

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Australian Manufacturing Workers' Union (AMWU)
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Hon David Clarke MLC
Chair
Law and Justice Committee
Parliament House
Macquarie St
SYDNEY NSW 2000

25 November 2011

Dear Mr Clarke

Re: Standing Committee on Law & Justice Inquiry into opportunities to consolidate tribunals in NSW

Please find attached the AMWU submission to the above Inquiry.

I would be very pleased to answer any questions that Committee members may have, or appear before the Inquiry if required.

Yours sincerely

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NSW State Secretary

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The Australian Manufacturing Workers Union is deeply concerned at the effect consolidating NSW's range of tribunals could have on victims of work-related asbestos disease. AMWU is asking the Government to commit to maintaining the Dust Diseases Tribunal and Workers Compensation (Dust Diseases) Board in their current forms, regardless of efficiencies that might be found in the consolidation of other tribunals.

1. The AMWU represents workers throughout the manufacturing industry in NSW; including metals and engineering, technical, administrative and supervisory, automotive, food, confectionery, paper and printing industries.

2. The AMWU has a vital interest in the deliberations and outcomes of this enquiry – AMWU members are represented in proceedings before the Industrial Relations Commission, the Workers' Compensation Commission, the Administrative Appeal Tribunal, the VCAT and sadly many AMWU members and their families appear as applicants in the Dust Diseases Tribunal and the Workers Compensation (Dust Diseases) Board.

3. Minister Pearce has announced that he will inquire into 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'. Specifically this includes the Industrial Relations Commission, (including in court session), the Administrative Appeals Tribunal and health disciplinary tribunals, the Consumer Trade and Tenancy Tribunal and any other consequential changes.

4. These are all tribunals that function to provide a publicly accessible means of appeal to working people who often have no other recourse to justice because of the prohibitive costs associated with private legal action.

5. As a matter of social justice any 'rationalisation' of tribunals, and consequent changes should be based upon the following principles:

- Any proposed rationalisation of current NSW tribunals must not be based upon a narrow cost-cutting agenda;
- Any process of rationalisation of current NSW tribunals must not reduce the rights of clients and other stakeholders, or access to specialist judges, staff and other associated personnel of current tribunals. Should there be any rationalisation of current NSW tribunals, then any consequent economies of scale must be used to deliver more expeditious processes for applicants and respondents alike.

6. There are clearly very significant implications that would arise from the proposed merging of dozens of NSW tribunals, each with their own history and

complexities and each having developed their own expertise for dealing with their unique clientele and other stakeholders.

7. It is with great concern we have read media reports accompanying the announcement of this Inquiry.

8. Specifically we are very concerned to read that Finance Minister Greg Pearce is proposing to include in his so-called new 'super tribunal' the five schemes charged with compensating injured workers including NSW WorkCover and the Dust Disease Tribunal. We anticipate that by implication the Dust Diseases Board would also be affected. The purpose of this is reported to be as a means of 'fixing a blowout in the deficit of the workers compensation budget'. (Daily Telegraph 19/10/11).

9. There is no relationship between the operation of the various tribunals and the WorkCover deficit, and the Committee's terms of reference do not extend to dealing with the framework surrounding the NSW WorkCover Scheme and the Committee should not deal with it in the context of the Inquiry.

10. This Inquiry should not allow itself to be a backdoor route to proposals to lower benefits, premiums or rehabilitation services for injured workers. However, given the media commentary the following submission contains some commentary on the cause of the rising WorkCover deficit.

11. The consolidation of some related tribunals in NSW may bring some additional efficiency to their administration. However, there are serious associated risks to those vulnerable people who access these courts as a matter of last resort and often as the only means of securing the long term financial security of their families. In many cases the clientele and stakeholders are in extreme financial hardship, are sick, injured or dying – particularly the case for applicants before the Dust Diseases Tribunal. Alternately it is the families of these very vulnerable people who rely upon tribunals as their only means to access justice.

12. There should be no unseemly rush towards the consolidation or 'merging' of existing NSW tribunals. Great care and sensitivity must be exercised in order to ensure that the minister's proposal does not adversely affect those who rely upon them through a poorly considered preoccupation with resolving budgetary issues.

13. It is also essential that there is a proper period of detailed community and stakeholder consultation in order to avoid less favourable outcomes for consumers and other stakeholders.

14. There has been a process of consolidation in Western Australia, Victoria, Queensland and the ACT. In each of these cases and in particular in WA and the ACT, existing tribunals were 'lifted' as a whole, without any change in function, personnel or resources and included in the new, larger tribunal. The

positive benefit of this arrangement has been a sharing of specialist skills and judicial functions, without any diminution in access to justice among tribunals with a similar clientele and stakeholder group. While commissioners and judges are appointed specifically to a particular tribunal, they may sit on any hearing when they have time. In this way there are economies of scale, while retaining the specialist skills of judicial and other staff in each division.

15. A similar arrangement in NSW would see a consolidation of appropriate tribunals sharing common administrative resources and where appropriate sharing their judiciary, but otherwise retaining their specialist personnel and functions, so that there is no reduction in access to justice and no reduction in the very special skills and expertise that has developed over the history of the boards, authorities and associated tribunals.

16. As already indicated, some steps have already been undertaken by Government and the agencies to deliver scale and administrative efficiencies. Specifically the advent of the Compensation Authorities Staff Division (CASD) has provided a pathway to efficiency, governance *and investment strategy* for a number of State Funds. Please see Annexure 1 which sets out the structure of the CASD.

17. Other submissions will deal with the full range of Tribunals which are the subject of the Committee's deliberations – the AMWU intends to focus upon the urgency of excising the Dust Diseases Tribunal and the from the process, ensuring that the Tribunal continues to operate as an independent Tribunal within the District Court and delivering certainty to the victims of asbestos and their families.

18. While we do not intend to enter into comment on other tribunals included in the terms of reference for this Inquiry, this submission will detail in its recommendations a position in relation to the NSW Industrial Relations Commission, the Workers' Compensation Commission and the Vocational Training Tribunal.

19. The WorkCover Authority of NSW is an agency of the CASD. It administers:

- Work health & safety
- Licensing & registration
- Workers compensation insurance
- Workers compensation benefits
- Return- to- work for injured workers

The Workers Compensation Commission of NSW is a controlled entity of the Workers Comp Authority. It is an independent statutory tribunal that resolves workers comp disputes between injured workers and employers.

20. The Workers Compensation Nominal Insurer: (trading as the NSW WorkCover Scheme) collects premiums for workers compensation insurance policies and pays benefits to injured workers.

It comprises two entities: the Workers Compensation Nominal Insurer and the Workers Compensation Insurance Fund. The Nominal Insurer manages the Insurance Fund.

The Nominal Insurer operates as a licensed workers compensation insurer. The Insurance Fund hold premiums, investment funds and other funds received.

The Workers Compensation (Dust Diseases) Board provides no fault compensation and services to workers who develop a dust disease from occupational exposure to dust as a worker in NSW.

Compensation paid increased by 6.6% in 2011 mainly due to an increase in the number of claimants, particularly those suffering from mesothelioma

21. The Dust Diseases Tribunal was established in 1989 to expedite claims made for dust related illnesses – The Tribunal deals with claims in tort for negligence relating to death or personal injury resulting principally from asbestos exposure and from specified diseases and other dust related conditions, including asbestos related diseases and carcinomas, mesothelioma, coal dust diseases, silicosis and related diseases, farmers lung and any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust.

22. The DDT is a specialist tribunal. Many of the people who lodge claims with the Tribunal are dying from their illness, or are the relatives of a person who has died from a dust related disease. These circumstances require considerable sensitivity. When a plaintiff is unable to travel, the Tribunal will convene a 'bed side court'. There is also a 'sick room' and oxygen available at the Sydney court.

23. The legislation has also has been drafted to take into account the time constraints that may affect plaintiffs. Parties are able to submit relevant material already obtained for other cases before the Tribunal. In some cases a person with a dust disease will later develop another dust disease. It is open to a plaintiff to recover provisional damages for the effects of the dust disease and in the event of another dust disease developing, return to the Tribunal to seek further damages. Damages are assessed taking into account pain and suffering, loss of earnings, medical and hospital expenses, the cost of care and the hurt and distress caused by a dust disease.

24. The DDT has an important and unique role in the NSW court system. Judges of the Tribunal are also Judges of the Compensation Court of NSW. Since 1999 the Tribunal has had a greatly increased workload. Over the past 3

years there has been an increase in the number of cases lodged with the Tribunal. This is because the use of asbestos in many industries continued well into the 1980s. It is anticipated that the peak of asbestos related claims will be around 2020.

25. Over the past ten years there has been an increase of 167% in cases lodged (not including cross claims). In each year mesothelioma and carcinoma still exceed all other categories. The increasing pleadings of asbestosis and asbestos related pleural disease is also significant and may reflect better medical practice, by which dust diseases are diagnosed earlier. The mission of the Tribunal is to ensure that all cases are handled as quickly and compassionately as a proper consideration of the law will allow.

26. The DDT is the leading court in Australia in relation to the jurisprudence of dust diseases litigation. Many of the judgments of the Tribunal have been interpreted favourably by the High Court. As a highly specialist court, its judges have highly specialised knowledge, not just in relation to scientific and medical evidence applicable to dust diseases litigation, but also to the legal principles applicable in that litigation.

26. The work of the Tribunal continues to be considerable. Set out below are the annual filing figures with cross claims listed separately. (current 22/11/11)

Year	Total	Meso	Carcinoma	Asbestosis	APRD	Other Asbestos	Silicosis	Cross Claims
2005	347	163	13	100	49	14	8	165
2006	323	130	14	73	86	16	4	179
2007	345	180	10	85	51	12	7	157
2008	333	181	15	83	45	6	3	104
2009	330	173	21	80	46	7	3	154
2010	342	205	20	59	50	5	3	122
2011	288	174	8	57	39	5	5	147

Recommendations:

1. The Dust Disease Tribunal should not be included in the terms of reference of the Standing Committee Inquiry into Tribunals.

The DDT is fully funded by the NSW Workers Compensation Dust Disease Board. The costs involved in the operation of the Tribunal, including the remuneration payable to the Registrar and all of the administrative staff is paid by the Workers Compensation Dust Diseases Board, under section 6 (2) (f) of the Workers Compensation (Dust Diseases) Act 1942. This includes the remuneration of the Judges. Since the retirement of the President of the Tribunal, Judge O'Meally, there are now only two Judges of the Tribunal and it is considered to be highly unlikely that a further Judge will be appointed.

The Tribunal already operates very efficiently and well within budget as a part of the District Court. Alternate dispute resolution is applied in relation to all proceedings before the Tribunal with a view to encouraging settlement through mediation.

The judicial resources of the DDT are already fully utilised as Judges of the Dust Diseases Tribunal have the status of a Judge of the Supreme Court. A person is qualified to be a member of the Tribunal if the person is a Judge or Acting Judge of the Supreme Court or the District Court or of any other Court of equivalent status. Therefore, those Judges who are not hearing matters in the Tribunal already take all types of work from the District Court; primarily civil work and also work for the Compensation Court. Any merging of this Tribunal with others is therefore unlikely to deliver any further efficiencies. Moreover, any attempt to distract the DDT judiciary and staff through a merger would undoubtedly result in diluting the specialised skills and knowledge of the Tribunal and likely reduced efficiency and increased costs due to increased hearing times and appeals. Under these circumstances the impact on very ill clients and their families would be unconscionable.

2. Consolidation of the WCC and the IRC would better utilise specialist resources and achieve administrative efficiencies

The NSW Industrial Relations Commission itself acknowledges its diminishing jurisdiction due to industrial relations changes and the removal of category 1 and 2 WHS prosecutions. In the medium to long term this may lead to an under utilisation of its resources. However, at the same time the NSW Workers Compensation Commission is unable to resolve matters before it in less than 6 months. This is particularly the case with liability disputes, leaving workers with no income to support themselves and their families. This situation arises most often from long term under resourcing of the Commission relative to its increasing workload.

It would be reasonable to consolidate the NSW IRC with the WCC in order to provide access to the specialist resources of the NSW IRC to supplement the WCC. Administratively this would reflect the CASD, while in judicial terms it would effectively mirror the role of the DDT in relation to the District Court in that when members of the NSWIRC are not engaged in industrial or WHS matters they would be assigned worker compensation matters.

The structure of the NSW IRC itself reflects the WCC. They both have presidential and deputy presidential members with lay professionals supporting those roles. In the case of the WCC it is supported by arbitrators, mediators and the registrar. The NSW IRC has commissioners and a registrar. This similarity in structure would lend itself to the new alignment. It is also significant that both commissions are of Supreme Court standing. Both commissions already deal with industrial matters; the IRC with workplace disputes and WHS, while the WCC handles workers compensation disputes and other related matters.

As the Vocational Training Tribunal and Appeals Panel also deal primarily with workplace disputes affecting apprentices and trainees, it may also be appropriate to consider including them in the new consolidated arrangement.

Each of these tribunals would benefit from the economies of scale that would accrue to centralised administration such as that existing at the CASD, discussed earlier. In recognition of their specialist function, a possible title for this new consolidated tribunal could be the NSW Workplace Issue Resolutions Commission.

- 3. Civil and professional tribunals should not be consolidated into this group as it would risk dilution of the specialist industrial skills and knowledge acquired, undermining any cost savings or efficiencies achieved through consolidation.**
- 4. There should be no consolidation of tribunals until there has been a proper consultation and assessment of the particular needs of each body and its clientele and associated stakeholders.**

Annexure

The CASD was formed on 1 July 2009 as an employment division by merging the former Office of WorkCover Authority and the former Office of Motor Accidents Authority. Each agency currently retains its own governing board or committee, with a combined audit and risk committee at the CASD level. There is only one CEO for CASD and all the agencies. CASD has extended its role beyond providing personnel to agencies and is involved in management and oversight of all the agencies in the group.

This is an administrative structure. Due to the absence of control, each agency has separate financial arrangements.

Current CASD Structure

