

## **INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW**

**Organisation:** NSW Local Government, Clerical, Administrative, Energy,  
Airlines and Utilities Union

**Date received:** 29/11/2011

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# New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

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Ref: 20111027LFR01IND

Contact: Lyn Fraser

29 November 2011

The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000



By facsimile: (02) 9230 2981

To the Director,

## **Inquiry – Opportunity to Consolidate Tribunals**

Please find **enclosed** the United Services Union's submission into the above enquiry.

Yours faithfully,

Graeme Kelly  
GENERAL SECRETARY

**Support Team:** 1300 136 604 • **Email:** [united@usu.org.au](mailto:united@usu.org.au) • **Website:** [www.usu.org.au](http://www.usu.org.au)

**Registered Office:** Level 7, 321 Pitt St Sydney 2000 • **Phone:** (02) 9265 8211 • **Fax:** (02) 9261 2265 • **ABN:** 95 571 805 442

**Regional Offices:** Newcastle, Wollongong. **Satellite Offices:** Armidale, Bathurst, Canberra, Dubbo, Grafton, Hay, Port Macquarie, Wagga Wagga

United Services Union  
Submission to the NSW Legislative Council  
Standing Committee on Law and Justice

## **Inquiry into Opportunities to Consolidate Tribunals in NSW**

USU Submission – focussing on the NSW Industrial Relations Commission

### **About the USU**

The United Services Union (USU) is a State registered Union based in New South Wales with over 30,000 members. Our members are employed in a range of industries including the energy sector, local government, utilities, airlines and the private sector. Whilst a proportion of our membership is now covered by industrial instruments within the federal industrial relations arena, the large bulk of our membership is employed in local government in NSW and remains within the state system (along with some other USU members employed in the health industry).

### **2002 Report into the Administrative Decisions Tribunal**

Point 1 of the Terms of Reference refers to the *2002 Report of the Committee on the Ombudsman and Police Integrity Commission* into the Administrative Decisions Tribunal and arrangements that are in place in other jurisdictions, such as the Victorian Civil and Administration Tribunal. This report is almost 10 years old and, because of the focus of the study, it did not include within its scope a study of the ramifications of a possible consolidation of the NSW Industrial Relations Commission with other tribunals. Indeed, very little reference is made within this report to the industrial relations arena at all.

Some rare references were made to employment/industrial relations tribunals in the discussions on comparative jurisdictions, viz:

- The section on the United Kingdom experience (as summarised by reference to the Leggatt Report) did contain some discussion on the nature of various tribunals (including employment tribunals). It appears to place some significance on the difference between employment tribunals (*party tribunals*) and other types of tribunals.<sup>1</sup>
- The Western Australian experience specifically noted the exclusion of industrial relations and workcover areas from the tribunal consolidation process.

*"In its report, the Law Reform Commission recommended a Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and workcover areas."*<sup>2</sup>

- Other comparative examples within Australia are noteworthy for the absence of discussion about industrial relations tribunals. For example, the Victorian experience of consolidated

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<sup>1</sup> Committee on the Office of The Ombudsman and The Police Integrity Commission, Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal, NSW Parliament House November 2002, p 13.

<sup>2</sup> Ibid. p9.

tribunals did not include industrial relations tribunals as the state government had already voluntarily referred its industrial relations powers to the Commonwealth.

Overall, the 2002 report has little relevance to the current inquiry about the future of the NSW Industrial Relations Commission (the "Commission"). This current inquiry is taking place without the benefit of a fully researched background document focussed on the possible future role and operations of the NSW Industrial Relations Commission.

### **The Industrial Relations Commission**

Many of the Australian tribunals discussed in the *2002 Report of the Committee on the Ombudsman and Police Integrity Commission* have recent histories; however our industrial relations tribunals have a substantial heritage. For example, the NSW Industrial Relations Commission has legal roots stretching back to 1901 - with the establishment of the Court of Arbitration of NSW.<sup>3</sup>

The current manifestation of the Commission was constituted under the *NSW Industrial Relations Act 1996* (the "Act"). As noted by Justice Walton "*the Act permits the Commission to grapple with the full range of industrial issues and gives ample powers to resolve such matters*". The Commission is often involved in the resolution of significant issues of public interest.<sup>4</sup>

Whilst the *Issues Paper* for this Inquiry listed some of the functions of the Commission, it is also appropriate to draw attention to some of the objects of the Act under which the Commission was established. In particular we draw attention to the following objectives from Section 3 of the Act:

- To provide a framework for the conduct of industrial relations that is fair and just.
- To promote efficiency and productivity in the economy of the State.
- To encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of these bodies.
- To prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value.

Over the decades, the local government industry parties have benefited from the Commission's power to resolve disputes, conciliate, arbitrate and make awards. It should be noted that most disputes in the industry have been successfully resolved through conciliation.

The principle of fairness that has been the statutory mandate of the Commission in its award-making and dispute resolution functions has encouraged a culture of respect amongst the local government industrial organisations.<sup>5</sup>

This was evident in Matter Number 127 of 2010, which was an application by the Union for a new Local Government (State) Award (the "Award"). Since 1992 the Local Government (State) Award has been negotiated between the industry parties with the assistance of the Commission and it has always been a consent award. Through this process, the parties have been able to continue to meet the ever changing needs of Councils, local government workers and the community.

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<sup>3</sup> See History of the Industrial Relations Commission of NSW (IRC) from the IRC website, last updated 27 October 2011, *Our History*, viewed 16 November 2011, <[http://www.lawlink.nsw.gov.au/lawlink/irc/ll\\_irc.nsf/pages/IRC\\_about\\_us\\_our\\_history](http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_about_us_our_history)>.

<sup>4</sup> Hon Justice Michael Walton, 'The New South Wales Industrial Relations System: 1998 to the Workplace Relations Amendment (Work Choices) Act 2005', *The University of New South Wales Law Journal*, Volume 29, No. 1, 2006, p48.

<sup>5</sup> Industrial Relations Act 1996 s3(a)

A further example of how the Commission assists in creating good outcomes across local government can be found in NSW IRC Matter Number 2189 of 2007 which involved the USU and Port Stephens Council. In this matter, the parties jointly sought and utilised the assistance of the Commission to obtain key employment arrangements specific to Port Stephens Council. In a statement issued by Deputy President Harrison on 3 July 2008 in relation to this matter His Honour noted at points 10 and 11 the following-

- 10 The centrepiece of the proposed agreement is a revised salary administration system which will better recognise, reward, and encourage skills development to the mutual benefit of Council and its employees.
11. This is supported by a range of flexible working conditions, rights and obligations designed to attract and retain employees and improve efficiency of Council's operations to the benefit of the community at large.

The agreement reached between the parties with the assistance of the Industrial Relations Commission was not only beneficial to Port Stephens Council and our members but also beneficial to the general community.

Further, it is appropriate to note that Industrial Relations involves a complex interplay of legal and socio-economic factors which have a direct impact on the creation of jobs, the availability of services and the economic well being of the State. Having an Industrial Relations Commission with specialist knowledge ensures that these complex decisions with wide ranging impacts are being carefully considered with a sufficient amount of depth.

In addition, the Industrial Relations Commission is discernibly different to other jurisdictions in that the participants are regular and recurring. Many matters are able to be resolved without going to arbitration because the parties have ongoing productive relationships and there is respect between the parties. This differs from other tribunals, where litigants are in many cases one off and will not interact in an ongoing manner in the future.

Further, many other tribunals focus on resolving disputes through monetary settlement. This is unlike the Industrial Relations Commission, where priority is placed on dispute resolution through local workplace solutions. This is beneficial for both employers and employees, and it would be a loss for NSW were we to lose a tribunal that places value on maintaining workplace relationships.

### **Local Government Employment and Industrial Relations**

There are approximately 49,000 workers employed in local government across New South Wales. In many regional and rural areas, local council is the main source of employment.

Since the consolidation of our local government awards in the early 1990s, the Local Government (State) Award has secured decent wages and conditions for council workers in NSW whilst delivering key flexibilities for local councils.

Almost all councils across the State are covered by the Local Government (State) Award. There are a few places such as Sydney, Newcastle and Wollongong where sheer size and density demand enterprise specific arrangements.

Where there is a need for local variations to the state award, Council and the Union are able to negotiate local council agreements. The State Award has delivered consistent employment conditions and living standards for local government workers across the state. The Commission has played an important role in assisting the industrial parties in the making of the Local Government

(State) Award, which is a consent award. The Commission has played an even more extensive role in the enforcement of the award provisions.

Many of the issues brought by the Union to the Commission require dispute resolution. This often involves the interpretation of award clauses by the 'independent umpire'. It has been of great benefit to the industrial parties to have Commission members assist in the resolution of disputes, using their specialist experience and knowledge of the local government industry and the State Award.

The maintenance of responsible yet adequate wage increases for council workers has an important flow-on effect for local economies. This is because local workers tend to spend their money locally, as opposed to contractors, who may be based in cities, and may take their money out of the local region or even out of the country.

The maintenance of the working conditions available through the Local Government (State) Award creates a positive benefit for individuals, their families and the broader community. Examples of some of these Award conditions include: the provision of adequate rest breaks between shifts; recognition that weekend work and unsociable hours should attract penalty rates; flexible arrangements to assist in the transition to retirement; the provision of paid parental leave; carers leave and other entitlements. These entitlements help to reduce stress on individuals and families as well as providing opportunities for the maintenance of the social fabric of communities. This is even more important at times of regional crisis.

In the period June 2010 through to June 2011 the United Services Union filed 208 Local Government matters in the New South Wales Industrial Relations Commission.

This included 123 disputes relating to alleged breaches of the Local Government (State) Award or other applicable Industrial instruments and 41 allegations of Unfair Dismissal. 36 local agreements providing for key flexibilities and enhanced conditions beneficial to both our membership and Local Council were filed. There was also a further 8 Award and/or Enterprise Agreements filed by consent between the Industry parties.

It is important to note that of the 123 disputes relating to alleged breaches of the Award or other Industrial instruments, 62 were from Regional and Rural New South Wales. Of the 41 alleged Unfair Dismissals, 24 were from Rural & Regional New South Wales and of the 36 agreements, 18 were from Rural and Regional New South Wales.

Approximately 88% of these cases were resolved with the assistance of experienced Judges, Deputy Presidents and Commissioners to the satisfaction of the parties. The unresolved matters, accounting for approximately 12% of matters, went to arbitration.

In short, the Industry parties and the NSW Industrial Relations Commission have played an important role in maintaining stability and contributing to the ongoing social and economic viability of local communities.

### **Preserving the important functions and role of the Commission**

The *Issues Paper* outlined a broad range of functions performed by the Industrial Relations Commission and noted a number of changes which have altered the work load of the Commission. Most notably, changes have included: the referral of industrial relations powers to the Commonwealth for private sector employees; the transfer of serious occupational health and safety criminal prosecutions to the mainstream criminal court; dual appointments by members of the Commission to Fair work Australia; reductions in the overall number of Commissioners; and the

transfer of GREAT and TAB to the IRC. In considering the Terms of Reference and the 3 Options put forward in the *Issues Paper*, the Union wishes to note the following:

1. The USU is concerned at the possibility of a hasty consolidation of the IRC with other tribunals which are not appropriately brought together or that may further detract from the functions and value of the Commission to communities and their workers employed in local government and the public sector.
2. However, there may be some opportunity for improving efficiency such as the dual appointment of IRC judges to the Supreme Court. It seems reasonable that this would assist in maintaining ongoing workloads and related efficiency. There may also be benefit in this from the perspective of broadening the arena and experience of the judges.
3. The role of the Chief Industrial Magistrate Court was not explored in the *Issues Paper* however the Union is of the view that some of its roles may fit well within the current arena of the Industrial Relations Commission (these may include the recovery of money owing under Industrial Instruments and prosecutions for breach of Industrial Instruments.)
4. In addition, the Union would not oppose having employment related discrimination issues referred to the President of the Industrial Relations Commission.
5. Points 3 and 4 could easily be achieved as the current Industrial Relations Commission has the existing architecture and structure to achieve such integration.
6. Contrary to concerns about the possible loss of value for money with respect to non-judicial functions of the Commission, the Union is of the view that the Commission would benefit from additional ongoing resources to attend to the existing workload.
7. It is important to value and retain the specialised knowledge on dispute resolution and wage-fixing processes. The Union is concerned that efficiency drives which inappropriately consolidate tribunals will detrimentally impact on their independence and specialised knowledge. There is already concern about the possible loss of knowledge relating to case precedent with the imminent transfer of health and safety matters to the District Court and Local Court.
8. The Union emphasises the need to ensure the protection of the independence of the Commission as well as the statutory mandated principle of fairness in its award-making and dispute resolution functions. The independence of industrial institutions is critical in ensuring they function effectively to meet their statutory charters to provide fair and equitable outcomes in the workplace by agreement or arbitration.
9. The USU is of the view that there is a need to once again empower the Commission to set fair and reasonable wages in the public sector and not to reduce costs by jeopardising these principles.
10. There are significant differences between dealing with individual citizens disputes as opposed to disputes brought forward by organisations. Industrial matters are brought by industry parties, not individuals. Examples of these collective matters include applications to make or vary awards or collective agreements. Industrial disputes and unions stand out as different from the individual based remedies proposed in Options 1, 2A, 2B and 3 of the *Issues Paper*.

11. Of particular concern is the issue of the "citizen focussed" approach referred to in the *Issues Paper*.<sup>6</sup> Whilst a citizen focussed approach may assist in achieving some efficiency in tribunals which relate to consumers, traders and tenancy; it is less likely to be the case with industrial relations and employment matters which relate to industrial organisations.
12. It is also important to maintain the Commission's genuine state-wide reach in providing dispute resolution and unfair dismissal functions to all regions of the State. This situation helps to ensure equity and access for workers who are not located in the Sydney metropolitan area.
13. Any proposal/outcomes from the inquiry requires a cost/ benefit analysis to ensure that the most efficient model meets the needs of the community/society, the industry parties and the Government.
14. The object of the inquiry should be based on the quality of service to the community and the quality of decision making.
15. The Industrial Relations Commission has established jurisprudence coupled with Industry/regional familiarity/knowledge that enables the user groups find practical workplace solutions that do not retreat to forms of legalism that are not appropriate to the workplace.
16. The Commission excels in—
  - Placing emphasis on leading the parties to their own solutions through conciliation/mediation/assisted bargaining
  - Providing quick dispute resolution
  - Having the ability to act on its own initiative in providing settlement options and preventing the escalation of disputes
  - Taking a pro-active role in dispute prevention
  - Taking into account public interest in the process of decision making.

## Conclusion

In short, the Union does not support any diminution or reduction in the service levels of the Industrial Relations Commission.

If there is to be any change, we would support a fully resourced integration of employment related and discrimination matters and the responsibilities of the Chief Industrial Magistrate being brought into the current Industrial Relations Commission.

The structure and the architecture of the current Industrial Relations Commission could allow for a "One Stop Shop" for employment related matters in New South Wales.

However, this could only be achieved through an appropriate and adequately resourced and funded Industrial Relations Commission.

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<sup>6</sup> Review of Tribunals in New South Wales, *Issues Paper*, p11.