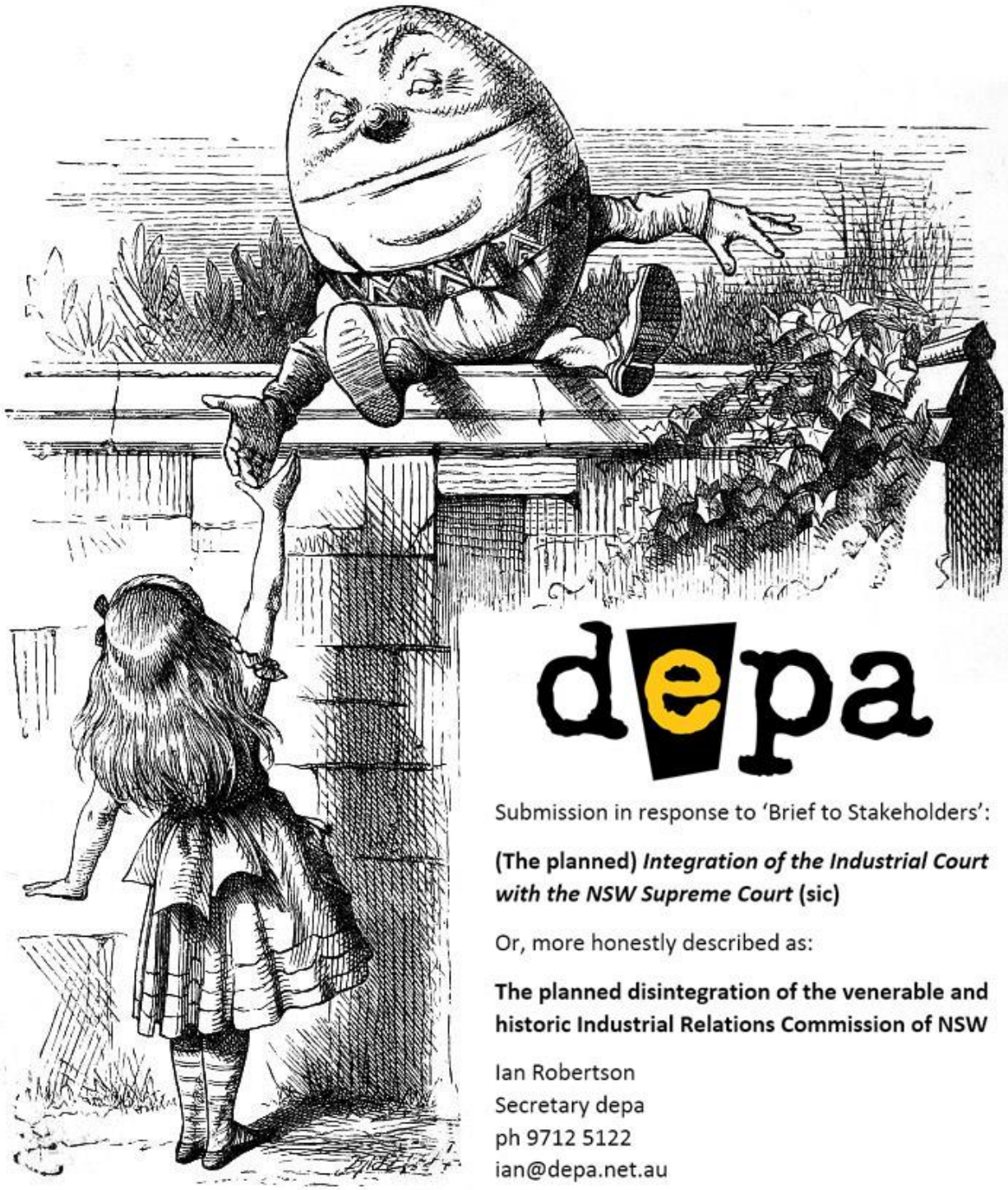

depa

Submission in response to 'Brief to Stakeholders':

(The planned) *Integration of the Industrial Court with the NSW Supreme Court* (sic)

Or, more honestly described as:

The planned disintegration of the venerable and historic Industrial Relations Commission of NSW

Ian Robertson
Secretary depa
ph 9712 5122
ian@depa.net.au

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."

Integration or disintegration, that is the question

Clearly when the NSW Government grappled with the concept of disintegrating the Industrial Commission of New South Wales as we know it, and separating out the Industrial Court to be integrated into the Supreme Court and making some consequent changes to the remainder of the Commission, they were inspired by Humpty Dumpty's words.

In publishing their "Brief to Stakeholders" titled "Integration of the Industrial Court with the NSW Supreme Court", the Government, The Treasury and Justice thought it better to ignore entirely whether the disintegration of the capable, venerable and honourable institution of the NSW Industrial Relations Commission, including the Industrial Court, was a good idea or a bad idea.

Originally it was an idea embraced without announcement in 2015. While Cabinet may have endorsed the integration of the Court into the Supreme Court, even at the relatively frank discussion with Unions NSW affiliates on 1 September, no-one was quite game to disclose when that decision was made. Yes, it had been decided by Cabinet but no, we won't tell you when.

Well, it was made in 2015 and it was also decided at the same time that the remainder of the IRC, left to discharge the primary obligations of the Industrial Relations Act - with its permanent commissioners and staff, its conference rooms, its chambers for commissioners which also allow informal conciliation between parties - would find itself as a minor part of NCAT - with its inadequate accommodation, lacking proper facilities for the equivalents of commissioners who are not permanent, but part-time or even casual and, on many occasions, simply keeping up an interest with potentially one or two cases a year?

It is both damnable and regrettable that there has been no consultation on the disintegration of the Commission. The word "proposal" is absent from the Brief to Stakeholders. All the stakeholders have been provided is a brief advising what is to proceed. 7.1 makes it clear that "the Department of Justice and NSW Industrial Relations will consult with key industry stakeholders about the change".

Not about any proposal that there be a change but, as is revealed in 7.2, the focus will be on elements consequential to the decision to disintegrate the Commission to allow smooth process. In 8.1 the views of stakeholders will be sought on seven specific consequential and machinery arrangements to facilitate the disintegration with as little collateral damage as possible.

Governments do what governments do - that they also damage historic, authoritative and venerable institutions in the process is part of the steam roller.

depa believes that the separation of "judicial" responsibilities that may normally be dealt with by the Industrial Court (although it's arguable that "judicial" matters also get dealt with by the Full Bench of the IRC) from those roles arising from the principal responsibility under the Industrial Relations Act for the Commission to resolve disputes by conciliation, is a tragedy. And we are not alone.

It is also arguable that "judicial" matters also get dealt with by the Full Bench of the IRC. The integrated IRC is an institution revered and honoured by employee organisations and employer organisations alike and its demise as an integrated tribunal is regretted by both. Others will simply be more polite about the tragedy than we are, particularly, the employer peak bodies and organisations.

Industrial law is a specialised area of the law and a poor fit for the Common Law Division of the Supreme Court

Legal education provides options to specialise in the various specialised area of the law. This includes industrial relations and workplace law. Lawyers obtain accreditation as an expert in industrial and workplace law and legal firms advertise that they have staff who are accredited specialists in industrial and workplace law.

The Government proposes to provide those significant areas of industrial and workplace law which are the province of the Industrial Court to the Supreme Court - which does not recognise that specialisation, where only by accident or misadventure would have more than a couple of judges with experience in the area, would have a majority of judges who would regard that area as a grubbier version of legal practice (grubbier than criminal?) and may not be able to provide applicants to the Supreme Court with any guarantee that the judge allocated to deal with the matter has any interest, expertise or experience in that specialised area of the law.

How does this make any sense? A good fit for a court with a reduced workload or a move more likely to disadvantage applicants and parties, increase costs, increase delays, be more foreboding and intimidating to clients, discourage applications and generally provide a less accessible, less procedurally restrictive, less hospitable, less experienced and less user-friendly service? The Government hasn't made out an argument for the integration and the opponents of the disintegration have compelling reasons to be disappointed and to oppose it.

Leaving aside these general anxieties about the Supreme Court, applications for declaratory relief under section 154 would not be handled as capably or confidently for applicants as they are in a specialised industrial relations tribunal. And the complexities of arguments about union rules as registered organisations under the Industrial Relations Act would cause apoplexy.

Is there another option for the Industrial Court?

Over the years, governments of different political persuasions have removed from the IRC/Court a range of employment and workplace roles and provided them to other jurisdictions. If the Government really intended to have genuine consultation about the future of the Commission, then this "proposal" provides the appropriate time to do it and to consider returning those lost areas and roles to the Commission. Further, the Government should use this opportunity to create a single tribunal dealing with the world of work. Clearly, despite the Government representatives describing the Brief to Stakeholders as a "proposal" in their meeting with affiliates of Unions NSW on 1 September, that word can't be found anywhere in the Brief. Humpty would be proud.

The Government could restore to the IRC the Discrimination Act matters and the Occupational Disciplinary matters currently in NCAT. Commissioner for Young children applications could be returned and, to really give the Commission everything back, so could return the Racing Appeals Tribunal. And, perish the thought, Occupational Health & Safety prosecutions and workers compensation. That would constitute an integrated employment and workplace tribunal.

It's not unusual for unfair dismissal proceedings in the IRC to involve issues relating to the Anti-Discrimination Act and issues to do with occupational discipline. It makes no sense to continue the potential for two different tribunals to contest interpretations of equal employment opportunity and antidiscrimination. Here are two examples:

Example 1

Part 4 Equal Employment Opportunity of the Local Government Act at section 344 provides at section 344(1)(a) the object "to eliminate and ensure the absence of discrimination of employment on the grounds of race, sex, marital or domestic status and disability in councils" and at 344(1)(b) "to promote equal employment opportunities for women, members of racial minorities and persons with disabilities in councils".
Section 345 requires councils to prepare and implement an EEO Management plan and section 346 provides "the provisions of an equal employment opportunity management plan, to the extent of any inconsistency between those provisions in the provisions of the Anti-Discrimination Act 1997, prevail".

These provisions of the Act have existed since 1993 and, while section 344 (1)(a) restricts itself to "eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital status and disability in councils", the Anti-Discrimination Act has significantly more areas of illegal discrimination – including, for example, family and carer responsibilities.

We have had an industrial dispute before the IRC about an EEO Management plan at Gosford Council which discriminated against parents who are carers by providing different entitlements for part-time employees who are part-time because they are parents. This was complicated because the Industrial Relations Act requires the IRC to act consistent with the Anti-Discrimination Act but the employer argued that section 346 prevents that happening. Uh oh, and this is an issue that remains unresolved.

It makes sense to remove the complication.

Industrial disputes and unfair dismissals regularly deal with issues that involve breaches or potential breaches of the Anti-Discrimination Act.

Example 2

We have members in local government who provide services under a variety of titles such as building and development control, building certifiers, etc. who are now required to be accredited by the Building Professionals' Board - notwithstanding that they are an employee of a Council and employed under the terms of the Local Government Act and the Local Government State Award (or in a few instances, another industrial instrument), to continue to do that job.

This sets up a parallel accountability for the employee to their employer and an accountability to the Building Professionals' Board. The BPB manages the accreditation regime and this includes a variety of disciplinary processes including reducing levels of accreditation (which affects work that can be done) and even the removal of accreditation entirely. While this is an example from this union's experience, the overlap between occupational disciplinary matters handled by NCAT and disputes and unfair dismissals in the IRC is likely to affect all the remaining users of the New South Wales industrial relations system.

The BPB has been relatively sensitive to the complications that can arise from dual accountability. Given the hostility of local government to having their own employees accountable to another organisation, the BPB under a previous administration has given practical undertakings that disciplinary or performance matters will be primarily the responsibility of the Council as the employer and the BPB will take that into consideration in how they proceed with complaints and/or potential discipline against Council employees who are accredited certifiers.

But this practical approach has not been echoed by a subsequent change of Board and CEO and is not provided for in any protocol, policy or procedure under which the BPB operates.

How does it make any sense to have potential complications of two tribunals dealing with the one employee at the same time? This can be resolved by transferring this area from NCAT to the IRC.

These other workplace issues should be considered by the Government with a view to rebuilding the Industrial Relations Commission and Industrial Court as a comprehensive and properly resourced workplace and employment tribunal.

Quote Vadis IRC?

It's not uncommon for private equity speculators to acquire majority shareholding in companies which they value more for their constituent parts than the integrated whole. Sometimes businesses can be stripped to their components and sold off, notwithstanding that there may have been a better public good or benefit, from the integrated business.

The concern, given the well-founded rumours in 2015 that once the Court is separated from the other roles, those roles will find their way into NCAT, needs to be addressed by Government as part of this exercise.

Five commissioners with support staff can easily be bundled up and put, both physically and metaphorically, anywhere. We don't want to see the asset stripping and the sell-off begin.

The Government needs to make announcements committing to the continued operation of the IRC after these changes to ensure the continued confidence of all of those parties using the New South Wales industrial relations system.

Ian Robertson
Secretary depa
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