

Integration of the Industrial Court with the NSW Supreme Court

Brief to Stakeholders

1 What is changing?

- 1.1 The NSW Government has decided to integrate the Industrial Court with the NSW Supreme Court. The judicial functions of the Industrial Relations Commission (**IRC**) will be exercised by Supreme Court judges in the Common Law Division of the Supreme Court.
- 1.2 There will be no change to the nature and distribution of functions between the Commission and the Industrial Court. All of the non-judicial functions of the Commission (such as conciliation, arbitration, award and agreement making) will continue to be performed by the IRC. The only difference will be that **the judicial functions of the Industrial Court will be performed within the Supreme Court.**
- 1.3 The one judicial member of the Industrial Court, President Walton, will be appointed as a Judge of the Supreme Court. A new Chief Commissioner will then be appointed to the IRC to lead and manage the Commission.

2 What is the current status of the Industrial Court?

- 2.1 The IRC is established under the provisions of Chapter 4 of the *Industrial Relations Act 1996* (NSW) (the **Act**). It is comprised of two bodies:
 - a) The Commission in Court Session, which is otherwise known as the **Industrial Court**, which exercises judicial functions, and
 - b) The **Commission**, which exercises non judicial functions.
- 2.2 The key functions of the Commission include: setting remuneration and other conditions of employment, resolving industrial disputes and hearing and determining other industrial matters, including unfair dismissals and approving enterprise agreements. The Industrial Court is traditionally responsible for exercising criminal jurisdiction, prosecutions for breaches, recovery proceedings, appeals and proceedings for declarations. The judicial functions are clearly itemised in section 153 of the Act. Both the Commission and the Court also have functions in relation to the regulation of industrial organisations which represent the interests of employers and employees.
- 2.3 Judicial members of the IRC constitute the Industrial Court. Judicial members may also exercise the non-judicial functions of the Commission. To be eligible, judicial members must hold, or have held, judicial office in Australia, or be an Australian lawyer of at least seven years' standing (s 149(2)). Currently President Walton is the only judicial member appointed to the Industrial Court.

- 2.4 There is a limited appellate relationship between the Commission and the Industrial Court. The Commission has its own internal appeals mechanisms to the Full Bench of the Commission. There are no rights of appeal to the Industrial Court except on questions of law from the Commission's decisions in public sector disciplinary matters. The Court is also able to make binding declarations of right in relation to a matter in which the Commission (however constituted) has jurisdiction – that is, it can deal conclusively with legal questions arising in matters before the IRC.

3 Why is this change being made?

- 3.1 The workload of the Industrial Court has decreased significantly in recent years, partially due to changes to the Commonwealth industrial relations framework, including laws which removed the unfair contract jurisdiction of the Industrial Court with respect to private sector employees. In addition, legislative changes in 2010 transferred prosecutions under Work, Health & Safety legislation from the Industrial Court to the District Court. The 2011 Wages Policy has also contributed to a reduction in industrial disruption.
- 3.2 In 2015, only 37 matters were commenced in the Industrial Court, compared to 766 in 2005. There is now insufficient work to fully occupy the one remaining judicial member of the Court.
- 3.3 Due to its decreased workload, the Industrial Court is not operating as cost effectively as larger courts. The change will deal with these inefficiencies. The change will also remove administrative difficulties increasingly arising as a result of arrangements made under s151B of the Act to appoint judges of the Supreme Court as Acting Judges of the Industrial Court when the President is unavailable to sit due to workload or other factors.

4 What will be the benefits of the integration?

- 4.1 Integrating the Industrial Court with the Supreme Court will allow existing Supreme Court judges to hear matters as demand requires.
- 4.2 There will be efficiencies of scale associated with handling matters under the larger jurisdiction of the Supreme Court.
- 4.3 There will be a benefit to parties through increasing the capacity of the court to attend to urgent industrial matters. With only one judge currently available to hear matters in the Industrial Court, parties could be significantly delayed in seeking the assistance of the court if President Walton is occupied with a lengthy hearing. The Supreme Court will be able to urgently allocate judicial resources to matters as required from a larger pool of judges.
- 4.4 The change will also avoid problems associated with having a single judge court, including the lack of judicial diversity within the Commission.

5 What will be the practical impact of the change?

- 5.1 The practical impact of the change will be minimal. The Supreme Court already hears matters falling within the Industrial Court's jurisdiction where necessary.
- 5.2 The Industrial Court and the Supreme Court both have status as superior courts of record. Judicial industrial relations matters will therefore continue to be heard in a superior court.
- 5.3 The integration also mirrors the Commonwealth industrial relations framework, where the Federal Court and Federal Circuit Court determine industrial relations matters which require judicial consideration.
- 5.4 The move of the judicial functions and the Judge to the Supreme Court will in practice create minimal change to the jurisdiction and functioning of the tribunal. The Commission will retain all of its conciliation and arbitration powers and all of its other functions under the Act.
- 5.5 There will be a new head of jurisdiction, titled the Chief Commissioner. The Chief Commissioner will exercise the tribunal functions currently assigned to the President, such as managing and allocating the case load, creating Full Benches where required, and providing an annual report. It is proposed the Chief Commissioner be legally qualified.
- 5.6 As all members will be non-judicial, the system of Presidential Members will no longer be required. The Government has confirmed that the total number of members will remain at five, but this will continue to be reviewed against workload.

6 Will there be an impact on regional and rural communities?

- 6.1 Any future registry functions for the Commission will be managed by the appropriate Local Court. Regional sitting arrangements for the Commission will remain unchanged.
- 6.2 The functions of the Online Registry of the Supreme Court will become available for matters currently heard in the Industrial Court, allowing regional applicants to file applications, lodge documents and receive updates about their matters online. This will assist to minimise the impact on regional and remote communities.

7 Consultation

- 7.1 The Department of Justice and NSW Industrial Relations will consult with key industry stakeholders about the change.

7.2 The focus of the consultation will be on ensuring:

- (a) That any function exercised in industrial relations matters in the Industrial Court continues to be exercised in the Supreme Court after the integration
- (b) That all existing matters in the Industrial Court will be transferred to the Supreme Court
- (c) That the remaining non-judicial functions of the Commission are undisturbed by the change
- (d) That the Commission is able to operate effectively as an industrial tribunal in the absence of any judicial members
- (e) That existing synergies between the Commission and the Industrial Court are maintained through referral arrangements between the IRC and the Supreme Court
- (f) That the transition is smooth and that there is minimal disruption to matters which are currently before the Industrial Court.

8 Questions for stakeholders

8.1 The NSW Government seeks stakeholders' views on the following questions:

1. The current arrangements in the IRC allow the Commission to switch matters to the Industrial Court where required. What referral pathways should be established between the IRC and the Supreme Court to ensure that these synergies are not lost?
2. Is there a need for a provision to allow general references on questions of law to the Supreme Court (similar to section 54 of the *Civil and Administrative Tribunal Act 2013*)?
3. Are there any judicial functions of the IRC that should be exercised by the District Court, rather than the Supreme Court (including functions assigned by other laws)?
4. Under the Industrial Relations Act (and other Acts that assign functions to the IRC), particular non-judicial functions of the Commission are required to be exercised by the full bench, including at least one judicial member (for example, for proceedings relating to the cancellation of the registration of industrial organisations: s155(2)). How should these functions be exercised after the integration?
5. Should the new Chief Commissioner of the IRC be legally qualified?
6. How should a full bench of the IRC be constituted?
7. What transitional arrangements will be required for proceedings which are currently underway in the Industrial Court?

8.2 Submissions should be sent to: Justice, Strategy and Policy, Department of Justice, GPO Box 6, Sydney NSW 2001, or policy@justice.nsw.gov.au **by 5 September 2016.**

For further information, contact:

Contacts

Celia Barnett
Senior Policy Officer
Department of Justice
(02) 8346 1130

George Petrovic
Principal Policy Analyst
NSW Industrial Relations
(02) 9228 5925