Submission No 40

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: NSW Bar Association

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The New South Wales Bar Association

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The Hon David Clarke MLC
Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney
NSW 2000

Dear Mr Clarke

Inquiries into opportunities to consolidate tribunals in NSW

Thank you for your letter of 28 October 2011 to the Executive Director concerning the Law and Justice Committee's Inquiry into Opportunities to Consolidate Tribunals in NSW.

The New South Wales Bar Association's submission to the Review is attached.

Thank you for providing the Association with the opportunity to comment on these issues. Please do not hesitate to contact the Association's Deputy Executive Director, Mr Alastair McConnachie on 9229 1756 or at amcconnachie@nswbar.asn.au if any further assistance is required.

Yours sincerely

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NEW SOUTH WALES BAR ASSOCIATION SUBMISSION TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Introduction

1. The New South Wales Bar Association (the Association) welcomes the opportunity to make a submission to the current inquiry being conducted by the Standing Committee on Law and Justice into the possibility of consolidating tribunals in New South Wales.

2. In the preparation of this submission, the Association has had the benefit of the Inquiry's Terms of Reference and the associated Issues Paper entitled "Review of Tribunals in New South Wales". Although the Issues Paper contains a number of general options for reform in this area, the Association does not propose to endorse any one of the particular options. Given the relative lack of detail contained in the paper on each option, the Association is unable to comment with any specificity in this regard. However, this submission does seek to provide input on each of the options to assist the Committee in framing its report. The Association's comments are predicated on the principles below, upon which any policy proposal for the consolidation of tribunals should be based.

3. The Association believes it is important that when considering any alteration to the existing courts and tribunals that the following principles are applied:

   (a) that the maintenance of the independence and status of tribunals should be paramount in any proposed new system and recognised in any legislative change;

   (b) that any new tribunal or tribunals be adequately resourced, with resources appropriate to their level and function, so that there is no diminution of service as a consequence of their establishment;

   (c) that any change to the current system should be aimed at bringing greater efficiencies and coherence to the current fragmented system of tribunals in this State;

   (d) that a party's right to legal representation be respected and preserved;

   (e) that any new tribunal or tribunals established retain the benefit of the existing developed expertise of, for example, judicial officers and commissioners of the Industrial Relations Commission (IRC) and the existing members of the various Tribunals. The existing specialised skills of judges and tribunal members should not be lost as a consequence of any change;

(f) that in developing any proposals for change proper regard needs to be had to the fact that the tribunals and other bodies mentioned in the Issues Paper exercise a range of distinct functions. Any new system should recognise and respect these clear distinctions. They include:

i. administrative review of original decisions, which is currently exercised by the Administrative Decisions Tribunal (ADT). In so far as existing Tribunals are concerned, there seems to be an important operational distinction between the review of administrative decisions on the one hand, and "court-substitute" tribunals on the other. However, this distinction has not stopped the ADT from operating effectively with both original and appellate jurisdiction;

ii. adjudication of individual private rights in respect of: commercial matters (currently for example exercised by the Consumer, Trader and Tenancy Tribunal (CTTT)); determination of equal opportunity rights (Equal Opportunity Division of the ADT); and industrial rights (the IRC);

iii. the exercise of original jurisdiction in respect of disciplinary matters (for legal practitioners, currently in the Legal Services Division of the ADT; for medical practitioners, in the Medical Tribunal which is chaired by a District Court Judge; and in many other, smaller tribunals for other medical professions); and

iv. The conciliation and arbitration of collective industrial rights (the IRC).

4. The Association considers that the opportunity to consolidate various existing tribunals and commissions in the State should be grasped, bearing in mind the importance of the above principles. In particular, for reasons which are developed below, the Association sees the Committee's Inquiry as an opportunity to enhance access to justice in the State.

5. At present, residents of the State are faced with a somewhat bewildering array of disparate tribunals and bodies in which jurisdiction is vested to hear and determine both private and public law disputes. This situation creates confusion and can operate to deny persons access to justice, for example, by commencing proceedings in the wrong Tribunal and thereby missing limitation periods, or by seeking inappropriate orders in the correct Tribunal. Further, it can be productive of unnecessary waste in terms of duplication of resources and the need to maintain separate administrative infrastructures to support such tribunals and bodies.

6. In principle, there is much to be said for consolidation, particularly of the multitude of smaller tribunals. In doing so, however, careful consideration will need to be given so as not to create a "super Tribunal" with a wide diversity of jurisdictions, particularly if the result would be that one or two of those

jurisdictions swamp the others. Such a situation could produce serious distortion. For that reason, the Association does not favour an option of including, in particular, the tenancy and general consumer jurisdiction of the CTTT in such a consolidated body in circumstances where that Tribunal currently handles more than 60,000 matters a year. That number of cases would overwhelm the other work of any consolidated tribunal and is best left in a stand-alone tribunal.

7. Further, consolidation should not be undertaken in a manner that deprives a tribunal from being able to utilise those who have developed specialised skills in that area. For example, the Association would be concerned if the changes led to a situation where Judges of the IRC were no longer available to deal with major industrial disputes affecting those employees who continue to fall within the NSW jurisdiction.

8. The Association also notes that many of the advantages of establishing a large consolidated tribunal could be achieved by the establishment of a single registry service, even if not a single tribunal. In this regard, the Committee may find the United Kingdom's approach to this issue instructive.

9. The United Kingdom Government created the Tribunal Service following the recommendations of the Leggatt Report (*"Tribunals for Users: One System, One Service"*) in 2001. The creation of the Tribunal Service addressed one of the key issues in terms of the proliferation of tribunals with disparate jurisdiction, namely, the problem of funding. As the Leggatt Report, makes clear, the creation of such a service is likely to:

> *yield considerable economies of scale, particularly in relation to the provision of premises for all Tribunals, common basic training, and the use of IT. It would also bring greater administrative efficiency, a single point of contact for users, improved geographical distribution of Tribunal Centres, common standards, an enhanced corporate image, greater prospect of job satisfaction, a better relationship between members and administrative staff, and improved career patterns for both on account of the size and the coherence of the tribunal service.*

10. The establishment of such a service in New South Wales could provide similar benefits to the State, the public and the tribunals. A single division within the Department of the Attorney General and Justice could establish appropriate premises that could be used as needed by different tribunals with proper facilities for the recording of proceedings, trained hearing room attendants and the like. This would greatly enhance the professionalism and legal effectiveness of each tribunal so served. The Association also notes the benefits brought to the court system in New South Wales by the introduction of the Uniform Civil Procedure Rules 2005 (UCPR), which have led to common/similar forms and procedures in our courts without amalgamating the bodies themselves. The procedural advantages for parties in a commonality of the *Civil Procedure Act 2005* and the

UCPR applying across all jurisdictions should not be discounted as a significant factor in the improvement of access to justice in NSW.

11. Whichever approach is adopted, the following principles relating to the administration of tribunals should also be adopted:

(a) tribunals should be staffed with suitably qualified members, including some Judges;
(b) tenure - Rather than the current common three year contracts, something like five to seven years ought to be considered for appointments;
(c) there should be a better balance of permanent versus sessional members, with the former predominating in order to ensure greater continuity, access to resources and commitment on the part of the members;
(d) proper resourcing should extend to appropriate hearing rooms more in the style of Courts, and staff for recording proceedings and hearing room attendant work;
(e) stipends should be fixed at an appropriate level to attract suitably qualified appointees; and
(f) common registry staff could be provided through the creation of a Tribunal Services Unit.

12. As mentioned earlier, the Issues Paper "Review of Tribunals in New South Wales" contains a number of options for consolidation of various judicial and quasi-judicial bodies. This submission will deal with each option in the Paper in turn.

Option 1 – An Employment and Professional Conduct Commission?

13. The Association considers that Option 1 is worthy of serious consideration. This would involve renaming the IRC as something like the "Employment and Professional Conduct Commission". The Industrial Relations Commission is one of the oldest continuous such jurisdictions in the common law world, and there is good reason why it should be retained in an expanded or alternative form. Its jurisdiction as the Employment and Professional Conduct Commission would incorporate the residue of its existing jurisdiction together with transferred powers relating to professional discipline.

14. The IRC currently exercises powers of adjusting private rights. Judges sitting as the Industrial Court currently adjudicate and make binding determinations as to those rights. The judges of the Industrial Court have Supreme Court status. Part of the established jurisprudence of those bodies is the determination of unfair dismissal cases. These cases often involve consideration of disciplinary matters, including disciplinary matters in respect of professionals. For example, there is a substantial body of case law dealing with dismissal in respect of medical specialists employed within the public health system. The Hon Justice Haylen, a Judge of the Industrial Court, is also the Head of the Legal Services Division of the ADT which has responsibility for disciplinary matters in respect of solicitors

and barristers. There are obvious synergies in joining together professional disciplinary tribunal matters with the jurisdiction of the IRC and Industrial Court.

15. The IRC/Industrial Court has an existing infrastructure, both by way of available court rooms and registry staff which could readily accommodate professional disciplinary work. In the future additional judges could be appointed to such a tribunal who have an administrative law background to help strengthen such a body's skills in those areas.

16. The Association notes that two States, Queensland and Western Australia, have declined to incorporate their industrial tribunal within a larger administrative tribunal. The Queensland Government took the decision not to do so after a comprehensive and wide ranging review in 2008-09 and, more recently, Western Australia after the Review of the Western Australian Industrial Relations System conducted by Steven Amendola and released in 2009 that specifically recommended such a step, but was not taken up by the Government.

17. This may well be a reflection that the very specialist nature of work undertaken by industrial tribunals and their unique structure, developed over many decades, is not conducive to inclusion in a larger, generic structure. It may well be though, that the structure and inherent expertise of the IRC can be broadened and enhanced to provide a forum for the resolution of all industrial and employment related disputation.

18. The inclusion of Professional Conduct matters is based on the serious nature of professional conduct matters. A brief outline of the current treatment of legal profession disciplinary matters may assist. The jurisdiction exercised by the Legal Services Division of the ADT is conferred on the Tribunal by the *Legal Profession Act 2004* (LPA). Any proposal affecting the jurisdiction presently exercised by the Legal Services Division under the LPA must recognise that the jurisdiction will shortly be found in National Legal Profession Model Legislation and not susceptible to State-based amendment.

19. Generally, it needs to be borne in mind that the ADT's functions, in the Legal Services Division are not the resolution of a consumer dispute, but the resolution of a complaint being prosecuted by the Bar Council, the Council of the Law Society or the Commissioner, alleging professional misconduct or unsatisfactory professional conduct of a kind not able to be dealt with by, for example, reprimand.

20. The jurisdiction is in these circumstances protective of the public. The express purposes of Chapter 4 (Complaints and Discipline) of the LPA include:

    (a) providing a nationally consistent scheme for the discipline of the legal profession in New South Wales, in the interests of the administration of justice and for the protection of clients of law practices and the public generally; and

(b) promoting and enforcing the professional standards, competence and honesty of the legal profession.

21. The jurisdiction under the LPA is of two kinds. First, and most often, making original decisions with respect to complaints against an Australian legal practitioner, following the filing of a Disciplinary Application. Secondly, review functions, where a lawyer has been reprimanded or a decision made regarding a 'show cause' event (there is a further original decision making function regarding statutory suspensions of practising certificates).

22. Appeals from an order or other decision made by the Legal Services Division under the LPA lie to the Court of Appeal of New South Wales. Separately, an appeal against a decision of a Council to suspend or refuse to renew a practising certificate other than in the exercise of powers regarding show cause events lies to the Supreme Court, and would be dealt with by a judge of the Common Law Division.

23. In conducting a hearing into a question of professional misconduct, the ADT must observe the rules of law governing the admission of evidence (despite the contrary provisions of the ADT Act). The ADT has the jurisdiction to make orders removing a lawyer's name from the roll, and in the ordinary course would award costs against a lawyer found guilty of professional misconduct or unsatisfactory professional conduct. Consequently the relative informality of tribunal hearings is inappropriate and a transfer to a more court-like body would better serve the purpose of the legal disciplinary functions and the protection of the public.

24. At hearings involving questions of professional misconduct with disputed factual questions and disputed questions of professional standards applying to those facts, the formal trappings of a "Court" hearing would assist the members of the tribunal and the parties in dealing with the matter, not least by the provision of hearing room attendants and an "Associate" who could marshal and mark the exhibits rather than requiring one of the (legally qualified) members of the tribunal to perform this function in addition to hearing the evidence.

25. The transfer of this jurisdiction, along with other professional conduct tribunals (such as those dealing with doctors, nurses, chiropractors, dentists, and possible veterinary surgeons) would provide the opportunity for the development of specialist expertise in a less informal and more stringent environment, with consistency of decision-making across the professions.

Option 1 versus Options 2A, 2B and 3

26. If there were a move to an "umbrella tribunal" there would be a need to continue to be separate divisions within such an organisation, located in separate places necessarily with registry staff in those separate locations, albeit with an overarching common name. Any other approach would see members of the tribunal and judges acting across the vast range of different specialisations in a manner that would both dilute (if not lose entirely) the specialised skills they have

developed and lead to matters being heard by those who do not have the requisite skill and experience. Once it is accepted that there will continue to be, in effect, separate tribunals, the need for a single super administrative tribunal incorporating the IRC would be a matter of form over substance. The better approach is to properly embrace the idea of bringing together those aspects of the existing tribunal work which are similar enough to justify being dealt with by a single set of judges/tribunal members, such as is envisaged by Option 1.

27. Option 1 is supported because it would retain the unique nature of the IRC as both a tribunal and a court. Its hybrid nature has been one of the main reasons for its success. The tribunal/court is in effect a one-stop shop for industrial and employment related matters. It is able to deal seamlessly, flexibly and speedily with all manner of industrial matters that come before it. As a hybrid body the IRC offers the optimum mix of a practical approach to industrial relations and ready access to more formal legal processes. There is no delay incurred if matters arising in proceedings before the tribunal are required to be dealt with by the court, eg, applications for declaratory relief, proceedings for contraventions of orders, proceedings for recovery of wages and proceedings for contempt. That would not be the case under an option that required certain matters to be referred to a court of general jurisdiction, even if likely to be allocated to a particular 'employment list' within that court. The expertise of the judges and commissioners in the IRC, with some additional appointments over time, could readily be brought to the determination of professional conduct disputes.

28. However, should an option such as Options 2A, 2B or 3 be preferred, the Association is of the view that it is important that the current structure of the IRC be retained in any Industrial Relations Division of any new tribunal as far as possible. In particular it would be important that the Judges of the IRC are appointed to that division.

29. As the Options Paper notes, about 15% of the employees in NSW fall within the jurisdiction of the IRC. They include those employed in providing important services to the people of NSW, such as nurses, salaried doctors, police and fire-fighters. It is of great importance that major industrial disputes in respect of such groups of workers are properly dealt with.

30. Parties respect the status of the IRC, given judicial members have Supreme Court status. Directions and recommendations of Judges, although not legally binding, are rarely ignored. The Options Paper fails to note that Judges and not Commissioners are usually allocated to deal with serious industrial disputes. The status of those Judges usually attracts competent and experienced advocates for the purposes of both conciliation and arbitration, which tends to facilitate the resolution of disputes. The IRC has an enviable record in preventing major industrial disputes that can be favourably compared to the situation federally.

31. The Association believes the loss of the specialised conciliation and arbitration skills of the Judges, which would occur if the Judges were appointed to the

Supreme Court as contemplated by one aspect of Options 2A and 2B and Option 3, would seriously undermine the effectiveness of the tribunal.

32. Finally, if an option such as 2A, 2B or 3 is adopted so that the IRC loses its status as a Court, it will be necessary to take steps to maintain the status and protections of the Judges of the IRC. One way to do that would be to appoint them judges of the Supreme Court but have them seconded to the relevant tribunal or division of tribunal.

Option 3

33. Option 3 of the issues paper provides for the creation of a comprehensive new tribunal for NSW, which consolidates the tribunals in option 2A or 2B and also includes the CTTT, the Guardianship Tribunal, the Mental Health Tribunal, Health professional tribunals, the Vocational Training Tribunal and the Local Government and Pecuniary Interests Tribunal. While this new tribunal is not given a name, it will be referred to in this submission as "NCAT" (New South Wales Civil and Administrative Tribunal).

34. The Association can, with the exceptions below under "a further proposal", broadly endorse the NCAT suggested in Option 3 provided it is accorded the appropriate independence and status, and provided it is given sufficient resources and staff to undertake the work. The Association refers to the principles set out in paragraph 3 above and notes that, without adherence to these principles, any consolidation of tribunals may not serve the interests of justice sufficiently to warrant the consolidation.

35. NCAT should have at its head a Supreme Court justice. That would set the tone of the appropriate status of the new body. That judge should have the same consultative privileges accorded to the Chief Justice and the heads of the District and Local Courts of New South Wales in recognition of the important work done by tribunals across the State.

36. As to the overall jurisdiction of NCAT, the Association considers that including the CTTT in whole would be overly problematic (see "a further proposal" below). However, the ADT has demonstrated that it can absorb many disparate jurisdictions involving unrelated quasi-judicial tribunals in different divisions, administered centrally, and still maintain good and fair decision-making.

A further proposal

37. The Association suggests that an option providing a better outcome than Option 3 would be the creation of NCAT which excluded the bulk of the CTTT's jurisdiction. The Association proposes that the CTTT's Home Building jurisdiction would better sit within the ADT (or NCAT), or within another appropriate venue within the court system of NSW. Accordingly, it is suggested that only the Home Building jurisdiction be transferred out of the CTTT, and the remainder of the CTTT's consumer and tenancy work stays where it is. It is not

the Association's preference for the CTTT to be subsumed into any new tribunal – for fear it will overwhelm any new tribunal in an administrative and fairness/justice sense and from a resources perspective.

38. The CTTT currently has exclusive jurisdiction for residential building claims up to $500,000. If a claim is commenced in the District Court the transfer to the CTTT is mandatory on the application of the defendant by virtue of s.48L of the *Home Building Act* 1989.

39. The CTTT also has the jurisdiction for hearing appeals against an insurer's decision when a claim is made against Home Owners Warranty insurance. This insurance must be provided by a residential builder for all contracts over $12,000.00. The level of cover which can be made the subject of the appeal is currently $300,000.

40. The hearing of these often substantial matters in the CTTT is currently not satisfactory. Case management and specialist expertise for large claims is not available in the CTTT. The CTTT's jurisdiction in building disputes frequently results in substantial building cases turning almost solely upon technical issues in contract law, being determined by tribunal members with very limited experience in these types of legal matter. This jurisdiction in regard to building disputes is restricted to residential buildings. As an illustration, if an individual has a dispute about building work quantified at say $400,000.00, in regard to a residential building, the matter will be heard in the CTTT in accordance with its informal rules and procedures, before a member who may not be legally qualified, with a right of appeal restricted to a District Court judge. Conversely, if the same person had a dispute about building work quantified at $400,000 in regard to the building or renovation of a shop, that dispute would be heard in the District Court before a judge, governed by the Uniform Civil Procedure Rules. The discrepancy is not explicable by any obvious reason or goal.

41. In addition, a significant problem is that appeals from the CTTT are confined to errors of law, lack of jurisdiction and/or a claimed denial of natural justice (ss 65 and 67 of the CTTT Act). Recent decisions in the NSW Court of Appeal make it clear that the scope for bringing an appeal is very confined. This is of particular concern when the amount the subject of the decision could be as high as $500.000.

42. In most other courts dealing with commercial claims of up to $500,000 normal appeal rights would apply (and in some cases at least based on the merits). In the case of the CTTT a bad decision for a large sum is often virtually impossible to challenge.

43. Accordingly, the Association is of the view that this part of the CTTT's jurisdiction would be better placed in a jurisdiction more ably equipped to deal with this important and complex work. As the Issues Paper does not venture into this territory in any great detail, the Association does not wish to commit to specific destinations. However, some possible venues are:-

(a) ADT/NCAT (in a specific Home Building Division); or

(b) Land and Environment Court (in a specific Home Building Division).

In making each of these suggestions, it is proposed that any Home Building cases with a quantum of over $100,000 (being the jurisdiction of the Local Court) be heard in a Court by judges with some degree of specialisation and experience in construction and building disputes.

Other bodies

44. The Local Government and Pecuniary Interests Tribunal should become part of the Land and Environment Court of NSW, perhaps in a new division or "class" of matters. The work done there, which is prosecution of local government councillors for breach of the pecuniary interest provisions of the *Local Government Act 1993* and for misbehaviour, is work not outside the scope of related matters dealt with by the Land and Environment Court and sits comfortably with its demonstrated expertise in handling local government issues of all kinds.

Conclusion

45. The current system of tribunals in NSW is extremely complex. Even if the Government were not disposed to take any action in terms of amalgamation, some streamlining of matters such as appeals (for example, the ADT has an internal as well as an external appeal structure, whereas the CTTT has "rehearings" and appeals on questions of law to the District Court) and registry structures could go a long way towards making the tribunal system easier to use.

46. The success of any "super tribunal" will depend in large measure on it being provided with adequate resources and appropriate personnel to enable it effectively to discharge its functions in all its jurisdictions. It is important that any consolidated tribunal is constituted by a sufficient numbers of appropriately qualified full-time and part-time members. It is also highly desirable that there be an adequate number of full-time members in order to encourage consistency in decision-making, as well as having appropriately qualified persons as part-time members to provide special expertise in appropriate matters as and when required. The Association considers that it is highly desirable to avoid the situation which currently prevails in the ADT, which only has two full-time members and numerous part-time members. That balance is inappropriate.

47. The Association would also urge the establishment within the Department of the Attorney General and Justice a Tribunal Services Unit to ensure that, particularly, the CTTT and the NCAT (or revamped ADT) are properly resourced in every way. This may involve a transfer in responsibility for the CTTT from the Minister for Fair Trading to the Attorney General.

48. In summary, the Association supports in principle the consolidation of the State's tribunals into one or more amalgamated bodies, subject to the view expressed

earlier in this submission that the majority of the CTTT be left to operate separately and the adoption of the retention of a separate judicial body which is currently the IRC. However, the Association notes that many of the advantages of amalgamation could be achieved through the implementation of a single registry structure for tribunals, and the adoption of uniform procedures and forms (possibly the Civil Procedure Act and the UCPR) and avenues of appeal.

49. The Association also supports in principle the establishment of an Employment and Professional Conduct Commission, incorporating the current jurisdiction of the IRC and the professional disciplinary tribunals. If a separate body incorporating the IRC is not retained then it is important that the body (or Division) that is given the jurisdiction of dealing with conciliation and arbitration of industrial disputes is constituted by members that include the current Judges of the IRC so that their specialised skills in that area are retained.

50. The Association welcomes the opportunity for its views to be heard, and will make some of its appropriately qualified members available for oral evidence should the Standing Committee wish to hear from them.

24 November 2011