Submission No 80

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Tenants' Union of NSW Co-Op Limited

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The Director
Standing Committee on Law and Justice
Parliament House
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Dear Director,

Submission to the Standing Committee on Law and Justice

Inquiry into Opportunities to Consolidate Tribunals in NSW

The Tenants' Union of NSW is the peak body representing the interests of tenants in NSW. We are a specialist community legal centre providing training, advice and other assistance to 16 Tenants' Advice and Advocacy Services ('**TAAS**s') and 4 Aboriginal TAASs across NSW. Our legal practice also acts for and advises tenants directly.

The Issues Paper points out that the CTTT's activities constitute the vast majority of tribunal decision making in NSW. In the CTTT, our work generally arises in the Tenancy, Social Housing, Residential Parks and General Divisions of the Tribunal. On figures published in the CTTT's 2010 - 2011 Annual Report, we are daily involved in matters that touch on almost 90% of the CTTT's exercised jurisdiction. Our involvement arises in numerous capacities: we advise and appear for clients, we monitor relevant CTTT decisions (both reported and unreported), we contribute to CTTT consultative forums and we frequently advise TAASs on CTTT proceedings.

We also regularly act on appeals and judicial review proceedings arising out of CTTT proceedings. This year we have appeared in District Court appeals, Supreme Court judicial review proceedings, appeals to the Court of Appeal and Land and Environment Court proceedings, all of which arose out of proceedings originally commenced in the CTTT.

Given our experience, this submission deals with the CTTT and the proposals having to do with the operations of NSW tribunals, rather than the arrangements concerning the Industrial Relations Commission. The CTTT and its predecessor tribunals have, over time, delivered an accessible and effective forum for the determination of

tenancy disputes. Nevertheless, there are opportunities for significant improvement of an important part of the institutional framework for the delivery of justice in NSW.

THE CTTT AND TRIBUNAL AMALGAMATION

The *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal*[1] (the '**2002 Report**') identifies and discusses potential benefits and risks of tribunal amalgamation, as does the Issues Paper. Generally, the benefits identified appear to be improved administrative efficiency, strengthened tribunal membership and greater public access. The identified risks appear to be loss of member expertise, loss of procedural flexibility and loss of innovation thought to arise in separated jurisdictions.

The Tenants' Union believes that tribunal reform can deliver substantial benefits of the kind identified by the 2002 Report, that many of the apparent risks can be ameliorated by appropriate practices within the Tribunal, and that the process of amalgamation could be a valuable opportunity for making improvements to tribunal justice in NSW.

Quality of decision making

Measuring the quality of decision making in the dispute resolution context is notoriously difficult. Perceptions about a lack of quality are often impressionistic and imprecise. The Tenants' Union regularly hears from tenants or tenant advocates who are dissatisfied with the CTTT's process or ultimate decision, but it would be difficult to move from those reports to an assessment of the CTTT's decision making generally.

However, the Tenants' Union has observed instances of persistent difficulty in some areas of the CTTT's decision making. An example may be illustrative and we make the following observations with respect. The CTTT has long awarded compensation to tenants claiming non-economic loss in the nature of mental distress. In *Insight Vacations v Young* [2010] NSWCA 137, the NSW Court of Appeal determined that such awards (often termed *Baltic Shipping* damages) were caught by Part 2 of the *Civil Liability Act 2001* (the '**CL Act**').

The Tribunal's decisions in the months that followed often failed to take account of *Insight Vacations* or to apply it correctly. The most recent instance of a Tribunal decision where this arises is *Reilly & Yates v Marta* [2011] NSWCTTT 523 (9 November 2011), where it appears (though is not stated) that the only possible basis of the compensation was the tenant's emotional distress. The Tribunal awarded $1000 compensation to the tenant, without any mention of the CL Act.

On 3 August 2011, the Tribunal awarded compensation for non-economic loss without regard to the CL Act (the amount of the award clearly did not meet the s 16

[1] Committee on the Office of the Ombudsman and the Police Integrity Commission, November 2002

CL Act threshold)[2]. And yet, the day before, a claim for non-economic loss was dismissed because it did not meet the CL Act threshold[3]. During 2010 and 2011, the Tribunal also awarded compensation for non-economic loss in a substantial number of other cases where, if the CL Act had been applied, an award would have been impossible[4].

While it is true that, a year on from *Insight Vacations*, the Tribunal's consistency on this point is improving, there are other problems. One of the questions to be determined in relation to the application of the CL Act is whether physical inconvenience loss is caught by Part 2 of the Act. On 17 August 2011, the Tribunal found that it would be absurd if physical inconvenience were not caught by Part 2 of the Act[5]. On 21 September 2011, the Tribunal decided the opposite was true (in a different division) and awarded compensation for physical inconvenience on the basis that it was not caught by the CL Act[6].

We are aware that Tribunal members have occasionally exhibited considerable impatience when confronted with considered legal submissions on this point. This impatience is difficult to understand: a well-advised tenant must stand ready to give the Tribunal all possible assistance in arriving at the correct outcome, particularly when the Tribunal has exhibited such marked inconsistency on the point at issue.

It may be noted that most of these errors redounded to the benefit of tenant claimants in the Tribunal. Nevertheless, the Tenants' Union believes that no one is well served by a decision making process regularly attended by inconsistency.

In making mention of this problem, the Tenants' Union seeks to give some concrete guidance about concerns with Tribunal decision making. We do not make any particular recommendations about remedies, but the following matters, which are often thought to have an impact on quality decision making in tribunals, may be relevant.

Specialisation

One of the key benefits of tribunals is the accumulation of specialist expertise to deal with matters arising within their jurisdiction. The Tenants' Union continues to support and encourage the retention of a specialist jurisdiction for the determination of tenancy matters in NSW.

The creation of a tribunal with a wide civil and administrative jurisdiction raises fears of dilution of expertise: such concerns were evident in the evidence received in

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[2] *Donnelly & Bunker v Sweeting* [2011] NSWCTTT 348

[3] *Rymer v Hofer* [2011] NSWCTTT 347

[4] *Xuereb v Simpson* [2011] NSWCTTT 253; *Hogan v Sacahawars* [2011] NSWCTTT 241; *Jolley v Heuston* [2011] NSWCTTT 115; *Jacky v NSW Land and Housing Corporation* [2011] NSWCTTT 104. This list is illustrative, not exhaustive. The Tribunal has determined a number of other matters in this manner.

[5] *Kelly v New South Wales Aboriginal Housing Office* [2011] NSWCTTT 373

[6] *Strangas and Son Building Contractors Pty Ltd v Lim and Ting* [2011] NSWCTTT 440

the preparation of the 2002 Report. The CTTT is already the product of earlier amalgamation – its predecessor (with jurisdiction to hear tenancy disputes) was the Residential Tenancies Tribunal. Staff solicitors of the Tenants' Union and advocates in the TAAP network have appeared in both Tribunals.

In our experience, members of the CTTT generally exhibit reasonable expertise in their understanding of the tenancy context and the resolution of tenancy disputes. In the ten years since its creation, the CTTT has ably arranged for the appropriate concentration of expertise within its various divisions. These arrangements reflect those of the Victorian Civil and Administrative Tribunal ('**VCAT**'), which were also described in the 2002 Report. In the Tenants' Union's view, a tribunal with wide jurisdiction can nevertheless retain and concentrate expertise, most evidently, in the use of separate divisions dealing with discrete jurisdictions – indeed, to some extent, a tribunal with greater scale may be better equipped to concentrate expertise in particular divisions.

However, specialisation is not an unqualified good. Some of the pitfalls of specialist jurisdictions were canvassed by Heydon J in *Kirk v Industrial Relations Commission* [2010] HCA 1 at [122], where His Honour says that "our legal system has often had to balance the advantages of creating specialisation over the disadvantages of doing so" and cautions that "distorted positions" may arise in specialist jurisdictions, particularly those with strong protections against appellate intervention or judicial review.

An amalgamated tribunal would be better placed than the multiple tribunals now found in NSW to ameliorate some of the problems that can arise in a specialist setting. As identified in the 2002 Report, 'cross-fertilisation' through some movement of members between specialist divisions allows for potential new approaches and fresh thinking on matters deserving of reconsideration by appropriately qualified individuals who are not so entrenched in the specialist jurisdiction. This can be particularly important in a setting in which legal practitioners rarely practice, which limits the assistance a tribunal might otherwise receive from the profession in articulating new lines of argument and a proper understanding of the applicable law.

Membership

The makeup of Tribunal membership is a matter of some importance in judicial review of tribunal decision-making. In *Craig v South Australia* [1995] HCA 58, the court identified the difference between a court and a tribunal and their amenability to judicial review based on the makeup of a tribunal with members lacking legal training. In *The Impact of Judicial Review on Tribunals - Recent Developments*[7], Robin Creyke associates the willingness of courts to engage in judicial review with a lack of institutional respectability. His prescription is for governments to raise the standing of Tribunals with particular attention to the calibre of their membership and their independence from government.

[7] 5th Annual AIJA Tribunals Conference, Melbourne, 6-7 June 2002

In both of these respects, the Tenants' Union believes the arrangements in Victoria and Queensland are superior to those of the CTTT. To differing extents, both VCAT and QCAT have a senior judicial membership. Such membership has the potential to more clearly place the tribunal in the NSW justice system and to improve its standing in the institutional arrangements for dispute resolution in NSW.

It is often observed that perceptions of justice and the reputation of the justice system are of paramount importance. In our view, judicial membership, appropriate tenure, and clearly independent administrative arrangements will ensure not only the actuality of an improved decision making process, but will also increase an amalgamated tribunal's stature both in the eyes of other elements in the justice system and in the eyes of the public.

Fears of 're-legalisation' appear to be misplaced. First, the practices of the courts, which are so often deprecated in the tribunal context, are perhaps less problematic in some respects than they once were. The modern law of civil procedure, the close attention of the courts to efficient and timely disposal of litigation and the High Court's strong protection of those practices in *AON Risk Services Australia v Australian National University* [2009] HCA 27 should give the automatic critic of legal process some pause. Indeed, exposure to the learning of the courts in efficient and effective case management may help, rather than hinder, a tribunal's efforts to quickly dispose of cases coming before it.

Second, as pointed out in the evidence given for the 2002 Report, lawyers involved in tribunal work are concerned "not to allow the traditional practices to take hold". While we have encountered some exceptions to this rule in dealing with lawyers representing clients in the Tribunal, we have not observed a lack of vigilance in protecting a tribunal's informal processes by legally qualified members of the CTTT.

To the extent that the Government wishes to reduce the Tribunal's amenability to judicial intervention, efforts to improve the general standing of the tribunal will generally assist to raise its standing and potentially protect its decisions on the basis that it is an institution with sufficient skill in the application of the law such that its jurisdiction may encompass a wider range of acceptable errors.

Accessibility

We see no inherent reason why an amalgamated tribunal would diminish access to its dispute resolution service. While the achievement of economies of scale may diminish the cost of tribunal justice in NSW, the Tenants' Union submits it is important that the realisation of efficiency gains does not lead to a real reduction in the resources available for determination of disputes.

In some respects, the Tenants' Union would look forward improvements to access in a larger tribunal. For example, we are aware that during 2010, the CTTT found it necessary decrease its sitting days in some country areas and in others to stop sitting entirely when it encountered a decrease in the number of tenancy matters arising in those areas. In the 2002 Report, evidence suggested that VCAT's scale allowed much

greater reach into regional areas that had previously not been viable sites for most or any individual tribunals.

Appeals

The present system for appeals from the CTTT, established by an amendment to the *Consumer, Trader and Tenancy Tribunal Act* in 2008, is unsatisfactory.

First, appeals to the District Court tend to increase, rather than diminish, the cost of proceedings. Lack of appeal avenues from the District Court will not prevent the determined litigant from taking proceedings further: a party may still commence proceedings under s 69 of the *Supreme Court Act* seeking orders in the nature of prerogative writs. Examples of this phenomenon abound in the cases that have come before the Court of Appeal since the 2008 amendment. In the most recent published decision of the Court arising out of CTTT proceedings[8] a litigant had commenced in the District Court, whereupon the proceedings were transferred to the CTTT, then appealed to the District Court and, subsequently, were the subject of judicial review proceedings in the Court of Appeal.

Second, the assumed cost savings of inferior court proceedings are limited. Most appeals from the CTTT require no more than a day of hearing and proceed without reception of additional evidence. There is little reason to suppose that the Supreme Court is unable to deal with such matters expeditiously and cost effectively.

Third, decisions of the Tribunal may still be the subject of direct judicial review. The difficulty attendant upon the jurisdictional bifurcation of appeals and judicial review has caused considerable difficulty since 2008. It is likely that the issue arises so acutely in this case (as opposed to other situations in which an appeal and judicial review lie in different forums) because the scope of an appeal is very limited so that, to the disappointed party, the judicial review grounds are comparatively attractive. The separate reasons of Handley AJA in *Brennan v New South Wales Land and Housing Corporation* [2011] NSWCA 258 provide a short summary of some of the issues that arise.

Fourth, it diminishes the CTTT's stature. An appeal from a tribunal decision does not lie to a superior court of record. Nor can it ever rise that high: in such cases, no appeal lies from the District Court to the Court of Appeal (*Sullivan v St George Community Housing* [2010] NSWCA 248).

Each of these issues can be remedied: at the least, a right of appeal to the Supreme Court of NSW from the CTTT ought to be reinstated. Consideration should also be given to determination of appeals by the Court of Appeal (though such a step would be more apposite in an amalgamated Tribunal with judicial members). Such proceedings would be closer to the ultimate site of their determination (and appeals from the Supreme Court to the Court of Appeal in such proceedings could be

[8] *Wright v Foresight Constructions Pty Ltd* [2011] NSWCA 327

limited); the problem of bifurcated forums for judicial review and appeals would be removed and the stature of the CTTT may be restored.

In the Tenants' Union's submission, consideration should also be given to more sweeping changes to rights of appeal from CTTT decisions or from decisions of an amalgamated tribunal.

VCAT provides for appeals to the Victorian Court of Appeal (if the appeal is from a decision of the President or Vice-President of VCAT) or to the Victorian Supreme Court (if from another member of the Tribunal). Any such appeal may only proceed with the leave of the Court.

QCAT similarly provides for appeals to the Queensland Court of Appeal, but it also adds an internal appeal process whereby a person dissatisfied with the Tribunal's decision at first instance may appeal to a three member panel constituted by judicial members.

The QCAT scheme is particularly attractive in that it provides for an internal check on tribunal decision making and, arguably, is an effective mechanism for promoting high quality decision making within the Tribunal itself. In this way, resort to the courts will less often be required and can more sensibly be limited to the Court of Appeal, making it increasingly likely that judicial power will only be invoked once up to final disposal of a matter.

ADMINISTRATIVE DECISIONS TRIBUNAL

Much of our work and the work of TAASs concerns administrative decisions of, among others, Housing NSW and NSW Aboriginal Housing Office. These decisions may currently be the subject of an internal review and, if the tenant remains dissatisfied following the review, a further review by the Housing Appeals Committee, which may make a non-binding recommendation to the housing provider.

Housing NSW may grant a rental rebate to a tenant under Part 7 of the *Housing Act 2001*. By this act, the effective rent payable by the tenant is reduced having regard to household income. Having made such a grant, Housing NSW may later vary or cancel a rental rebate. It is an everyday occurrence for Housing NSW to cancel a tenant's rental rebate, backdate the cancellation for an extended period, allege a rent arrears debt that arises from the cancellation and then seek termination of the tenancy for rent arrears through an application to the CTTT. The debt is often in the order of tens of thousands of dollars, and is occasionally greater than $100,000.

The decision adversely affects those affected in several ways. First, the extent of the arrears is likely to lead to termination of the tenancy by order of the Tribunal (which will not investigate the merits of the Housing NSW decision). Second, the tenant now owes a large debt to a government agency, which may be enforced directly (which rarely occurs in practice) or collected by way of instalments to pay rent

arrears following a CTTT order. Third, the existence of the debt will arise in any future application for housing by the tenant.

It is imperative that such a decision be made with proper regard to the merits in the circumstances of the case. The most appropriate forum for doing so is the ADT (or its amalgamated successor). The Tribunal's clear independence, community standing, relative rigour and binding force are well adapted to ensuring that each decision of this kind is made on the merits of the case. Decisions of comparable effect in other states and at the Commonwealth level are subject to this kind of scrutiny. It is an aberration that a decision with such potentially serious consequences is not subjected to the same attention.

In general, we endorse suggestions made in the 2002 Report regarding a broader general jurisdiction for the ADT. In the Tenants' Union's submission, all public housing decisions should fall within the jurisdiction of the ADT. However, if not all such decisions are included, then, at a minimum, decisions under Part 7 of the Housing Act should fall within the jurisdiction of the ADT.

We would welcome the opportunity to further assist the Committee's inquiry. Please contact Carl Freer or Ned Cutcher at the Tenants' Union on (02) 8117 3700 to discuss any of these matters.

Yours faithfully,
TENANTS' UNION OF NSW CO-OP LIMITED

Carl Freer
Solicitor