**Submission No 84**

# INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW


**Organisation**: The Law Society of New South Wales

**Name**: Mr Stuart Westgarth

**Position**: President



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THE LAW SOCIETY
OF NEW SOUTH WALES

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Director,

***Inquiry into opportunities to consolidate tribunals in NSW***

The Law Society of NSW thanks you for the invitation to provide comments to this Inquiry into opportunities to consolidate tribunals in NSW.

The Employment Law Committee, Elder Law & Succession Committee, the Property Law Committee, the Business Law Committee and the Government Solicitors Committee (together referred to as the "Committees") of the Law Society of NSW have considered the Issues Paper and provide comments below.[1, 2] The Committees review developments in the various fields of law and policy as they relate to their particular areas. These committees are comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in their respective areas of law in this State.

This submission sets out in the first section a summary of main issues that arise in the Committees' comments. In the second section, the Committee-specific comments are set out in greater detail.

## 1 SUMMARY

### 1.1 Desirability of consolidation of all Tribunals as a goal

The Committees note that the Issues Paper at page 15 refers to the benefits of a "citizen focused" approach where there is a single point of contact for Tribunal-related dispute resolution. In relation to the desirability of a consolidation of all Tribunals in NSW as set out in Option 3 of the Issues Paper, the Committees hold different views.

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[1] The Injury Compensation Committee notes that the Terms of Reference and the Issues Paper make no reference to motor accidents Claims Assessment Resolution Service/Medical Assessment Service and that one reference to the Workers Compensation Commission is made in the Issues Paper (at page 2). Given the context of the Terms of Reference and the Issues Paper, and following a conversation had between Patrick McCarthy of the Law Society and Teresa McMichael, Principal Policy Officer of the Law and Justice Committee, the Injury Compensation Committee has decided not to make submissions on the inclusion of motor accidents and workers compensation matters into a consolidated tribunal. Should the Law and Justice Committee require submission from the Injury Compensation Committee on these points please advise.

[2] The Dispute Resolution Committee notes that while the Issues Paper does not explicitly consider the use of Alternative Dispute Resolution (ADR), there is a role for ADR to play in the tribunal system. The Dispute Resolution Committee respectfully urges the Government to consider the utility of ADR (benefits of which are maximised especially when used early in the process), when considering a redesign of NSW's tribunal system.

### 1.1.1 Advantages of the consolidation model contemplated in Option 3.

The Business Law Committee considers that consolidation is a desirable goal and would achieve a number of important objectives. A "one-stop-shop" approach to disputes would introduce an element of simplicity which facilitates access to justice. The Government Solicitors Committee also holds the view that consolidation is a desirable goal.

The Business Law Committee considers that consolidation presents an opportunity to streamline procedural requirements across jurisdictions, with particular benefit to the lay litigant. Consolidation would also widen the pool of members available to handle disputes and allow for rotation across jurisdictions. The Business Law Committee acknowledges that the degree of any cost savings associated with consolidation would depend on the final model adopted. However, economies of scale are desirable. If they can be realised, financial resources would be available to effect improvements in other areas related to the performance of the tribunal.

The Government Solicitors Committee notes that if consolidation does indeed take place, there should be leadership by a judicial officer with sufficient terms and conditions of appointment for members to attract and retain candidates of the appropriate quality and experience. There should be also common registry systems and points of entry with capacity to cross-appoint members to various divisions of the tribunal. There will also need to be consideration of the appropriate oversight department within government, the process for appointment of members and provision for appeals.

### 1.1.2 Considerations against the consolidation model contemplated in Option 3

The Committees that expressed caution in relation to Option 3 have done so due to concern that consolidation would take place at the expense of the high level of expertise that many specialist Tribunals, or divisions of Tribunals, currently possess. For these Committees, in determining whether consolidation would result in greater consumer welfare, the Government should note that the relevant drivers might be expertise and specialisation, rather than cost savings or consistency across Tribunal procedures. This is particularly true in complex matters, and matters that involve extra-legal considerations such as Guardianship matters.

These Committees are concerned that any cost and efficiency gains that might accrue from consolidation might be outweighed by the disadvantages to the public resulting from the loss of expertise. Further, these Committees note that the various existing Tribunals carry out quite different functions. For example, the Industrial Relations Commission (IRC) has arbitral and conciliation functions that are different from Tribunals where, for example, principles of administrative law apply.

From an employment and workplace law perspective, the Employment Law Committee believes, for the reasons set forth below, that Option 3 should be deferred for more long term consideration, while the identified need for a "citizen focused" tribunal is addressed in a practical and effective manner.

The Employment Law Committee notes the arguments for a "VCAT" type tribunal in this State but believes that such an initiative needs to be approached with caution. Any such proposal would need very considerable thought and input from a wide range of stakeholders in all the various jurisdictions that might be affected by it. The Employment Law Committee also points out that the proposed jurisdiction of "NCAT" would be significantly different to the Victorian model because the latter does not have the "industrial/employment" jurisdiction that is at the core of Option 3.

In giving effect to the citizens-based approach it needs to be appreciated that, industrial matters and representation by employers' organisations and by unions stand out as different from the individual-based representation and remedies provided for in Options 1, 2A, 2B and 3 in the Issues Paper. Conciliation and arbitration of industrial disputes is a major function of the IRC. Many industrial matters can only be brought by organisations, not individuals. Examples of these matters are collective matters such as varying an award or enterprise agreement. In this context it is to be remembered that the "industrial relations/unfair dismissal" jurisdiction of the State IRC still covers approximately 322,450 public sector employees and 49,000 local government employees. This represents a not insignificant 15% of the workforce in this State, and that jurisdiction also extends at least to some extent to contractors in the "Regulated Contracts" jurisdiction.

From an employment and workplace law perspective, the Employment Law Committee's view is that Option 3 (to create a comprehensive Civil and Administrative Tribunal for NSW called NCAT) may not be appropriate for New South Wales. The Employment Law Committee notes that the Victorian Civil and Administrative Tribunal (VCAT) arose out of a different jurisdictional and legislative environment, and more importantly, does not have an industrial dispute jurisdiction.

In respect of guardianship matters, the Elder Law & Succession Committee also notes that this Inquiry is "citizen focused" and acknowledges that while there may be some advantages to a "one-stop-shop" approach, guardianship matters are specialised. As such, the Elder Law & Succession Committee's view is that when considering how consumers might be better served, the relevant consideration in relation to guardianship matters is the expertise of the three-member panel of the Guardianship Tribunal, rather than flexibility or convenience. The Elder Law & Succession Committee is concerned that if the Guardianship Tribunal is consolidated, or becomes subordinated as a division of a "super" tribunal, much of its expertise and experience will be dissipated. To this end the Elder Law & Succession Committee notes the recent review of guardianship in Victoria under VCAT.

The Property Law Committee emphasises that any consolidation of Tribunal functions must not be achieved at the expense of the specialised skills required of decision-makers in the strata and community title mediation and dispute resolution roles of the Consumer Trader and Tenancy Tribunal (CTTT). Strata and community title legislation is complex. It is necessary for Tribunal members to have detailed and practical knowledge of the legislation and its application. The need for this expertise is underscored by the fact that Tribunal members do not always have the benefit of legal analysis or submissions made by solicitors, as members of the public may appear before the Tribunal unrepresented.

## 2 COMMITTEE-SPECIFIC COMMENTS

In addition to the comments made in the section above, the Committees each make comments in relation to consolidation options specific to their areas of law and practice.

### 2.1 Comments of the Employment Law Committee (ELC)

The ELC firstly notes that the Terms of Reference of this Inquiry and also the Issues Paper identify quite clearly that one of the factors prompting this Inquiry (although not the only one) is the current and forecast workload for the IRC particularly the Judicial members of the Industrial Court/IRC.

The Issues Paper suggests three options to deal with the issues identified in the Paper (with internal variations suggested in relation to Option 2). Option 1 proposes establishing an Employment and Professional Services Commission, by

renaming the IRC and transferring functions from the Administrative Decisions Tribunal (ADT) (the Anti-Discrimination Division and the professional discipline functions in relation to lawyers) and the health professional tribunals, including the medical tribunal. As stated in the Issues Paper, the professional disciplinary matters have a focus on public protection and are not simply employment issues. Both the ADT and the health professional tribunals hear matters brought by individuals.

The ELC notes that Option 3, which suggests the establishment of an "umbrella" Tribunal to cover a whole swathe of current and disparate jurisdictions, including what may be generally described as the "residual industrial jurisdiction" is the most radical and calls in aid the precedent of the VCAT. As noted in the section above, the ELC respectfully submits that the VCAT arose out of a different context and environment, and more importantly, does not have an industrial dispute jurisdiction (because of course that jurisdiction was referred by the then Kennett Government to the Federal Government in 1997). The ELC understands that in Victoria, a few matters are dealt with in county courts and in the Supreme Court, with the bulk of industrial relations matters referred to Fair Work Australia. The ELC reiterates that Option 3 may not be appropriate for New South Wales and urges the Government to defer this option for more long term consideration.

The ELC believes that Option 2A proposed in the Issues Paper is the better option, subject to specific comments below.

***Comments specific to Option 2A:***

The ELC understands that Option 2A would involve:

- changing the name of the current Administrative Decisions Tribunal to the NSW Administrative and Employment Tribunal (NEAT);
- Retaining the six divisions that the ADT currently has;
- Creating an Employment Division consisting of a former judge of the IRC to head IRC commissioners;
- Establishing an employment list within the Supreme Court and appointing the remaining judicial members of the IRC to the Supreme Court (including hearing appeals from the Employment Division of the NEAT); and
- Retaining a separate Professional Discipline Division.

The ELC's view is that, subject to one amendment, this is the better option as it preserves the IRC's current arbitral and conciliation functions in the public sector (including Local Government) and the jurisdiction of other matters such as Regulated Contracts and internal governance of registered organisations that cannot be initiated by individuals.

The ELC proposes that Option 2A would be even more effective if the common law employment jurisdiction of the District Court was also transferred to this "Employment" Division. The Judges of the Industrial Court are experienced in that area because of the nature of the work they have done in their current roles, and certainly are more specifically qualified in that area than the judges of the District Court.

The ELC suggests that the name of the Employment Division be changed to "Workplace and Employment Division" in order to capture the IRC's current jurisdiction.

The ELC notes that if Option 2A is taken up, in time more than one judicial member may be required in the Workplace and Employment Division, particularly

if common law claims that would arise in the District Court's jurisdiction were to be embraced in this Division.

The ELC suggests also that judicial members could be appointed to more than one Division as this can be an efficient use of expertise. An obvious example is a joint appointment to deal with complaints of discrimination arising in an employment context.

**2.2 Comments of the Elder Law & Succession Committee (ELSC)**

The ELSC provides its comments specifically in relation to the Guardianship Tribunal (GT) and does not make specific comments in relation to the benefits or disadvantages of the three options set out in the Issues Paper.

The ELSC's view is that if a consolidation of tribunals is to occur in NSW, the GT should remain a separate Tribunal and should not be included within that consolidation for the reasons set out below.

The GT is a specialist tribunal that deals with people with physical and mental disabilities. It is specialised in its structure and has a three-member panel composed of a legal, medical and community member. The ELSC understands that this structure is unique to NSW, and is of the view that this multi-faceted approach lends a great deal of expertise and quality to the decision-making.

GT members possess a high level of expertise and undergo specialised training. Due to the effects of aging and disability, a wide variety of issues and law can impact on a person under guardianship, in relation to their medical and financial affairs. Members of the GT must therefore be familiar with a wide variety of issues including trusteeship, company structure, guardianship, powers of attorney, capacity and advance care directives. The GT has also started developing considerable jurisprudence in relation to guardianship matters. It has also started to issue Practice Notes.

The GT conducts many hearings in Sydney, but it also conducts approximately 29% of its hearings outside of Balmain NSW, in metropolitan, rural and regional NSW. Hearings may also be conducted via video-conferencing, and parties may also participate by telephone.[3]

The ELSC notes that many people are either not planning ahead, or if planning ahead their plans may be still subject to review. This, coupled with the fact of Australia's aging population and recent research findings regarding the projected growing incidence of dementia suggests that there will be a growing role for the GT. The recent study carried out by Deloitte Access Economics on dementia commissioned by Alzheimer's Australia[4] finds that there are approximately 91,038 people in NSW currently with dementia. This figure is projected to rise to 128,239 by 2020 and 303,674 by 2050. The study suggests that across Australia, dementia prevalence is expected to grow by around 254% between 2011 and 2050.[5]

Figures regarding the number of applications received and the applications finalised provided in the GT's Annual Report 2009/2010 indicate that the GT is

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[3] Guardianship Tribunal, Annual Report 2009/2010 at p45 available online: http://www.gt.nsw.gov.au/information/doc_235_gt_ar_09_10_web.pdf (accessed 22 November 2011)

[4] Deloitte Access Economics, "Dementia Across Australia: 2011-2050", 9 September 2011 available online: http://www.fightdementia.org.au/common/files/NAT/20111014_Nat_Access_DemAcrossAust.pdf (accessed 21 November 2011)

[5] Ibid at 16

currently able to handle its workload.[6] The Committee suggests that this supports the view that it would be counter-productive and inefficient to replicate or to dilute its expertise, particularly for communities in country areas. However, when planning for the future, the ELSC's view is that the trend discussed above suggests an increase in guardianship matters, which would support a case for better resourcing the GT as a separate Tribunal, rather than its consolidation with other areas and thereby potentially weakening its ability to deal with a burgeoning specialised workload.

The ELSC's view is that the expertise currently possessed by the GT would not be broadened or in any other way enhanced by consolidation. Further, even if there were corporate service savings benefits that would accrue from re-positioning the GT, the GT is now part of the portfolio of the Department of Attorney General and Justice, and part of that cluster of courts and tribunals. The ELSC's view is that the GT already benefits from those efficiencies, or will do as these services are more integrated into the Department

**2.3 Comments of the Property Law Committee (PLC)**

The comments of the PLC relate solely to the operation of the strata and community title mediation and dispute resolution roles of the CTTT.

The PLC appreciates the advantages of a scheme that is timely, efficient and low cost. However, as noted in the Options Paper, there have been considerable concerns raised about the quality of the decision-making in the CTTT. The PLC reiterates those concerns particularly in relation to decision-making at adjudicator level in strata title matters.

Committee members emphasise that consolidation of Tribunal functions must not be achieved at the expense of the specialised skills required of decision-makers in this area. Strata and community title legislation is complex. It is necessary for Tribunal members to have detailed and practical knowledge of the legislation and its application. The need for this expertise is underscored by the fact that Tribunal members do not always have the benefit of legal analysis or submissions made by solicitors, as members of the public may appear before the Tribunal unrepresented.

As well as expert knowledge, appropriate training and performance management is necessary to ensure consistent legal outcomes to aid both those living in strata schemes and their advisors.

If the new Tribunal is vested with the powers to make monetary determinations in its strata and community title scheme jurisdictions, as is the case with both the VCAT and QCAT, then there is greater onus to deliver a standard of decision-making, at least equivalent to that of the Local Court.

The PLC has had the benefit of reading the comments of the Australian College of Community Association of Lawyers in relation to these issues. The PLC endorses those comments, particularly as they relate to the delivery of an appropriate standard of decision-making by Tribunal members and in relation to the comments relating to Ministerial responsibility for the Tribunal.

It has been suggested by other stakeholders that responsibility for a consolidated Tribunal should rest with the Attorney General. The PLC agrees that if such a

[6] Guardianship Tribunal, *Annual Report 2009/2010*, at p37 available online: http://www.gt.nsw.gov.au/information/doc_235_gt_ar_09_10_web.pdf (accessed 22 November 2011)

Tribunal is established, its judicial officers should have the benefits of judicial training and education afforded to such officers in other courts administered by the Attorney General's department. It is also been suggested that for reasons of public transparency and to avoid the suggestion of conflict of interests or bias, it is not appropriate that such a Tribunal should be administered by a Minister responsible for policy making in one of its jurisdictional areas.

**2.4 Comments of the Business Law Committee (BLC)**

The BLC has considered the matters outlined in the Issues Paper and notes that the Issues Paper states that this Inquiry is, inter alia, "an opportunity to determine whether operational improvements and efficiencies can be achieved through consolidation," and to this end, "an opportunity to consider whether the CTTT is continuing to meet its objectives."

The BLC is of the view that the CTTT suffers from serious shortcomings and is not meeting the objectives that are set out for the Tribunal in section 3 of the *Consumer, Trader and Tenancy Tribunal Act 2001* ('the CTTT Act'). Despite the impact of reviews into its operation, the CTTT continues to suffer from chronic administrative delays and errors, and a lack of consistency and transparency in decision-making. Further, some of the Tribunal's processes, and the avenues for appeal from decisions of the Tribunal, are unduly complex.

The BLC submits that, a distinction should be drawn as between simpler, and more complex matters that are handled by the CTTT. Of these, the BLC submits that the latter should be transferred to the mainstream court system. In the event of consolidation, matters categorised as 'simpler matters' should be transferred to the new tribunal.

Some of the shortcomings that have become a feature of the operations of the CTTT are outlined below.

- As previously indicated, the Tribunal's administrative processes are characterised by delay and inconsistency. Notices containing directions are frequently issued some weeks after a directions hearing has taken place. This also applies in the case of the return of a summons to produce documents. It is frequently the case that by the time the Tribunal document has arrived in the mail, the return date or the date for the fulfillment of the order has already passed.
- A party may not be advised that a matter has been rescheduled, resulting in lost time in making an unnecessary appearance.
- Notices containing decisions of the Tribunal do not refer parties to their rights to appeal or review, which hinders the lay litigant from pursuing any rights that she or he may have.
- The Tribunal suffers from a lack of transparency in decision-making, as adequate reasons for decisions are not always provided.
- Decisions of the Tribunal are inconsistent, creating uncertainty for parties.

As mentioned earlier, appeal rights from decisions of the Tribunal are complex and difficult for a lay litigant to understand. Indeed, the decision of the New South Wales Court of Appeal in *Dayelan v. Davidson*[7] highlights the complexity that attends the choice of forum for appeal.[8] The avenues for appeal or review of a

[7] [2010] NSWCA 42

[8] The case involved an application for leave to appeal from a decision of the District Court, which had found that the CTTT had erred in law in a manner which constituted a jurisdictional error. The New South Wales Court of Appeal observed that as the District Court does not have jurisdiction to make orders in the nature of a prerogative relief, an aggrieved party should be careful when considering whether to apply to the District or Supreme Court to challenge the decision.

decision of the CTTT are numerous: Part 6 of the CTTT Act provides several avenues for relief to aggrieved parties. These include appeal to the District Court in respect of a question of law,[9] applying to the Chairperson of the CTTT for a rehearing,[10] seeking judicial review of a decision by the Supreme Court under section 69 of the *Supreme Court Act 1970* (relief formerly granted by way of a writ[11]). Further, judicial review of certain CTTT decisions is precluded under section 65 of the CTTT Act. In the Committee's submission, the analysis required to select the appropriate forum for an appeal or review necessarily requires the engagement of professional advice, and as such would seem ill-suited to a lay tribunal.

As previously indicated, the BLC advocates the removal of complex matters from the jurisdiction of the CTTT to the mainstream court system. Many home building matters, for example, require the consideration of plans and specifications and other technical material. Expert witnesses are frequently called upon by parties in the CTTT. At the same time, the rules of evidence do not, prima facie, apply, so that evidence is adduced and challenged in a context of a high level of uncertainty. It is submitted that this is an unsatisfactory situation.

In the submission of the BLC it would be possible to distinguish between more and relatively less complex matters in the CTTT by applying a monetary value. It is suggested that the claims involving disputed sums of up to $10,000 could continue to be dealt with according to the informal mechanism of a consolidated tribunal, while claims involving sums exceeding $10,000 would be dealt with by the appropriate court. In the latter case, the rules of evidence would apply; procedural fairness and considerations of natural justice would govern the manner in which applications were handled, and parties would be entitled to legal representation without requiring leave or the consent of the opposing party.[12]

Thank you once again for the opportunity to comment. Please contact Lawyer on if you have any queries.

Yours sincerely,

Stuart Westgarth
**President**

[9] Section 67 *Consumer, Trader and Tenancy Tribunal Act 2001*
[10] Section 68 *Consumer, Trader and Tenancy Tribunal Act 2001*
[11] By prohibition, certiorari, mandamus or otherwise.
[12] In relation to the issue of legal representation, it is the Law Society of NSW view that parties appearing in tribunal proceedings should be entitled to make their own decision about whether they wish to have legal representation without having to seek prior permission.