Industrial Relations Commission
New South Wales

UNIONS NSW TRAINING CONFERENCE

SPEECH FOR 28 AUGUST 2025 AT NSW TEACHERS FEDERATION CONFERENCE CENTRE

JUSTICE INGMAR TAYLOR, PRESIDENT OF THE INDUSTRIAL RELATIONS COMMISSION OF NSW

1 We meet today on the lands of the Gadigal people of the Eora Nation. I pay my respects to their elders, past and present, and extend that respect to any Aboriginal and Torres Strait Islander peoples with us today.

2 Thank you to Mark Morey, Connie Vartuli, Sam Priebee and Todd Pinkerton for organising today's conference and for inviting me to speak.

3 I have been asked to speak about the passage of the Industrial Relations and Other Legislation Amendment (Workplace Protections) Act 2025 (Workplace Protections Act).

4 In her Second Reading Speech for the Bill, Minister Cotsis summarised the key industrial reforms as "establishing new anti-bullying and sexual harassment jurisdictions before the Industrial Relations Commission; clarification of the commission's powers during industrial disputes; and changes to the freedom from victimisation provisions", and the reform to the *Work Health and Safety Act 2011* (WHS Act) "to provide a pathway for work health and safety disputes to be dealt with by the Industrial Relations Commission".[1] I will speak about each of them this morning.

5 Some of these amendments, like the new arbitration power of the Industrial Relations Commission (IRC) and changes to the victimisation provisions, commenced on 3 July, the date of assent. Other amendments, like the anti-

[1] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 27 May 2025.

bullying and sexual harassment jurisdictions, will come into effect on 13 October.

6 As I will identify, a number of these changes allow employees who are not employed by the NSW public sector or local government and their unions to make applications in the IRC.

7 The reforms from the Act are significant. I estimate that they will increase the IRC's workload by about 25% once they fully come into effect and become well understood by industrial parties.

8 Today time permits me to make only some brief observations about the key changes: first, the IRC's new power to deal with work health and safety (WHS) disputes; second, the bullying and sexual harassment jurisdiction; third, changes to the freedom from victimisation provisions; and fourth, the IRC's new arbitration power.

WHS Disputes

9 First, the IRC now has a new power in the WHS Act to hear and determine a "dispute" about a "WHS matter".

10 This is dealt with in new Division 7A of the WHS Act, which has yet to come into effect.

11 A dispute about a "WHS matter" includes broadly a dispute over a health and safety issue and a dispute over the right to cease work due to a risk to a worker's health or safety, and also disputes about other specific issues such as a health and safety representative's (HSR's) access to information or right of entry to a workplace, or who constitutes a health and safety committee.

12 Four types of applicants can apply to the IRC to initiate a WHS dispute. They are a person conducting a business or undertaking, a worker or HSR affected by the WHS matter, or a registered organisation on behalf of a worker affected by the WHS matter.

13 New section 102C states that a party to the dispute may initiate proceedings by giving the Industrial Registrar written notice of the dispute. We will publish a new form on our website allowing parties to do so. On receiving notice, subject to subsection (3), the Registrar will "immediately" publish the notice on the IRC's website.

14 The IRC will then deal with WHS disputes using the same procedure that is applied to industrial disputes. On notification, the matter will be listed within 3 days, or more quickly if it is identified to be urgent. Consistent with new section 102E, we will initially attempt to deal with the dispute by conciliation. If conciliation is unsuccessful, we will deal with the dispute by arbitration, during which the IRC may make any order it considers appropriate for the prompt settlement of the dispute.

15 Those used to the restricted capacity of the Fair Work Commission (FWC) to arbitrate will note the broad power of the IRC to arbitrate to resolve a WHS dispute that cannot be resolved by conciliation and to do so quickly. A failure to comply with such an order is a civil penalty provision and may give rise to an injunction.

Bullying jurisdiction

16 I'll move on now to the industrial amendments of the Workplace Protections Act, starting with the bullying and sexual harassment jurisdiction, which has yet to come into effect. The powers given to the IRC to deal with these disputes are similar to those given to the FWC under the equivalent jurisdictions of the *Fair Work Act 2009* (Cth), although there are some key differences.

17 A person can make an application for a stop bullying order if they are a "worker" under the WHS Act, which includes employees as well as contractors, apprentices, and anybody else who carries out work in any capacity for a person conducting a business or undertaking.

18 However, they are excluded from making a claim if they are already eligible to apply to the FWC for a stop bullying order. It is easy to say who cannot bring a

claim – namely those that can bring a claim before the FWC. It is harder to explain exactly who they are.

19 Those that can bring a stop bullying claim before the FWC (and so cannot bring such application before the IRC) are workers who are bullied at work in what the *Fair Work Act* defines as a "constitutionally-covered business", which is a business or undertaking that is conducted by a person who is the Commonwealth or a Commonwealth authority, or a constitutional corporation, which is a foreign corporation or trading or financial corporation formed in Australia. Examples of persons who are bullied in workplaces that are not a constitutionally-covered business (and so can bring a claim to the IRC) include persons bullied at a school conducted by the NSW Department of Education,[2] a local government authority with insignificant trading activity,[3] or a community-based organisation providing support to people with psychiatric disabilities and their carers.[4] It would also include those working at the workplace of a sole trader or a partnership. Our Commission will be able to hear bullying claims brought by workers bullied in such workplaces. As a matter of practice, however, we expect that most applicants before the IRC will be workers who claim that they have been bullied in NSW public sector workplaces (whether or not they are themselves public sector employees).

20 An applicant can bring their own stop bullying claim or have their union bring it on their behalf. A union may also bring a claim on behalf of a number of employees who were bullied at work in related circumstances.

21 While the applicant will always be the worker alleging that they have been bullied or the union representing that worker, it is less obvious who the respondent may be in a bullying proceeding. A stop bullying order can apply to the individual or group who has bullied the applicant, the applicant's employer, or a person conducting a business or undertaking if the bullying occurs in connection with the business or undertaking. For example, an employee might

[2] *Re AB* [2014] FWC 6723.
[3] *Applications by Mr Martin Cooper and Mr Lancelot Bagster* [2017] FWC 5974.
[4] *Re McInnes* [2014] FWC 1395.

want to seek a stop bullying order against their employer, but not against the colleague who has bullied them. It is our intention that the applicant will serve the application on those persons who the stop bullying order could apply to.

22 The IRC must endeavour to settle the application by conciliation. Our rules will allow us to exercise a broad power to determine how best to conciliate, including the ability to require persons who may not be parties to the proceedings, like a HR manager at a workplace, to attend the conciliation so as to most efficiently resolve the dispute. As occurs at the FWC, we intend that conciliation for bullying disputes will usually be conducted in private. Failing conciliation, the IRC has the power to make any stop bullying order it considers to be appropriate during arbitration.

23 The IRC has the power to make any order it considers appropriate to prevent an employee from being bullied at work. That includes, but is not limited to, damages of up to $100,000, as well as a prohibition on further bullying, requiring a respondent to take reasonable steps to redress loss or damage, an apology or retraction, or the introduction of an anti-bullying program or policy.

24 The IRC can only grant relief, however, if it is satisfied that “the employee has been bullied at work” and “there is a risk that the employee will continue to be bullied at work”. A stop bullying order can only be made to “prevent an employee from being bullied at work by the individual or group” who was bullying them. Relief is therefore limited to circumstances where the applicant is still working at the workplace where they were bullied.

Sexual harassment jurisdiction

25 The IRC’s sexual harassment jurisdiction covers a wider group of workers than our bullying jurisdiction. All workers in NSW, other than national system employees, can bring a sexual harassment claim before the IRC. That includes workers at a NSW public sector or local government workplace, but also any worker other than an employee at a private sector workplace. Prospective employees or persons conducting a business or undertaking can also make an application for a sexual harassment order.

26 I use the expression “workers” rather than “employees” deliberately. Similarly to the IRC’s bullying jurisdiction, a person can make an application for a sexual harassment order if they are a “worker” under the WHS Act.

27 I note here that whereas the provisions in the *Fair Work Act* which deal with bullying only apply to workers in constitutionally-covered businesses, the *Fair Work Act* provisions which deal with sexual harassment apply to any person in an Australian workplace, including workers, prospective workers, and persons conducting a business or undertaking. The *Fair Work Act* however contains a provision that makes clear that its provisions on sexual harassment are not intended to exclude or limit the operation of State laws that deal with the same subject matter and which can operate concurrently with this Part. That means that every person at a workplace in NSW, except for a national system employee, can apply to either the NSW IRC for a sexual harassment order or the FWC for a sexual harassment order or another remedy.

28 A sexual harassment application can relate to sexual harassment in respect of *any* harassment that occurs at work, not only harassment from a colleague or employer. For example, if a visitor to a workplace sexually harasses a worker and the owner, both the worker and owner are entitled to make a sexual harassment claim against that visitor.

29 There is a limitation period of 24 months after the sexual harassment occurred during which the claim has to be brought. The aggrieved person need not still be employed by the same employer as they were when the incident occurred.

30 Similarly to a bullying claim, a sexual harassment claim can be brought by a union on behalf of one or more workers.

31 We will take a similar approach to conciliating a sexual harassment dispute as we will for conciliating a bullying dispute, but with an increased focus to ensuring that the procedure is handled appropriately. The IRC’s Registry, rather than the applicant, will serve the applications on the persons alleged to have sexually harassed the applicant and those persons’ employer or principal. This

avoids the applicant having to serve their application on the persons they allege to have harassed them. We will also have regard to the parties' wishes in determining how to conduct the conciliation, including whether conciliation should be done via AVL or with parties kept in separate rooms.

32 If the matter proceeds to arbitration, and the IRC is satisfied that the aggrieved person has been sexually harassed, the IRC can make an order against the persons who sexually harassed the applicant and/or their employers or principals. The Commission can make any order it considers appropriate to prevent further harassment or remedy the harassment.

33 A civil penalty proceeding can also be brought against a person who has sexually harassed an aggrieved person. An application for such a proceeding can only be brought after the IRC has made a sexual harassment order. That means, in practice, that an applicant will need to bring two proceedings to obtain a civil penalty for sexual harassment, and it cannot use evidence and findings made during the arbitration for the sexual harassment order in the proceedings for a civil penalty.

Differences between State and federal bullying and sexual harassment jurisdictions

34 One important difference between our bullying jurisdiction and the FWC's is that the IRC has the power to award up to $100,000 in "damages" to compensate for the "loss or damage" suffered from bullying, whereas the FWC does not have the power to make orders for damages. Applicants may need to lead expert medical evidence as to the effect of the bullying on their life.

35 It is possible to get damages for sexual harassment from both the IRC and FWC, but there are slightly different procedures in doing so. If the IRC is unable to conciliate a sexual harassment dispute, the matter will proceed to arbitration, during which the IRC can award up to $100,000 in damages in a sexual harassment order. In comparison, what is called a "stop sexual harassment order" in the FWC is not made during arbitration. A federal "stop sexual harassment order" can only be made if there is a risk that the aggrieved person

will continue to be sexually harassed and it cannot require the payment of damages. An applicant who seeks an order for damages must obtain a certificate from the FWC, which the FWC can issue if it is satisfied that all reasonable attempts to resolve the dispute other than by arbitration have been, or are likely to be unsuccessful. The FWC can then proceed to arbitrate the dispute and make an order for compensation, but only if at least one complainant and one respondent agree. Alternatively, if the complainant and respondent do not agree to arbitration after the certificate has been issued, proceedings can be commenced in the Federal Court or Federal Circuit Court for a civil penalty for the contravention of the prohibition of sexual harassment in connection with work. There is, in that case, no limit on the quantum of damages that an applicant can receive.

36 So far, the FWC has made just one stop sexual harassment order and neither the FWC nor the Federal Court have made orders for compensation, although Justice Raper is currently reserved on an application. Most cases settle or are withdrawn. Time will tell whether the sexual harassment cases that come before us will proceed similarly and whether applicants will prefer to commence proceedings in one jurisdiction over another.

37 My final observation here is that our bullying and sexual harassment jurisdiction could potentially become a jurisdiction adopted by personal injury lawyers, noting that compensation for injury can be sought without having to establish a percentage of whole of person impairment, as is the case if seeking compensation before the Personal Injury Commission.

Freedom of association

38 The Workplace Protections Act has made three major changes to the victimisation provisions in sections 209 and 210 of the *Industrial Relations Act*, which all came into effect on the date of assent on 3 July 2025. These are changes which only apply to NSW public service and local government.

39 The first change is that an employee is now protected from detrimental action because of their engagement or participation under "industrial organising activities".

40 Section 209 creates an entitlement to do industrial organising activities, such as organising or promoting a lawful activity for or on behalf of the industrial organisation, or representing and advancing the view, claims or interest of the industrial organisation. Section 210 then prohibits the victimisation of an employee because they have engaged in or proposed to engage in industrial organising activities. This is a broader entitlement than the equivalent protection in the *Fair Work Act*, since the definition of "industrial organising activities" in section 209 includes participation in industrial action organised or promoted by their union.

Expansion of protected characteristics

41 The second change to the victimisation provisions is an amendment to section 210 to add to the list of protected characteristics against which an employer or industrial organisation must not victimise an employee or prospective employee. These additions have the effect of more closely aligning our victimisation jurisdiction with the adverse action provisions in Part 3-1 of the *Fair Work Act*.

42 One of the most significant additions is the protection from victimisation due to a characteristic of a person which is protected from discrimination under the *Anti-Discrimination Act 1977* (NSW), namely, race, sex, marital or domestic status, disability, homosexuality, age, transgender status, and carer's responsibilities. This provides public sector and local government employees an alternative to pursuing a discrimination claim before NCAT.

43 The other significant addition is the protection from victimisation due to a person making a complaint or inquiry about their employment or to a public authority. The equivalent provisions in the Fair Work Act give rise to claims by employees asserting "adverse action" when they are dismissed who cannot bring a claim for unfair dismissal because of statutory limitations, such as the initial qualifying

or probation period, or because they are not covered by an award or earn above the high-income threshold. Similarly, I expect claims will be made under these provisions by public sector employees and local government employees dismissed within a probationary period.

Reverse onus for victimisation claim

44 The last change to the victimisation provisions is the creation of a presumption that an employee or prospective employee who suffers a detriment due to an action from the employer was victimised because of a matter referred to in section 210. Subsection (5) creates a reverse onus on the employer which is similar to the reverse onus for adverse action in section 361 of the *Fair Work Act*.

45 An employer can rebut that presumption if they can satisfy the IRC that, objectively, the section 210 matter was not a substantial and operative cause of the detrimental action.

New arbitration power

46 The final reform I will talk about today is the IRC's new arbitration power, which came into effect on 3 July along with the amendments to the victimisation provisions.

47 The IRC now has an additional power at subsection (d) of section 136 of the *Industrial Relations Act* to "make an order or determination with prospective application, whether on an interim or final basis, including an order or determination about the interpretation or application of an industrial instrument for the purposes of resolving the dispute".

48 This means in practice that the IRC can determine an industrial dispute by making an arbitral order without needing to make or vary an award. That includes an "interpretation" provided it can only have prospective effect.

49 It means that if there is a dispute as to whether certain employees are entitled to an allowance, the IRC can resolve that dispute either by varying the award or by making an order or determination with prospective effect. In either case, the varied award term, order, or determination is enforceable thereafter as a civil penalty.

50 Any dispute as to past entitlements will continue to need to be addressed by an application to the Industrial Court for a declaration under s 154 or civil penalties.

Other reforms

51 I only had time today to deal with the largest reforms. I will just identify four of the other reforms of some significance.

52 First, the IRC now has the power to deal with disputes regarding return to work after a workplace injury, under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

53 Second, the IRC now has the power, when making a civil penalty order, to grant an injunction to restrain further contraventions of a civil penalty provision. Civil penalties can be awarded for the contravention of an order or determination made by the IRC under our new arbitration power and the breach of an industrial instrument provision. Once all the amendments come into effect, civil penalties will also be able to be awarded against a person who commits sexual harassment in connection with work or who contravenes a stop bullying or sexual harassment order.

54 Third, in civil penalty proceedings, the Court will have the power to award costs against a respondent where the applicant is successful. However, the Court may only award costs against an applicant in more limited circumstances, such as where the applicant initiated proceedings without reasonable cause, in bad faith, or improperly.

55 Fourth, the objects of the Act have also changed to include the object of eliminating gender-based undervaluation of work, a matter that I expect to be examined in the upcoming Nurses' Award arbitration proceedings.

Conclusion

56 In conclusion, can I identify two takeaways of the Workplace Protections Act's impact on the IRC.

57 First, we are expecting claims from industrial parties who do not regularly appear in the IRC other than to enforce federal law, and have not done so since 2006, namely applicants, unions, and employers of workers who are not NSW public sector or local government workers. Anybody in NSW can notify us of a WHS dispute. Any worker who is bullied at a public sector workplace, like a contractor or volunteer, can apply for a stop bullying order. Any worker other than a national system employee can bring a sexual harassment claim.

58 Second, we expect the IRC's workload to significantly increase as a result of these amendments. The new jurisdictions of WHS disputes, bullying, and sexual harassment are not expected to be offset by a decrease in our jurisdiction elsewhere. The amendments to the victimisation provisions, particularly the new protections against victimisation due to protected characteristics from the *Anti-Discrimination Act* or making a complaint and the reverse onus on the employer to disprove victimisation create the opportunity for applicants to bring claims that cannot currently be brought or are brought before a different tribunal.

59 To assist the parties to adjust to these changes, the IRC will soon begin a seminar series on different amendments from the Workplace Protections Act. We aim to run the first session on sexual harassment and bullying in November.

60 The Commissioner User Group is also carefully considering the advent of the new jurisdictions. There will be opportunities for industrial parties to let us know how new practice notes and procedures are going and whether they can be

improved upon. I very much appreciate the time taken by parties to give this sort of feedback and it will be responded to.

61 For now, thank you again to Unions NSW for organising this training day. I look forward to having the assistance of industrial parties, old and new, before us in respect of the new jurisdictions I have talked about today.

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