Submission No 15

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales

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SUBMISSION BY THE PUBLIC SERVICE ASSOCIATION AND PROFESSIONAL OFFICERS' ASSOCIATION AMALGAMATED UNION OF NEW SOUTH WALES

TO THE

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NEW SOUTH WALES

LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

Authorised by: John Cahill
General Secretary

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1. About the PSA

The Public Sector Association and Professional Officers' Association Amalgamated Union of New South Wales (**PSA**) is a State registered Organisation of employees registered under the provisions of the *Industrial Relations Act* 1996 (**IR Act**). It represents approximately 47,000 members, the majority of whom are employed in the administration of the Government of New South Wales.

Following the passage of the *Workplace Relations Amendment (Work Choices) Act* 2005 and the *Industrial Relations (Commonwealth Powers) Act* 2009 it is one of the major users of the Industrial Relations Commission of New South Wales (**IRC**).

2. IRC

The inquiries terms of reference place a focus on the IRC and how the current forecast downturn in workload for the IRC provides an opportunity for structural reform of tribunals in NSW. Before considering any consolidation it is important to understand the current role and function of the IRC.

The IRC has existed as a separate entity since 1901. It is widely considered as an "independent umpire" able to achieve a fair and reasonable result. Its members have extensive experience in the wide range of alternative dispute resolution practices. In particular its members have developed the skills necessary to assist employers and employees (and their unions) to resolve their differences through conciliation, and where necessary arbitration. It provides an effective means for resolving disputes without the need to take industrial action.

The workload of the IRC has, in recent years, been reduced to that of the industrial and employment proceedings for public sector employees, local government employees and employees of numerous large corporations such as BlueScope Steel which utilise the dispute resolution powers of the IRC under section 146B of the IR Act. This reduction in workload should not be overstated. There are approximately 271,416 full time equivalent public sector employees and their

wages (including superannuation) account for 49% of the total expenses of the NSW Government.[1]

The PSA supports the retention of the IRC and the system under which it operates for a number of reasons:

- Fairness and justice is a primary object of the system;
- the NSW System is based on an underlying system of common rule and enterprise award that provide a safety net of minimum wages and conditions that are based on the principle of "fair and reasonable" conditions;
- unlike the Fair Work Act regime the NSW system places an emphasis on conflict resolution without recourse to industrial action;
- the NSW system is flexible and equitably balances the rights of unions, employers and employees;
- its preparedness and ability to move quickly to determine any application before it; and
- unlike the Fair Work Act regime which places an emphasis on disputation and court based enforcement the NSW system is accessible and rights are capable of being enforced without encountering prohibitive costs

3. Options

The committee should approach the question of consolidation from the perspective of the tribunal's users. At present employees, employers and unions are faced with a number of jurisdictions from which to choose. These should be consolidated into a single tribunal for employment matters. In July 2010 the IRC smoothly consolidated the jurisdictions formerly administered by the Government and Related Appeals Tribunal and the Transport Appeals Board. That process of consolidation should continue. In particular the following jurisdictions should be incorporated into the IRC:

[1] Budget Statement 2010-11 p 4-17.

(1) Discrimination functions performed by the Anti-Discrimination Board of NSW (**ADB**) and the Equal Opportunity Division of the Administrative Decisions Tribunal (**ADT**)

The IRC is already required by section 169 of the IR Act to take into account the principles contained in the Anti-Discrimination Act 1977 yet has no specific jurisdiction to deal with claims of discrimination. This piecemeal approach should be ended as it forces employees to make the undesirable choice to either bring multiple proceedings or bring one proceedings and drop the other cause of action altogether. Employees should not be faced with this choice and employers should not be faced with dealing with essentially the same facts in two different tribunals.

The essential function of the ADB is to mediate complaints of discrimination, harassment, vilification or victimisation in employment, education, accommodation, registered clubs and the provision of goods and services. The members of the IRC have extensive experience in alternative dispute resolution. There is a natural synergy for the consolidation of this function into the IRC.

(2) Underpayment of wages and breach of industrial instrument functions performed by the Chief Industrial Magistrates Court (**CIM**);

Currently employees and unions can choose to commence underpayment of wages and breaches of industrial instrument proceedings in either the CIM or the IRC. There is no strict monetary limit which divides proceedings between these jurisdictions. They should be merged. In 2009 the Parliament of NSW passed the *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009 No 32 to achieve that end. The committee should recommend that this legislation commence.

(3) Breach of contract of employment claims (including restrictive covenant proceedings)

The IRC (when sitting as the Industrial Court of NSW) should be given additional jurisdiction to deal with breach of contract claims. It is uniquely placed to determine whether an employee is covered by an award, agreement or common law agreement. Currently common law breach of contract claims are heard by the appropriate common law court depending of the amount of compensation claimed. This has created a fragmentation of precedent and a dilution of expertise within judicial officers.

(4) Vocational Training Tribunal

This body hears and determines complaints that a party to an apprenticeship or traineeship agreement has failed to discharge his or her obligations under the agreement. Given the Fair Work Act 2009 now provides rights for national system employees these functions should now be consolidated into the IRC, particularly as they only relate to apprentices and trainees in the public sector.

(5) Professional disciplinary functions performed by tribunals such as the Dental Technicians Registration Board; Dental Tribunal of NSW; Chiropractors Tribunal of New South Wales; NSW Medical Tribunal; Nursing and Midwifery Tribunal of NSW; Optometry Council of New South Wales; Osteopathy Tribunal of New South Wales; Pharmacy Tribunal of New South Wales; Physiotherapists Tribunal of New South Wales; Podiatry Tribunal of New South Wales; Psychologists Tribunal of New South Wales; and Legal services division of the ADT

It is already the case that some of the judges of the IRC are carrying out functions for these professional tribunals. For example Justice Haylen holds appointment as Divisional Head of the Legal Services Division of the ADT and Justices Marks, Kavanagh, Staff and Backman hold appointment as Deputy Chairpersons of the Medical Tribunal of NSW. Their appointments

reflect the common nature of the work of those tribunals (inquiries into complaints of misconduct with power to impose restrictions on or terminate a professional's right to practice) to the work of the IRC to hear and determine unfair dismissal cases for medical practitioners employed by the Area Health Services.

If all these jurisdictions were consolidated into the IRC employees would have a single tribunal to approach for assistance in relation to an employment related grievance. This 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.

In addition the IRC could be granted the power of 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.

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[2]. As a result of 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.

It would be inappropriate to appoint any of the seven (7) current judicial members of the IRC (some of whom are due to retire shortly) to positions within a new tribunal. Current judicial officers should be appointed to the Supreme Court of NSW. There is precedent for this to occur. For example in 2009 Justice Monika Schmidt, who was sworn in as a Judge of the Industrial Court and a Deputy President of the Industrial Relations Commission of NSW on 22 July 1993, was appointed as a Judge of the Supreme Court of NSW. These judicial officers could be available to do work in any new tribunal as required. For example they could hear applications under section 181E of the *Police Act* 1990 and or any other such applications that currently must be heard by a Presidential member of the IRC.

The remaining question of potential to consolidate non employment related tribunals could be achieved by consolidating the functions of the ADT (without discrimination or the legal services division); the Local Government and Pecuniary Interests Tribunal; Guardianship Tribunal; Mental Health Tribunal and the CTTT into one tribunal. This would be consistent with the approach taken in relation to both QCAT and VCAT in that the industrial relations functions were not consolidated into either tribunal.

Lastly any consolidation will necessarily result in PSA member's positions being declared excess. Positive steps should be taken to redeployed effected employees within the public service.

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[2] The Hon. Wayne Martin, Chief Justice of Western Australia, "Courts in 2020: Should they do things differently", National Judicial College of Australia Conference 25 October 2008.

4. Summary

The PSA is a strong advocate for the retention of the arbitral functions of the IRC. Those functions have served both unions and employers to create a climate of harmonious industrial relations in the public sector. The Government should explore a consolidation of tribunals in NSW to create a single employment tribunal and a separate administrative law tribunal.

John Cahill
General Secretary