 16 August 2001, Part III, Chapter 6, para [95].
[5] Ibid, para 6.10.
[6] *Administrative Decisions Tribunal Act* 1997, Chapter 7, Part 1.
[7] Ibid, Chapter 7, Part 2.

The utilisation of the IRC judges in the Supreme Court is a matter properly for comment by the Chief Justice.

In summary, Option 2A is attractive, because the IRC Commissioners would provide a welcome addition to the staff and jurisdiction of the Administrative Decisions Tribunal, and an effective public utilisation of their expertise, without any obvious disadvantage to the administration of justice. For consistency, however, appeals should continue to lie to the Appeal Panel of the Tribunal, and thereafter to the Court of Appeal.

One matter that will require careful consideration is the full-time nature of the employment of Commissioners. The Tribunal currently operates on a 'sessional' model, with all judicial and non-judicial members (with two exceptions) being engaged on an 'as needs' basis. The immediate benefits of this are flexibility both for the Tribunal and the members, and relief from the financial burden of providing office space and support services apart from Registry functions.

Full-time Commissioners will require both office space and administrative support. If they are to be transferred to the Tribunal, such a transfer might more easily be accommodated if the Tribunal itself were to change from the sessional model to a more permanent model of employment, like VCAT. This is commented on in the context of Option 3.

Option 3

This option, in effect, implements the 2002 report, consistently with the findings of the Leggatt Report in 2001.

This is, by far, the most ambitious of the three options. It would require the creation of a 'super tribunal' along the Victorian and UK models, resulting from the centripetal attraction of jurisdiction to the Administrative Decisions Tribunal (however named or re-named) from the CTTT, the health professional tribunals, the Guardianship Tribunal, the Mental Health Tribunal, the Vocational Training Tribunal, and the Local Government and Pecuniary Interests Tribunal.

An obvious attraction of such a consolidation is the economies of scale that would likely result, particularly in the sharing of accommodation and staffing resources.

The existing availability of regional offices and other resources in the CTTT, and the potential for making these available across the entire range of jurisdictions is also likely to be of public benefit, particularly to citizens in rural areas.

The precedents for such a consolidation, particularly those in Victoria (VCAT), Queensland (QCAT) and the UK (Tribunals System), demonstrate that it can be done successfully, and cost effectively.

Given the success of those precedents, it would be difficult to argue that such a consolidation is inappropriate. The observations which follow will be limited to the identification of important issues to be considered if such a consolidation is to be attempted.

Staged implementation

The merger into the new body of the existing jurisdictions of the IRC Commissioners and the tribunals listed in Option 3 (apart from the CTTT) might well be feasible, subject to the considerable planning necessary to implement the (complex) mechanics of legislative change, new accommodation, terms of engagement of decision-makers, and avenues of appeal.

The merger of the CTTT, however, is another matter. According to the data provided in the issues paper, the business of this tribunal 'dwarfs' that of every other tribunal combined. Given its sheer size, both in terms of listings and personnel, it cannot fail to dominate any tribunal with which it is to be merged.

According to the issues paper, there have been complaints about the workings of the CTTT. I neither sit on that Tribunal, nor appear as counsel in it, and cannot comment on the nature or accuracy of any complaint. However, if problems are perceived within the CTTT, it is inconceivable that a merger alone would rectify or even ameliorate them.

It is more likely that they would be carried over into any Tribunal with which a merger occurred. A safer option would be for the problems to be addressed by the CTTT itself, as is now the case, and to rectify them (if necessary) before a merger is implemented.

For that reason, if the Standing Committee is otherwise inclined to recommend the consolidation of tribunals in NSW, I would suggest a staged implementation, providing for the initial merger into NCAT of the jurisdictions of the IRC Commissioners and all tribunals under consideration apart from the CTTT, with provision for a later merger with the CTTT if that is thought desirable.

Tribunal members exercising judicial functions

If option 2 or option 3 is adopted:

1. the jurisdiction of the Administrative Decisions Tribunal (however named or re-named) will be substantially enlarged, and
2. provision will have to be made for the accommodation of IRC Commissioners employed on a full-time basis, and for other tribunal members required to exercise those functions.

It will be necessary, therefore, to give careful consideration to the basis for appointing and re-appointing tribunal members, and the conditions of their appointment.

It is central to any modern democracy that the rights and obligations of citizens are determined by a judiciary which is demonstrably independent of the executive, and of government generally. It was for that reason, following the Civil War in England in the seventeenth century, that English judges were given security of tenure, and freedom from salary interference during their term of office[8]. That model of judicial independence is mirrored in Chapter III of the Australian Constitution, and continues to inform the High Court in reserving the exercise of judicial power for Chapter III courts, as a bulwark of our democracy[9].

The constitution of this State does not prohibit the exercise of judicial power by persons who are not judicial officers, and who do not enjoy the indicia of independence – that is, tenure and protection from salary interference. That fact has enabled the Parliament to repose judicial power in various Tribunals whose decision-makers are appointed for short periods, often of three years duration, and whose re-appointment depends on the exercise of executive discretion.

This achieves considerable cost savings in the administration of justice, because the salaries of such decision-makers are a fraction of those of judicial officers, and they enjoy no pension rights. It also enables the appointment of decision-makers on a sessional basis, avoiding the need to provide office space, secretarial support, and workers compensation.

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[8] Act of Settlement, 12 and 13 Will. III c.2. The history of the emergence of an independent judiciary in England is complex. For a detailed account, see Baker, *An Introduction to Legal History*, 3rd edition, pp189-193.

[9] For a discussion of the nature of Chapter III judicial power, see *Gregory Wayne Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

However, it comes at an important cost. That is, the loss - actual or potential - of public confidence in the exercise of judicial power. It is settled law that tribunals like the Administrative Decisions Tribunal can, and do, exercise the judicial power of the State[10]. They are not courts, because *inter alia* their members are not judges[11]. It follows that their members do not enjoy those incidents of judicial appointment which are designed to protect the decision-making function from executive interference.

The situation becomes particularly sensitive where, as in the case of the Administrative Decisions Tribunal, judicial members are required to review, at the request of citizens, decisions made against them by the executive, and officers appointed by the executive. One of many such examples is provided by the Revenue Division of the Tribunal, where taxpayers routinely seek review of the decisions of the Chief Commissioner of State Revenue. Unless citizens can be satisfied that the person deciding their case is truly independent of the executive, and not looking to curry favour for re-appointment, maintenance of salary or other conditions of office, they can have no rational confidence that the outcome will be decided in an unbiased manner.

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[10] This is so of the Administrative Decisions Tribunal: *Trust Company of Australia Limited (trading as Stockland Property Management) v Skiwing Pty Ltd (trading as Café Tiffany's)* (2006) 66 NSWLR 775 at [26]. It is also true of the functions of, for instance, medical Appeal Panels in the Workers Compensation Commission: *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, per Basten JA at 394-396. For the distinction between administrative decision-making and the quasi-judicial nature of the power exercised by Commissioners of the Land & Environment Court, see *Segal & Anor v Waverley Council* [2005] NSWCA 310 [at 51].

[11] 'One aspect of a court of law is that it is comprised, probably exclusively although it is sufficient to say predominantly, of judges': *Skiwing*, per Spigelman CJ at [52]

For that reason, it is particularly important that the independence of decision-makers in such tribunals be made obvious to litigants. This was addressed in the Leggatt Report. The recommendation was that appointments be made for five or seven years, and that they be automatically renewable, except for sufficient cause being shown[12]. It was also recommended that:

> 'There should be a thorough review of the pay and conditions of service for all tribunal posts, with a view to a systematic and comprehensive provision across the System.'[13]

In the NSW context, the appropriate body for conducting such a review is the Statutory and Other Officers Remuneration Tribunal, which currently does not determine the remuneration of judicial members of the Tribunal.

If the jurisdiction of the Administrative Decisions Tribunal is to be enlarged in the significant way proposed, it becomes even more important that there be public confidence in the independence of its decision-makers. That means, at the very least, security of tenure, and from wrongful interference with fair salary entitlement. That will require appropriate funding, and appropriate legislative protections.

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[12] Leggatt Report, Chapter III, paras 121 to 123. The origins of the requirement for 'cause being shown' can be traced at least to the eighteenth century concept of judicial appointments *quamdiu se bene gesserit* (so long as he should behave well): Bennet, *op cit*, page 191.
[13] *Ibid*, para 115.

Even if it is reasonable to expect economies of scale in the long term, the proper establishment of a 'super tribunal', which will meet public expectations, survive public scrutiny, and stand the test of time, will require careful planning, and proper funding.

Conclusions

1. Options 2 and 3 are to be preferred to Option 1, because the human rights and public protection character of the Equal Opportunity and professional disciplinary jurisdictions makes the transfer of those jurisdiction to an industrial jurisdiction inappropriate.

2. Properly considered, Option 3 is an enlargement of Option 2, rather than a substitute for it.

3. Implementation of Option 2 will necessarily require the transfer to the Administrative Decisions Tribunal of full-time IRC Commissioners, necessitating the provision of appropriate accommodation and administrative support.

4. If that occurs, it is opportune for the Administrative Decisions Tribunal to consider changing its model from a 'sessional' one to the more settled character adopted by VCAT, including full and part-time members.

5. This will have the added advantage of maintaining public confidence in the independence of decision-makers, by providing security of tenure and salary entitlements determined by an independent statutory tribunal.

6. Option 3 is a logical extension of Option 2. If the Standing Committee is satisfied that Option 3 will produce significant synergies and cost saving in the longer term, it should be implemented, provided that implementation is staged so as to delay the merger of the CTTT with NCAT.

I should be pleased to provide any further assistance that the Standing Committee might require.

R J Perrignon

25 November 2011