

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Local Government Association NSW
Shires Association NSW

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Submission

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Inquiry into opportunities to consolidate tribunals in NSW

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1. Executive summary

The Local Government Association of NSW (the "LGA") and the Shires Association of NSW (the "SA") thank the NSW Parliament Standing Committee on Law and Justice (the "Committee") for the opportunity to provide comment and submissions to the 'Inquiry into opportunities to consolidate tribunals in NSW'.

In summary, the LGA and the SA (collectively referred to as the "Associations"):

- a. Support the consolidation of tribunals in NSW; and
- b. Support a single employment jurisdiction. That is, all industrial relations and employment related matters should be dealt with by a specialist "one stop shop" tribunal.

The Associations have considered each of the options discussed in the *"Issues Paper – Review of Tribunals in New South Wales"* (the "Issues Paper"). Of the options under consideration, the Associations prefer Option 1 which, if implemented, would result in the creation of an Employment and Professional Services Commission for all industrial relations and employment related matters within the State industrial relations system (the "State IR system") by renaming the IRC and transferring functions from the ADT and health professionals, including the medical tribunal.

2. Background

The Associations represent the employer interests of NSW Local Government and are registered as industrial organisations of employers pursuant to s294 of the *Industrial Relations Act 1996* (NSW) and s18 of the *Fair Work (Registered Organisations) Act 2009*. The LGA and SA have separate Executives with a common Secretariat and shared administration staff.

The LGA was established in 1883 and primarily promotes the interests of urban councils.

The SA was established in 1908 to promote the interests of rural councils.

The Associations support and represent the interests of local councils by providing many specialist services including industrial relations, legal and policy advice, specialist publications and industry purchasing discounts. Through their activities, the Associations also promote and publicise the views of local government.

Currently there are 152 general purpose councils in NSW and 14 special purpose county councils (with functions such as noxious weed control, flood mitigation and water supply).

New South Wales Local Government is a \$6 billion industry. In 2008, NSW councils employed approximately 51,700 people and managed infrastructure assets worth in excess of \$55 billion.

3. Industrial relations and employment related matters involving NSW Local Government

All NSW councils and county councils were declared non-national system employers pursuant to section 9A of the *Industrial Relations Act 1996* (NSW) (the "Order") on 22 December 2009 by then NSW Minister for Industrial Relations, the Hon. John Robertson. The Order was endorsed by the Hon. Julia Gillard, on 17 December 2009, pursuant to s14(4)(a) of the *Fair Work Act 2009* (Cth) (the "Endorsement"). As a consequence, all NSW councils and county councils are non-national system employers and part of the State IR system.

The *Local Government (State) Award 2010* (the "State Award") is the main industrial instrument regulating the terms and conditions of employment of NSW council employees. This award, together with the *Local Government (Electricians) State Award* are industry awards approved by the Industrial Relations Commission of New South Wales. Other Industrial relations Commission of New South Wales approved industrial instruments regulating the terms and conditions of employment of NSW councils include enterprise awards and enterprise agreements (see for example: *Mid Coast County Council Enterprise Award*, *Goldenfields Water County Council Enterprise Award*, *Riverina Water Council Enterprise Award*, *Lake Macquarie City Council Consent Award*, *Ballina Shire Council Managers' Enterprise Agreement*, *Blacktown City Council Enterprise Agreement*, *Cessnock City Council Indoor Staff Enterprise Agreement*, *City of Newcastle Enterprise Agreement*, *Clarence Valley Council Enterprise Agreement*, *Lake Macquarie City Council Enterprise Agreement* and *Pittwater Council Rangers' Agreement*).

The *Local Government Industry Award 2010* (the "Federal Award") is a modernised federal award that applies to Local Government employers and employees operating in the national industrial relations system (the "national IR system") unless covered by a transitional federal award. Currently councils in Western Australia, the Northern Territory, Victoria and Tasmania are in the national IR system, however, it is the Associations' understanding that councils in Victoria and Tasmania will remain covered by transitional federal awards until 31 December 2013. The Federal Award does not directly apply to NSW councils because NSW councils are part of the State IR system, however the Federal Award indirectly applies to NSW councils when national IR system labour hire companies and group training companies perform work for NSW councils. The Federal Award also applies to corporations that are either owned or controlled by NSW councils unless such corporations are declared non-national system employers.

The Industrial Relations Commission of NSW, and the Industrial Court of NSW (IRC)

The Associations are active participants in the State IR system and regularly appear before the Industrial Relations Commission of New South Wales and the Industrial Court of New South Wales (collectively referred to as the "IRC") in a wide variety of matters. Such matters include industrial disputes, proceedings involving awards and

enterprise agreements, alleged unfair dismissals, alleged unfair contracts and alleged underpayment of wages claims. Over the past decade the Associations have also represented the interests of NSW Local Government in various major industrial cases before the IRC, including State Wage Case proceedings (yearly) and the Secure Employment Test Case (2003-2005).

In general, the Associations' and NSW councils' experience with the IRC has been a positive one. In our opinion, the members of the IRC have extensive experience in dealing with industrial relations and employment related matters.

Industrial relations and employment related matters do not exist in a vacuum. By being a specialist tribunal, the members of the IRC generally better understand issues impacting on NSW local government, such as increasing demand for services, cost shifting, limited resources, political considerations and a limited capacity to raise additional funds. As a consequence, the IRC, when exercising its functions, typically provides practical assistance and guidance that is tailored to suit the specific needs of the industry.

We understand that the IRC is Australia's oldest industrial relations tribunal and one of the oldest industrial relations tribunals of its type in the world. Further, as noted by Arthur Moses (Senior Counsel) in a 2009 report on the future of the IRC, *"Over the years, this Tribunal through its various statutory manifestations has made a distinguished contribution to the development of fair standards of employment"* (Moses A; Re: *The Future of the Industrial Relations Commission of NSW and/or the Industrial Court of NSW*, 20 August 2009, at para 2.2). In our opinion, having a tribunal with members that specialise in industrial relations and employment related matters (such as the IRC) assists in achieving fair and harmonious industrial relations and provides compelling reasons as to why a specialist tribunal should be retained for such matters.

As a provider of essential services under the *Essential Services Act 1988* (NSW), NSW councils have benefited from the IRC's capacity to facilitate the speedy resolution of industrial disputes through conciliation and/or arbitration. The timely resolution of industrial disputes is significant in that it assists councils to keep compliance costs down and to minimise lost productive time due to industrial action. In our experience, the IRC typically lists new industrial disputes within 2 to 3 days of notification although it is not uncommon for industrial disputes to be listed on the same day that the notification is filed with the IRC registry.

The Associations are concerned that the period between the notification of an industrial dispute and the listing of that industrial dispute, as well as the period in which industrial disputes are resolved, may increase under a consolidated tribunal.

It is important to note that in the context of the *Fair Work Act 2009* (Cth) where long service leave entitlements for NSW national system employees are for the most part derived from the *Long Service Leave Act 1955* (NSW), the Industrial Court of NSW still has an important role to play in the interpretation, administration and application of the *Long Service Leave Act 1955* (NSW). Section 12 of the *Long Service Leave Act 1955* (NSW) provides that employees may apply to the Industrial Court of NSW for "...an order directing the employer to pay the worker the full amount of any

payment which has become due to the worker under this Act at any time during the period of 6 years immediately preceding the date of the application ...".

Similarly, under the *Fair Work Act 2009* (Cth) (refer to sections 12, 539 and 545) the Industrial Court of NSW is defined as an eligible State or Territory Court that may, upon application, order a civil remedy if the Court is satisfied that an employer was required to pay an amount under the *Fair Work Act 2009* (Cth) or a fair work instrument and the employer has contravened a civil remedy provision by failing to pay the amount in question.

The absence of a specialist tribunal for industrial relations and employment related matters in the NSW jurisdiction may invite consideration by relevant stakeholders as to whether it would be appropriate for NSW local government industrial relations and employment related matters to be dealt with by the specialist tribunal in the federal IR system.

Administrative Decisions Tribunal (ADT)

The Associations represent NSW councils in alleged discrimination and alleged victimisation matters before the Administrative Decisions Tribunal (the "ADT"), albeit less frequently than we represent councils in matters before the IRC.

In our experience, the types of matters the Associations are involved in before the ADT often involve a consideration of industrial relations and/or employment related concerns that are capable of being ventilated before the IRC, such as via an industrial dispute (pursuant to s130 of the *Industrial Relations Act 1996*), an action for relief from alleged victimisation (pursuant to s210 of the *Industrial Relations Act 1996*), an application for relief from alleged unfair dismissal (pursuant to s84 of the *Industrial Relations Act 1996*), a summons seeking relief in respect of an alleged unfair contract (pursuant to s106 of the *Industrial Relations Act 1996*) or an application for reinstatement of an injured worker (pursuant to s242 of the *Workers Compensation Act 1987*).

Further, given that s169 of the *Industrial Relations Act 1996* requires the IRC to take into account the principles contained in the *Anti-Discrimination Act 1977* when exercising its functions, the IRC has the expertise and experience to deal with a broader range of discrimination matters than it currently does.

The issues paper upon which this Inquiry is based comments that it *"...is an opportune time to reconsider the approach recommended in 2002 by the Parliamentary Committee as there are some emerging issues, particularly in relation to the Industrial Relations Commission, that need to be addressed"*. The Parliamentary Committee in question was the Committee on the Office of the Ombudsman and the Police Integrity Commission which handed down in November 2002 a Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal.

In 2002 the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission (the Committee) formed the view that the ADT's jurisdiction required further consolidation. The view of the Committee was that a range of tribunals could be considered for merging with the ADT. None of the

tribunals that were considered for consolidation dealt with industrial or employment related matters (see p21 or clause 3.2.1 of the 2002 of the Report).

The Committee noted that the ADT's jurisdiction can be divided into two areas, namely the original jurisdiction which involves making a decision in the first instance in relation to a matter in dispute; and the review jurisdiction which involves the external review on the merits of classes of administrative decisions (see p2 clause 1.2 of 2002 report). In 2002, it was the evidence of the existing President of the ADT, Judge O'Connor that "...extensions to the ADT's original jurisdiction were likely to be more debatable than extensions to its merit review jurisdiction". Similarly, the then President of the NSW Guardianship Tribunal, Mr O'Neil, submitted that while there is scope for an expansion of the ADT's jurisdiction to review administrative decisions, tribunals that exercise original jurisdiction should not be merged with the ADT (see pp27-8 at clause 4.1.1 of the 2002 report). The Associations submit that, the proposals to extend the ADT's original jurisdiction by creating a new Employment Division of the ADT, appear at face value to be at odds with the concerns and submissions of both the existing President of the ADT and the former President of the NSW Guardianship Tribunal.

It is important to note that when it was formed in 1998 (post the 1996 referral of the industrial relations powers by the Kennett government) the Victorian Civil and Administrative Tribunal ("VCAT") amalgamated 14 independently operated boards and tribunals. None of those boards and tribunals save for the Anti-Discrimination Tribunal specialised in industrial and/or employment law. Similarly, in 1999 the Western Australian Law Reform Commission handed down a report entitled Review of the Criminal and Civil Justice Systems in Western Australia. The report recommended the establishment of a Western Australian Civil and Administrative Tribunal that would amalgamate the adjudicative functions of existing boards and tribunals, save for tribunals in the areas of industrial relations and Workcover (see p9 clause 2.3 of 2002 report).

Finally, we note the submissions of Judge O'Connor in 2002 when he acknowledged that the question of amalgamation becomes more difficult when dealing with large-volume tribunals. He submitted that: *"The case in favour of integration seems to me to be very strong in the case of relatively small tribunals, often with a minuscule registry and a handful of part-time members. Large specialist tribunals are in a somewhat different situation Such a tribunal may well have a good ethos, good operating procedures and good resources and see amalgamation as a danger, with the possibility that a lowest common denominator approach will prevail when absorbed into a larger structure. This is a serious issue"* (see p32 clause 4.1 of 2002 report). The Associations are of the view that the IRC is a specialist tribunal with a good ethos, good operating procedures and a complimentary registry – the absorption of this tribunal into a larger structure will raise serious issues if a common denominator approach prevails.

Accordingly, for the above reasons, the Associations are of the view that a consolidation of the ADT and IRC would be best achieved by transferring the industrial relations and employment related functions of the ADT to the IRC, rather than transfer the functions of the IRC to the ADT.

Chief Industrial Magistrates Court (CIMC)

Although the Chief Industrial Magistrates Court (the "CIMC") is a court and not a tribunal, we consider it appropriate, given the matters currently under consideration by the Standing Committee, to comment on the functions of the CIMC.

The Associations represent NSW councils in a variety of matters before the CIMC, albeit less frequently than we represent councils in matters before the IRC.

The types of matters the Associations are involved in before the CIMC can generally be described as industrial relations and/or employment related matters (e.g. alleged underpayments and/or alleged non-compliance with the provisions of an award, enterprise agreement or contract of employment).

In our opinion, the members of the IRC have the experience and expertise to undertake the full range of functions of the CIMC. The IRC already has responsibility for approving the making and variation of awards and enterprise agreements, and the members of the IRC when exercising the IRC's functions are often required to interpret the provisions of awards, enterprise agreements and contracts of employment. Further, as the tribunal responsible for approving awards and enterprise agreements, the IRC is likely to understand the history and intention behind their provisions and application.

We also note that s380 of the *Industrial Relations Act 1996* provides a mechanism in which an industrial organisation can seek to have a small claim determined by the IRC instead of by the CIMC where the matter involves other proceedings before the IRC. An example of where this typically occurs is during industrial dispute proceedings brought under s130 of the *Industrial Relations Act 1996*.

Accordingly, for the above reasons, the Associations are of the view that there are compelling reasons to consolidate the functions of the CIMC into the IRC.

Local Government Pecuniary Interests and Disciplinary Tribunal (LGPIDT)

The Associations do not currently have a view as to whether the Local Government Pecuniary Interests and Disciplinary Tribunal (the LGPIDT) should be consolidated with another tribunal.

Workers Compensation Commission (WCC)

The Associations do not currently have a view as to whether the Workers Compensation Commission (the WCC) should be consolidated with another tribunal.

The Land and Environment Court (LEC)

Although the Land and Environment Court (LEC) is a court and not a tribunal, we consider it appropriate, given the matters currently under consideration by the Standing Committee, to comment on the way alleged breaches of employment related provisions of the *Local Government Act 1993* (the "LG Act") are currently dealt with.

Sub-section 674(1) of the LG Act provides that "Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act". The section applies to alleged breaches of the LG Act that involve industrial and employment related matters, including the provisions at Chapter 12 of the LG Act concerning how councils are staffed. For example, currently an alleged breach of s349 of the LG Act, which requires councils to only appoint persons to positions on merit following a merit selection process, are required to go to the LEC.

In the Associations' opinion, the IRC is a more appropriate tribunal for dealing with alleged breaches of Chapter 12 of the *Local Government Act 1993* than the LEC, due to the IRC having specialist experience in dealing with industrial relations and employment related matters.

Other tribunals

The Associations have limited and/or no involvement with the various other NSW tribunals that the Standing Committee is considering as part of its Inquiry. As such, we are reluctant to comment on what should happen to these other tribunals during any future consolidation.

4. Reasons supporting the consolidation of NSW tribunals

The Associations generally agree with the following comments of Arthur Moses (Senior Counsel) that were made in his 2009 Report:

- "3.7 An appropriate structural adjustment may be achieved by the amalgamation of a number of State Tribunals into one new Tribunal tentatively entitled the "Employment Court and the Employment & Professional Services Commission".
- 3.8 It is suggested that such an amalgamated Tribunal would have the advantage of a single registry and provide economies of scale. It would:
 - (a) provide a "one stop shop" for all industrial and employment matters within the State system;
 - (b) promote cost savings through amalgamation;
 - (c) eliminate the possibility of forum shopping or duplication of litigation; and
 - (d) provide a single forum to hear a series of relevantly related matters concerning the rights of employees and consumers.
- 3.9 Candidates for amalgamation include the various professional disciplinary bodies (Lawyers, Doctors, Veterinarians and the like), which already in large part are within the Administrative Decisions Tribunal in any event. There are also Tribunals concerned with Racing in NSW. In short, all bodies concerned with the supervision of professionals in NSW could appropriately be placed within the proposed Tribunal. This would be consistent with recommendation 2 that the functions of GREAT and the TAB be transferred to the IRC.

...

- 3.15 The Industrial Relations Commission of NSW has functional premises in Bridge Street, Sydney, and these could be used to accommodate for the amalgamated Tribunal. This is

something that could be considered by the Attorney General's Department which, I understand, generally administers that heritage property.

3.16 Another possible role for such a new tribunal includes the compulsory mediation or conciliation of all disputes arising out of employment in the New South Wales jurisdiction, irrespective of which Court the proceedings were commenced in. The West Australian Industrial Relations Commission has been vested with the power to mediate with respect to "employment disputes" through the Employment Dispute Resolution Act 2008 (WA). "Employment disputes" are defined in that Act as any question, dispute or difficulty that arises out of or in the course of employment and includes an industrial matter under the Industrial Relations Act 1979. A provision of this nature would be sufficient to capture proceedings which have been commenced in the Supreme Court and the District Court under general law such as a breach of an employment contract.

3.17 The mediation provision would enable Judges of the Industrial Court to utilise their extensive experience in conciliation and mediation to successfully resolve litigation that has been commenced in the common law courts. The advantages of Court based mediation (being conducted by Judges) have been recently highlighted by the Chief Justice of the Supreme Court of Western Australia. As a result on their statutory role and experience in conciliating matters pursuant to s.109 of the Industrial Relations Act 1996 (NSW), the Judges of the Industrial Court would be better placed (and more inclined) to conduct these mediations than Judges of the Supreme Court and District Court.

5. Conclusion

The Associations generally support the consolidation of tribunals in NSW. However, for the above reasons we are also of the view that all industrial relations and employment related matters should be dealt with by a tribunal that specialises in such matters and that has members with a high level of experience in industrial relations and employment related matters.