



**The Industrial Relations Commission**

*of*

**New South Wales**

# **Annual Report**

**Year Ended 31 December 2004**



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*of*

**New South Wales**

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**Year Ended 31 December 2004**



**The President**

**Industrial Relations Commission of New South Wales**

50 Phillip Street Sydney

The Honourable J J Della Bosca MLC  
Special Minister of State, Minister for Industrial Relations,  
Minister for Commerce, Minister for Ageing,  
Minister for Disability Services, Assistant Treasurer,  
and Vice-President of the Executive Council  
Level 30, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister,

I have the honour to furnish to you for presentation to Parliament the Ninth Annual Report of the Industrial Relations Commission of New South Wales made pursuant to section 161 of the *Industrial Relations Act* 1996 in respect of the year ended 31 December 2004.

Yours faithfully,

The Honourable Justice F. L. Wright  
President

**ISSN 1832-2093**

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**Cover:** Hyde Park Barracks, Macquarie Street, Sydney: *Between 1927 and 1977 the Industrial Commission of New South Wales sat at this historic location.*

## TABLE OF CONTENTS

INTRODUCTION .....	1
ABOUT THE COMMISSION.....	3
MEMBERSHIP OF THE COMMISSION .....	6
JUDGES AND PRESIDENTIAL MEMBERS .....	6
COMMISSIONERS .....	7
INDUSTRIAL REGISTRAR .....	8
DUAL APPOINTMENTS.....	8
ANCILLARY APPOINTMENT .....	8
OVERVIEW .....	9
INDUSTRY PANELS .....	9
REGIONAL AND COUNTRY SITTINGS .....	9
MAJOR JURISDICTIONAL AREAS OF THE COMMISSION .....	11
UNFAIR DISMISSALS .....	11
INDUSTRIAL DISPUTES .....	12
DETERMINATION OF AWARDS AND ENTERPRISE AGREEMENTS .....	13
AWARD REVIEW .....	13
UNFAIR CONTRACTS .....	15
OCCUPATIONAL HEALTH AND SAFETY PROCEEDINGS .....	16
CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION .....	17
FULL BENCH .....	17
TIME STANDARDS .....	29
THE REGISTRY .....	31
REGISTRY CLIENT SERVICES.....	31
ELECTRONIC SERVICES TEAM.....	31
INDUSTRIAL ORGANISATIONS TEAM.....	31
EXECUTIVE AND LEGAL TEAM.....	33
INFORMATION MANAGEMENT TEAM .....	34
THE ATTORNEY GENERAL'S DEPARTMENT .....	34
OTHER .....	35
ANNUAL CONFERENCE.....	35
TECHNOLOGY .....	35
COURT USERS' GROUP .....	37
COMMITTEES .....	38
COMMISSION RULES .....	38
COMMISSION PREMISES .....	38
AMENDMENTS TO LEGISLATION ETC.....	38
PRACTICE DIRECTIONS.....	39
CONCLUSION.....	40
APPENDIX 1.....	41
INDUSTRY PANELS .....	41
APPENDIX 2.....	42
OTHER SIGNIFICANT FULL BENCH DECISIONS.....	42
APPENDIX 3.....	59
TIME STANDARDS.....	59
INDUSTRIAL RELATIONS COMMISSION.....	59

TIME STANDARDS.....	60
COMMISSION IN COURT SESSION.....	60
APPENDIX 4.....	61
COMMITTEES .....	61
APPENDIX 5.....	62
LEGISLATIVE AMENDMENTS .....	62
APPENDIX 6.....	64
AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION.....	64
APPENDIX 7.....	67
MATTERS FILED IN INDUSTRIAL RELATIONS COMMISSION.....	67
(Other than in Court Session) .....	67
APPENDIX 8.....	68
MATTERS FILED IN INDUSTRIAL RELATIONS COMMISSION.....	68
(IN COURT SESSION) .....	68

The principal place of business of the Commission is 50 Phillip Street, Sydney. We would like to acknowledge that this land is the traditional lands of the Eora people and that we respect their spiritual relationship with their country. The Industrial Relations Commission of NSW also conducts proceedings in other locations across the State and we acknowledge the traditional custodians of other regions.

## **INTRODUCTION**

The Ninth Annual Report of the Industrial Relations Commission of New South Wales is presented to the Minister pursuant to section 161 of the *Industrial Relations Act 1996*.

The Commission is constituted by the President, the Vice-President, judicial Members, Deputy Presidents and Commissioners. At the end of the year the Commission was comprised of ten judges, three Deputy Presidents and 12 Commissioners.

During the year the Honourable Justice Russell James Peterson retired. His Honour's service with the Commission commenced with his appointment as a judge of the then Industrial Court and a Presidential Member of the Industrial Relations Commission under the *Industrial Relations Act 1991* on 21 May 1992. His Honour had previously held office as a Deputy President of the Australian Industrial Relations Commission.

On 3 February 2004 Conrad Gerard Staff was appointed as a Deputy President and judicial Member of the Industrial Relations Commission of New South Wales. On 19 August 2004 Anna Frances Backman was appointed as a Deputy President and judicial Member of the Industrial Relations Commission of New South Wales.

Commissioner James Neil Redman proceeded on pre-retirement leave in the later part of 2004. Commissioner Redman's appointment to the Commission occurred on 3 February 1986 and included those difficult transitional periods when new legislation was introduced in 1992 and 1996. Commissioner Redman will be remembered for his dedication to the proper performance of his office, his exceptional conciliation skills and his commonsense and fair-minded approach to the resolution of industrial disputes. His contribution was greatly valued by the Commission and the industrial community, particularly in the Hunter region where for the latter part of his career he was one of the regional Members.

I note with appreciation the work of the Industrial Registrar and Principal Courts Administrator, Mr G M Grimson, and the staff of the Registry who have greatly assisted the members of the Commission in meeting the demands made during the year. The dedication of the Industrial Registrar, Deputy Industrial Registrar and the staff of the Registry is greatly appreciated by the Commission.

I commend the work of my Principal Associate, Ms Dorothy Martin, and my Associate, Ms Lisa Gava, who have the major responsibility for the significant administrative burden of matters passing through the President's Chambers. I also commend the work of the President's Tipstaff, Mr John Bignell, whose assistance has been invaluable.

I wish also to express my thanks to the Research Associates to the President, Mr Anthony Howell, Ms Sue-Ern Tan, Mr Alexander Giudice and Mr Damien Timms for their valuable assistance throughout the year, often providing research assistance at very short notice. Mr Giudice and Mr Timms assumed the roles of Mr Howell and Ms Tan during the year.

The Commission continues to be ably assisted by its Librarian, Ms Juliet Dennison, and the library staff. Thanks are also due to the staff of other courts and departmental libraries for the cooperation and assistance they provide to the Librarian and to the Commission.

As in previous years, the Commission has been faced with some significant challenges in the past twelve months. The Commission remains focussed on ensuring that it continues to meet the objectives of the Act, particularly in relation to ensuring that our processes are timely and effective.

I make specific reference to those matters elsewhere in this report.

I acknowledge the dedication and commitment of the Members of the Commission in their approach to the duties and responsibilities under the Act. The Commission has undergone significant changes in the preceding two years and it is pleasing to note the enthusiasm and support of all Members in assisting to bring those changes to fruition.

## **ABOUT THE COMMISSION**

The Industrial Relations Commission of New South Wales is the industrial tribunal and industrial court for the State of New South Wales. The Industrial Relations Commission is constituted as a superior court of record as the Commission in Court Session. It has jurisdiction to hear proceedings arising under various industrial and related legislation.

The Commission is established by and operates under the *Industrial Relations Act 1996*. The Court of Arbitration (subsequently renamed and re-established as the Industrial Commission of New South Wales) was first established in New South Wales in 1901 and commenced operation in 1902. The present Commission is the legal and practical successor of that Court, the Industrial Commission which existed between 1927 and 1992, and also of the Industrial Court and Industrial Relations Commission which existed between 1992 and 1996. The Commission celebrated its centenary in 2002.

Broadly, the Commission (other than when sitting in Court Session) exercises its jurisdiction in relation to:

- establishing and maintaining a system of enforceable awards which provide for fair minimum wages and conditions of employment;
- approving enterprise agreements;
- preventing and settling industrial disputes, initially by conciliation, but if necessary by arbitration;
- inquiring into, and reporting on, any industrial or other matter referred to it by the Minister;
- determining unfair dismissal claims, by conciliation and, if necessary, by arbitration to determine if a termination is harsh, unreasonable or unjust;
- claims for reinstatement of injured workers;
- proceedings for relief from victimisation;
- dealing with matters relating to the registration, recognition and regulation of industrial organisations;
- dealing with major industrial proceedings, such as State Wage Cases;

- applications under the *Child Protection (Prohibited Employment) Act 1998*;
- various proceedings relating to disciplinary and similar actions under the *Police Act 1990*.

When sitting in Court Session, the Commission has jurisdiction to hear a range of civil matters arising under legislation as well as criminal proceedings in relation to breaches of industrial and occupational health and safety laws. The Commission in Court Session determines proceedings for avoidance and variation of unfair contracts (and may make consequential orders for the payment of money); prosecutions for breaches of occupational health and safety laws; proceedings for the recovery of underpayments of statutory and award entitlements; superannuation appeals; proceedings for the enforcement of union rules; and challenges to the validity of rules and to the acts of officials of registered organisations.

Full Benches of the Commission have appellate jurisdiction in relation to decisions of single members of the Commission (both judicial and non-judicial), the Industrial Registrar, industrial magistrates and certain other bodies. When exercising appellate jurisdiction involving judicial matters the Full Bench of the Commission in Court Session is constituted by at least three judicial members.

Specifically, the Commission in Court Session exercises jurisdiction in the following circumstances:

- proceedings for an offence which may be taken before the Commission (including proceedings for contempt - the major area of jurisdiction exercised in this area relates to breaches of the *Occupational Health and Safety Act 2000* and of its predecessor, the *Occupational Health and Safety Act 1983*);
- proceedings for declarations of right under s 154;
- proceedings for unfair contract (Part 9 of Chapter 2);
- proceedings under s 139 for contravention of dispute orders;
- proceedings under Parts 3, 4 and 5 of Chapter 5 – Registration and regulation of industrial organisations;
- proceedings for breach of an industrial instrument;
- proceedings for the recovery of money payable under an industrial instrument other than small claims under s 380 (which are dealt with by the Chief Industrial Magistrate or an Industrial Magistrate);

- proceedings on a superannuation appeal under ss 40 or 88 of the *Superannuation Administration Act 1996*;
- proceedings on appeal from a Member of the Commission exercising the functions of the Commission in Court Session; and
- proceedings on appeal from an Industrial Magistrate or any other court.

## **MEMBERSHIP OF THE COMMISSION**

### **JUDGES AND PRESIDENTIAL MEMBERS**

The Judicial and Presidential Members of the Commission during the year were:

#### **President**

The Honourable Justice Frederick Lance Wright, appointed 22 April 1998.

#### **Vice-President**

The Honourable Justice Michael John Walton, appointed 18 December 1998.

#### **Presidential Members**

The Honourable Mr Justice Russell John Peterson, appointed 21 May 1992; retired 17 August 2004;

The Honourable Justice Francis Marks, appointed 15 February 1993;

The Honourable Justice Monika Schmidt, appointed 22 July 1993;

The Honourable Deputy President Rodney William Harrison, appointed Deputy President 2 September 1996; and as a Commissioner 4 August 1987;

The Honourable Justice Tricia Marie Kavanagh, appointed 26 June 1998;

Deputy President Peter John Andrew Sams AM, appointed 14 August 1998;

The Honourable Justice Roger Patrick Boland, appointed 22 March 2000;

Deputy President John Patrick Grayson, appointed 29 March 2000;

The Honourable Justice Wayne Roger Haylen, appointed 27 July 2001;

The Honourable Justice Patricia Jane Staunton AM, appointed 30 August 2002;

The Honourable Justice Conrad Gerard Staff, appointed 3 February 2004;

The Honourable Justice Anna Frances Backman, appointed 19 August 2004.

## **COMMISSIONERS**

The Commissioners holding office pursuant to the *Industrial Relations Act 1996* during the year were:

Commissioner Raymond John Patterson, appointed 12 May 1980;

Commissioner Peter John Connor, appointed 15 May 1987;

Commissioner Brian William O'Neill, appointed 12 November 1984;

Commissioner James Neil Redman, appointed 3 February 1986 (pre-retirement leave in late 2004);

Commissioner Inaam Tabbaa, appointed 25 February 1991;

Commissioner Donna Sarah McKenna, appointed 16 April 1992;

Commissioner John Patrick Murphy, appointed 21 September 1993;

Commissioner Ian Walter Cambridge, appointed 20 November 1996;

Commissioner Elizabeth Ann Rosemary Bishop, appointed 9 April 1997;

Commissioner Janice Margaret McLeay, appointed 2 February 1998;

Commissioner Alastair William Macdonald, appointed 4 February 2002;

Commissioner David Wallace Ritchie, appointed 6 September 2002.

## **INDUSTRIAL REGISTRAR**

The Industrial Registrar is responsible to the President of the Commission in relation to the work of the Industrial Registry and, in relation to functions under the *Public Sector Employment and Management Act 2002*, to the Director General of the Attorney General's Department.

Mr George Michael Grimson has held office as Industrial Registrar and Principal Courts Administrator of the Industrial Relations Commission since 26 August 2002.

## **DUAL APPOINTMENTS**

The following Members of the Commission also hold dual appointments as Presidential Members of the Australian Industrial Relations Commission:

The Honourable Justice Frederick Lance Wright

The Honourable Mr Justice Russell John Peterson (retired 17 August 2004)

The Honourable Justice Francis Marks

The Honourable Justice Monika Schmidt

The Honourable Deputy President Rodney William Harrison.

## **ANCILLARY APPOINTMENT**

The Honourable Justice Roger Patrick Boland has constituted the Parliamentary Remuneration Tribunal since 2 October 2001.

## **OVERVIEW**

The President is responsible for the arrangement of the business of the Commission (section 159) and there are a number of delegations in place that assist in the allocation of work to Members and are designed to ensure that the speedy and effective resolution of issues brought before the Commission:

### **INDUSTRY PANELS**

Industry panels were reconstituted during 1998 to deal with applications relating to particular industries and awards. Adjustments have been made to the assignments to the panels as appropriate since then. Seven panels are now in operation, each comprising a number of Presidential Members and Commissioners. Each panel is chaired by a Presidential Member of the Commission who allocates matters to the members of the panel. The panels deal with applications for awards or variations to awards, applications for the approval of enterprise agreements and dispute notifications arising in relevant industries.

Four panels now deal essentially with metropolitan (or Sydney-based) matters. Three panels specifically deal with applications from regional areas. The panel dealing with applications from the Hunter region and North Coast is chaired by Deputy President Harrison. The panel dealing with applications from the Western area of the State is chaired by Deputy President Sams. The panel dealing with applications from the Illawarra-South Coast region is chaired by Deputy President Grayson.

The membership of the metropolitan Industry Panels at the end of the year is set out at Appendix 1.

### **REGIONAL AND COUNTRY SITTINGS**

There is a substantial workload in Newcastle and Wollongong in heavy industry, serviced by Presidential Members and Commissioners, and a considerable workload in the area of unfair dismissals for Commissioners in regional areas.

The Commission has its own dedicated court premises located in Newcastle and Wollongong. The Registry has been staffed on a full-time basis at Newcastle for many years. During 2002 that situation was extended to Wollongong to assist the clients of the Commission and the sittings of the Commission that occur there.

In July 2004 the Commission entered into an arrangement with the Registrar of the Local Court at Parramatta to provide registry services for clients of the Commission at the Parramatta Court Complex, Cnr George and Marsden Streets, Parramatta. This was initially commenced as a pilot for three months designed, principally, to meet the needs of industrial organisations located in Sydney West. In short, this initiative allows for any application that may be filed at the Sydney Registry to be filed at Parramatta with the exception of industrial disputes under s 130 of the Act. The Commission acknowledges the contribution of Ms Lin Schipp, a senior officer of the registry, who initially conducted the pilot and continues to maintain the service at Parramatta.

The general policy of the Commission in relation to unfair dismissal applications (s 84) and rural and regional industries has been to sit in the country centre at or near where the events have occurred. Allocation of those matters is carried out by the Heads of the regional panels mentioned above. This requires substantial travel but the Commission's assessment is that it has a beneficial and moderating effect on parties to the industrial dispute who can often attend the proceedings and then better understand decisions or recommendations made.

There were a total of 749 (804)\* sitting days in a wide range of country courts and other country locations during 2004. For the majority of 2004 two regional Members were based permanently in Newcastle (the regional Member for the Newcastle-Hunter Valley region, Deputy President Harrison, and Commissioner Redman). Since the time that Commissioner Redman proceeded on pre-retirement leave, Newcastle has been assisted by Sydney-based Commissioners. The Commission sat in Newcastle for 252 (314)\* sitting days during 2004 and dealt with a wide range of industrial matters in Newcastle and the Hunter district.

The regional Member for the Illawarra - South Coast region, the Honourable Justice Walton, Vice-President together with Deputy President Grayson, deal with most Port Kembla steel matters and other Members also sit regularly in Wollongong and environs. There were a total of 172 (159)\* sitting days in Wollongong during 2004.

The Commission convened in 43 other regional locations in 2004 including Albury, Armidale, Ballina, Bathurst, Bowral, Coffs Harbour, Dubbo, Gosford, Goulburn, Griffith, Tamworth, Wagga Wagga and Queanbeyan.

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\* Numbers in brackets are figures from 2003

## MAJOR JURISDICTIONAL AREAS OF THE COMMISSION

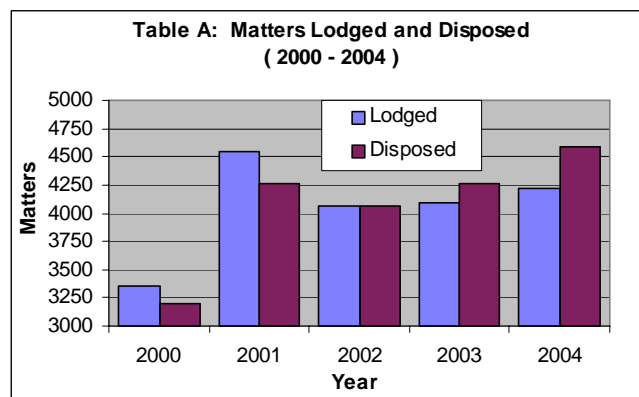
### UNFAIR DISMISSALS

A large and continuing volume of work lies in the area of unfair dismissal applications brought under s 84 of the *Industrial Relations Act 1996*.

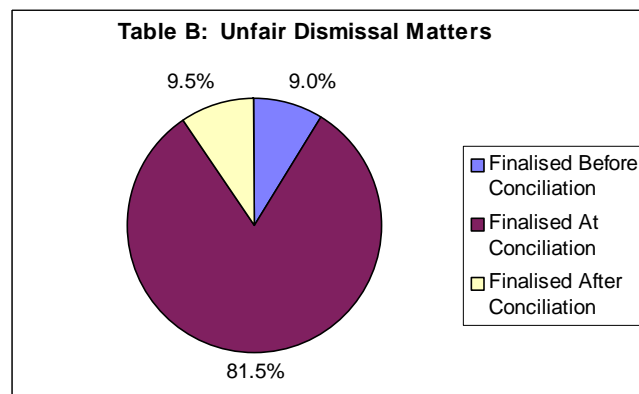
The Act provides that each matter is initially dealt with by listing for conciliation conference (s 86) with a view to reaching an early settlement between the parties. Where the conciliation is unsuccessful the matter proceeds to an arbitrated hearing.

The tables following show matters filed and disposed of in the past five years (Table A); the method of disposal in 2004 (Table B); and median listing times (Table C).

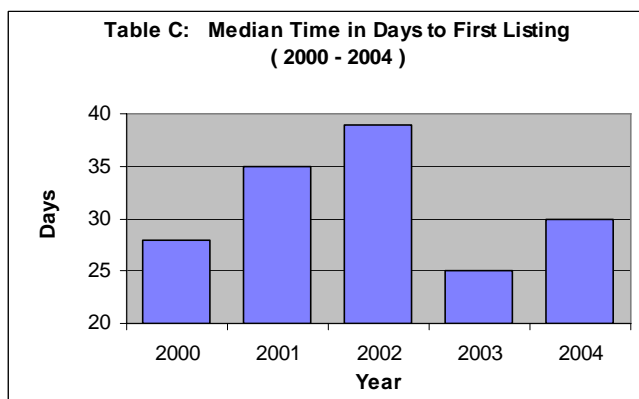
**TABLE A**



**TABLE B**



**TABLE C**



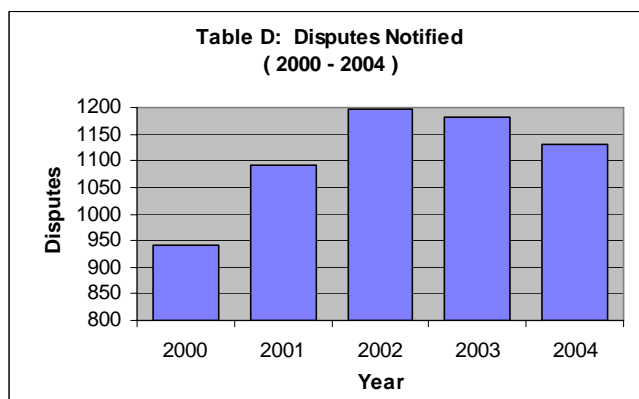
**INDUSTRIAL DISPUTES**

The procedure for dealing with industrial disputes is set out in Chapter 3 of the *Industrial Relations Act 1996*. The allocation of disputes are dealt with under the Industry Panel system referred to earlier in this report. The nature of this area of the Commission's jurisdiction often requires that the matters be listed at short notice and the Commission sits outside of normal working hours where necessary.

Wide powers are granted to the Commission in respect of dealing with industrial disputes with the statutory and practical focus on resolving such matters by conciliation.

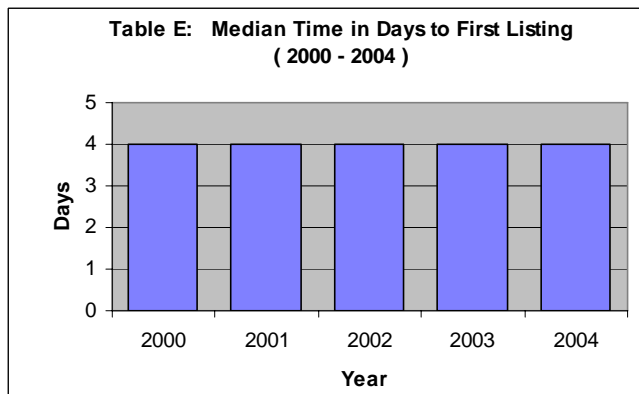
"Industrial dispute" is a broadly defined term linked, as it is, to the definition of "industrial matter" in s 6 of the *Industrial Relations Act* and this area of the Commission's jurisdiction remains high. The table below shows disputes filed in the previous five years:

**TABLE D**



The Commission reacts in a timely way when an industrial dispute is lodged. The time frame is highlighted by Table E below which shows the median times from lodgement to first listing.

**TABLE E**



#### **DETERMINATION OF AWARDS AND APPROVAL OF ENTERPRISE AGREEMENTS**

One of the objects of the *Industrial Relations Act 1996* is to facilitate the appropriate regulation of employment through awards, enterprise agreements and other industrial instruments.

The Commission is given power to:

- make or vary awards (s 10 and s 17 respectively);
- make or vary enterprise agreements (s 28 and s 43);
- review awards triennially (s 19); and
- consider the adoption of National decisions for the purpose of awards and other matters under the Act (s 50) (for example, the State Wage Case).

#### **AWARD REVIEW**

The first major round of the triennial Award Review process commenced in the later part of 2003 and continued throughout 2004. In recognition of the intense resource implications that this process has for parties affected and the Commission, significant consultation occurred with major employer and employee organisations prior to commencement. As a result of that process the Commission issued *Practice Direction No 13* on 19 September 2003 to facilitate the Award Review Process. The details of this practice direction were considered in the 2003 Annual Report.

The results of the significant administrative streamlining of the processes undertaken by the Registry were realised during 2004 where feedback confirmed that these steps materially assisted both the parties and the Commission.

As at the end of 2004 there were only a small number of awards (11) that remained to be reviewed.

The principles of the Award Review process were defined by the Full Bench in *Principles for Review of Awards - State Decision 1998* (1998) 85 IR 38. The Full Bench of the Commission further considered the principles in *Poultry Industry Preparation (State) Award and other Awards* [2003] NSWIRComm 129; (2003) 125 IR 64

Table F provides details of filings in the award and enterprise agreement areas in the last five years.

**TABLE F**

Awards and Enterprise Agreements	2000	2001	2002	2003	2004
Application to make award	133	152	123	108	131
Application to vary award	377	426	334	338	296
Application enterprise agreement	361	369	307	348	336
Terminated enterprise agreement	103	152	172	180*	214
Review of awards (Total) (Notices issued)	108*	591	0	233	431
Awards reviewed	173	447	1	97	438
Awards rescinded	203	515	0	15	88

\* = data revised since previous report.

### State Wage Case 2004 [2004] NSWIRComm 148; (2004) 132 IR 190

On 5 May 2004, the Commission issued a summons pursuant to Part 3 of Chapter 2 of the *Industrial Relations Act 1996* to show cause why, after considering the decision of the Australian Industrial Relations Commission in the *Safety Net Review - Wages, May 2004 Case*, Print PR002004, it should not adopt the decision.

The Full Bench sat at the Commission's premises at Wollongong to hear the proceedings. In considering the quantum of wage increases to be granted, the Commission followed the Australian Commission in having regard to the state of the economy. The Full Bench determined that the New South Wales economy broadly reflected the strengths and weaknesses of the national economy and could sustain the wage increases adopted by the Australian Commission. The Full Bench was satisfied that the increases arising from the National decision were consistent with the objects of the Act and that there were no good reasons for departing from the increases determined by the Australian Commission. Accordingly, the Full Bench granted an increase in rates of pay by the

amount of \$19 per week adjusting relevant allowances by 3.5 per cent in State Awards, in accordance with the provisions of s 50 of the *Industrial Relations Act*, having given consideration to the National decision.

## UNFAIR CONTRACTS

Under section 106 of the *Industrial Relations Act* 1996 the Commission is granted power to declare contracts, whereby a person performs work in any industry, either wholly or partly void, or to vary any such contract, if satisfied that the contract is unfair.

As will be seen from the table below, due to pending legislative amendments in 2002 designed to limit the class of applications that could be brought before the Commission, filings significantly increased in the later part of 2001 and early in 2002:

**TABLE G**

### Section 106 Filings

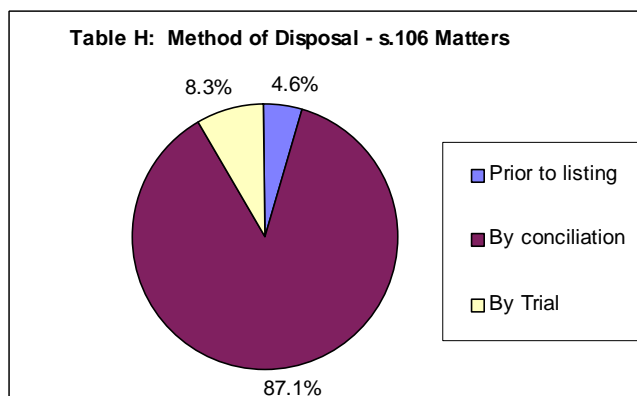
Year	2000	2001	2002	2003	2004
No.	552	956	894	631	550

The consequence of this is that significant pressure has been placed on the resources of the Commission in seeking to ensure that these matters can be disposed of in a timely way.

A major initiative of the Commission during 2004 was to pilot the diversion of resources at a particular time during the year to conciliation in light of the high settlement rate at this stage of proceedings. The initiative was co-ordinated by her Honour Justice Schmidt and proved highly successful. Her Honour and four other judicial Members listed slightly over 100 matters for conciliation in a two week period. Of the matters listed 40 per cent were settled at the conciliation and a further 30 per cent were stood over with high prospects of settlement. This is an initiative that the Commission will be carrying forward into 2005.

As the table below highlights a significant proportion of harsh contract matters were resolved at the conciliation stage and it is appropriate that resources be diverted to ensure that these matters are dealt with in a timely way with the consequent benefits to parties particularly in the area of costs.

**TABLE H**



In June 2004 the Commission published *Practice Direction No 14* designed to facilitate the effective case management of applications brought under s 106 of the Act. The practice direction provides for

- standard directions for conciliation under s 109 of the Act;
- pre-hearing standard directions in the event of an unsuccessful conciliation;
- certification that the matter is ready for hearing;

and, as far as practicable, is designed to ensure that matters are dealt with in an orderly and expeditious manner.

**OCCUPATIONAL HEALTH AND SAFETY PROCEEDINGS**

The *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation 2001* have as their primary focus workplace safety. Prosecutions for breach of the relevant provisions may be brought before the Commission in Court Session for determination.

The majority of prosecutions brought before the Commission are initiated by the WorkCover Authority of New South Wales. However, section 106 of the *Occupational Health and Safety Act 2000*, also provides that a secretary of an industrial organisation of employees may initiate proceedings. It is understood that, as a matter of policy, WorkCover prosecutions relating to workplace fatalities and incidents of serious injury are instituted in the Commission in Court Session.

The significant penalties under this legislation are directed to the vindication of safety in the workplace and are designed, no doubt, to have the effect of discouraging dangerous practices and encouraging a more thoughtful and professional approach to occupational health and safety.

**TABLE I**

**Occupational Health and Safety Prosecutions**

	2000	2001	2002	2003	2004
No.	273	188	183	152	186

As the table above shows this remains a significant area of the Commission's workload given the complexity and seriousness of the matters that fall for determination.

**CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION**

The *Child Protection (Prohibited Employment) Act* 1998 and associated legislation came into force in July 2000. Its provisions include the imposition of prohibitions on persons convicted of serious sexual offences from being employed in child-related employment unless an order is obtained from the Industrial Relations Commission or the Administrative Decisions Tribunal declaring that the Act was not to apply to a person in respect of a specified offence.

While not a high volume area of the Commission's jurisdiction, the importance of the legislation is acknowledged through the adoption of procedures to ensure that matters are dealt with expeditiously.

**FULL BENCH**

A Full Bench of the Commission is constituted by the President under section 156 of the *Industrial Relations Act* 1996 and must consist of at least three Members. The constitution of a Full Bench will vary according to the nature of proceedings being determined. The nature of proceedings range from appeals against decisions of single Members, Industrial Magistrates and the Industrial Registrar; matters referred by a Member (s 193) and major test case decisions (s 51).

During 2004 Full Benches finalised in excess of 150 matters the majority of which involved appeals. A "snapshot" of the significant decisions are referred to hereunder. Other significant decisions can be found in Appendix 2.

**United GlobalCom Inc and Ors v McRann (No 2) [2004] NSWIRComm 16; (2004) 132 IR 3**

In the earlier judgment in *UnitedGlobalCom.Inc v McRann* [2003] NSWIRComm 318, the Full Bench refused the appellants leave to appeal and dismissed their appeal against the judgment in *McRann v UnitedGlobalcom Inc and ors* [2003] NSWIRComm 131. The appellants were ordered to pay the respondent's costs of the appeal as agreed or, in default of agreement, as assessed. The initial appeal related to the dismissal by the trial judge of motions by the appellants to strike out claims by the respondent made under s 106 of the *Industrial Relations Act* 1996. The appellants had taken objections on jurisdictional and estoppel grounds to the Commission in Court Session hearing the respondent's claims. At the conclusion of the appeal proceedings, the respondent pressed for an order under r 203(2) of the *Industrial Relations Commission Rules* 1996 that costs of the appeal and the proceedings at first instance be paid forthwith. The appellants opposed the application. The Full Bench in this matter dealt with the costs issue.

The Full Bench considered the proper construction of Rule 203 of the Commission's Rules, noting its similarity with Rule 9 of Part 52A of the Supreme Court Rules. Having considered numerous authorities the Court then determined whether the appellants' behaviour was unreasonable in the circumstances. The Court held that it was in the interests of justice that the appellants pay the respondent's costs forthwith notwithstanding that the proceedings were not concluded.

**Re Local Government (State) Award 2001 [2004] NSWIRComm 24; (2004) 132 IR 357**

In this matter, an application was made for the making of a consent variation to the Local Government (State) Award 2001 in respect of certain categories of employment in the community services area of local government councils. The variation to the award resulted in the hours of work of all of the employees, both male and female, being equalized at 35 hours per week. The variation proposed had a long phasing in period as it was not to have effect until 16 February 2005. Councils, however, were not precluded from implementing the agreement from earlier dates.

In granting the application, the Court noted the acceptance by the employer parties to the award that the application came within Principle 14, Equal remuneration and other conditions, of the *State Wage Case 2003* Principles (see (2003) 121 IR 446 at 472) and that ss 21 and 23 of the *Industrial Relations Act* 1996 were also relevant.

The Full Bench also considered that wage-fixing principles applied to the present application and that the proper application of those principles, particularly having regard to Principle 14 and the terms of ss 21 and 23 of the statute, permitted the application to be granted. It was considered that the application represented an apparently unique conjunction of circumstances which, having regard to the principles earlier noted, resulted, in the appropriate exercise of discretion, to grant the application notwithstanding Principle 7, Standard hours, of the *State Wage Case* principles.

**Mealey and the Council of the City of Sydney [2004] NSWIRComm 58; (2004) 132 IR 177**

The appellant sought relief from unfair dismissal. At first instance an application for an adjournment to enable the appellant to obtain legal representation was refused. The application was dismissed for want of prosecution pursuant to r 146 of the Commission's Rules.

The Full Bench granted leave to appeal on the basis that the case raised issues of significance concerning applications to dismiss for want of prosecution pursuant to r 146 of the Commission's Rules. The Full Bench determined that the dismissal of the application at first instance denied the appellant a right to be represented as he was actively seeking representation and that this amounted to a denial of procedural fairness.

The Full Bench found that the appellant was not able to appropriately respond to an application to dismiss his case for want of prosecution and was not given reasonable notice that such an application would be made. Consequently, the Full Bench considered that the proceedings miscarried. Their Honours concluded that such errors were worthy of appellate intervention under the principles in *House v The King* (1936) 55 CLR 499. The decision at first instance was quashed and the matter was remitted for rehearing.

**Commander Australia Limited v Kerr [2004] NSWIRComm 74; (2004) 134 IR 160**

This case concerned the interpretation of the words "annual remuneration" in s 108A of the *Industrial Relations Act* 1996. The question for Full Bench determination was whether the meaning of the words was to be determined according to the actual amount paid to the employee in the 12 months preceding termination of employment or whether an incentive payment earned in the previous financial year by reference to the respondent's performance but paid during the 12 months prior to termination of the contract formed part of the remuneration package. Adopting a purposive

approach to interpretation, the Full Bench determined that the proper interpretation was what the applicant was "paid" or "received" in the 12 months preceding termination. Leave to appeal was granted and the first instance decision was set aside.

**AOS Group Australia Pty Ltd (in liquidation) v Arrogante and Others [2004] NSWIRComm 80; (2004) 135 IR 44**

At first instance, the trial judge concluded that the arrangement existing between the parties was unfair and varied it, requiring the appellant and the second respondent to pay the 22 personal respondents certain moneys. On appeal, the Full Bench held that the history of s 106 "throw[s] considerable light upon how the statutory intention to ensure that the Court is clothed with sufficient power to unravel unfair subterfuges, sham arrangements and those designed to permit one party to extract an unfair advantage from those less powerful, has been achieved." The Full Bench was satisfied that the orders made by the trial judge were open as a matter of jurisdiction, power and discretion. Accordingly, the appeal was dismissed.

**Zoological Parks Board of New South Wales and The Australian Workers' Union, New South Wales [2004] NSWIRComm 85; (2004) 135 IR 56**

At first instance, a determination was made pursuant to s 175 of the *Industrial Relations Act 1996* as to the interpretation of a disputed clause in the enterprise agreement. On appeal, the Full Bench granted leave in order to deal with questions central to the Commission's jurisdiction such as the principles of interpretation of industrial instruments. The case turned on the interpretation of Clause 11.11 of the relevant enterprise agreement and, in particular, whether the clause applied to both human and animal waste. While the Full Bench agreed with the primary decision on this point it held that reliance upon the principle of condonation at first instance was contrary to principle. The parties were required within 21 days to agree upon appropriate orders to give effect to the decision.

**Tab Agents Association v TAB Limited [2004] NSWIRComm 88; (2004) 136 IR 45**

This application for leave to appeal and appeal against an interlocutory decision was denied on both jurisdictional and merit bases. While the parties were heard both on the issue of leave and the substantive appeal, the appeal was dismissed on the basis of leave being refused. The Full Bench observed that the raising of a jurisdictional issue will not, of itself, establish a basis for the grant of

leave to appeal. The Court held that the decision of the trial judge represented a proper exercise of discretion and was not inconsistent with established law and principle.

**Khawar v WorkCover Authority of New South Wales [2004] NSWIRComm 89, (2004) 134 IR 15**

The appellant, the owner of three taxis, sought leave to appeal against the severity of a \$5,000 fine imposed upon him by the Chief Industrial Magistrate for a breach of s 174(5) of the *Workers Compensation Act* 1987. The appellant failed to comply with an order by WorkCover for the production of wage records for the previous two years as he believed that he was not required to do so as he considered the taxi drivers were contractors and not employees. The appellant was initially unrepresented. Subsequent to the decision at first instance, the appellant received advice and accepted that he was guilty of the offence. The appellant also submitted that had he received that advice from the outset, he would have paid the \$500 penalty notice rather than be required to pay a \$7,651.50 fine and costs. Leave to appeal the severity of the sentence was not contested and was, in the circumstances, granted by the Court.

The Full Bench cited with approval the principle in *Llandilo Staircases Pty Ltd v WorkCover Authority of New South Wales (Inspector Parsons)* (2001) 104 IR 204 that the Workers' Compensation legislation created "a compulsory insurance scheme for employers to contribute to the scheme to minimise the costs to the community"; and that statement was applicable to s 174 of the Act. In reassessing the penalty, the Court noted that both general and specific deterrence had a significant part to play, particularly as the maximum penalty available was \$55,000. The Court also took account of the subjective features of the offence, noting that this was a first offence. The Court held that the penalty was excessive and consequently upheld the appeal. A reduced penalty of \$2,000 was imposed.

**Verso Technologies Inc (formerly Eltrax Systems Inc) v Rasmussen and ors [2004] NSWIRComm 90; (2004) 135 IR 147**

This matter concerned the question of whether the respondent had entered a submitting appearance and whether service on a foreign corporation had been properly effected. At first instance the trial judge found that in spite of procedural irregularities service had been properly effected. The Full Bench held that service out of time and failure to comply with r 112(2) of the Commission's Rules

were considerable defects. Applying the judgment of the Court of Appeal in *Castagna & Anor v Conceria Pell Mec SpA* (unreported, BC9601018, NSWCA, 15 March 1996), the Full Bench held that service was not effected and that the order granting leave to proceed was not properly made. The appeal was upheld and the decision at first instance was set aside.

**Morrison v Joy Manufacturing Co Pty Ltd [2004] NSWIRComm 107; (2004) 137 IR 8**

At first instance, the trial judge permanently stayed proceedings brought by Rodney Morrison of the Department of Mineral Resources against Joy Manufacturing Company Pty Ltd on the basis that they constituted an abuse of process: *Morrison v Joy Manufacturing Co Pty Ltd* [2002] NSWIRComm 366. On appeal, the Full Bench held that the Commission in Court Session did not have jurisdiction under the combined operation of s 196 of the *Industrial Relations Act* and s 5F of the *Criminal Appeal Act* to hear and determine an appeal against an interlocutory judgment or order made in proceedings to which s 168 of the *Industrial Relations Act* applied. The judgment at first instance was also found not to be susceptible to appeal under the combined operation of s 196 of the *Industrial Relations Act* and s 5C of the *Criminal Appeal Act*.

**Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award [2004] NSWIRComm 114; (2004) 133 IR 254**

These proceedings arose from an application by the New South Wales Teachers' Federation for the making of a new award known as the Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award. The Teachers' Federation submitted a claim for a 25 per cent across the board increase in salaries and allowances for teachers in government schools and TAFE over a 2-year period.

The Full Bench took into account changes in the work value of teachers in government schools and TAFE. It was concluded that the Federation was able to demonstrate a very substantial work value case for government schools sufficient to support the findings in its favour under both the work value changes and special case principles.

In relation to TAFE teachers, their Honours found the evidence to be demonstrative of significant changes in the development of the administration, supporting, presentation and assessment of vocational training. They found that the introduction of competency-based training in TAFE

represented a significant shift in the nature and purpose of vocational training, resulting in significant changes to the skills and responsibilities of TAFE teachers. On balance, the Full Bench concluded that a special case had been made out, and that there was sufficient foundation to warrant a finding of a significant net addition to the value of teachers' work.

**Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004 and other awards [2004] NSWIRComm 159; (2004) 134 IR 71**

On 19 December 2003, the Full Bench awarded interim salary increases of 5.5 per cent effective from 1 January 2004 to principals, teachers and advisers in the NSW Catholic school sector: *Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004 and other awards* [2003] NSWIRComm 476. This matter arose from an application by the Independent Education Union for increases in salaries and allowances of 25 per cent.

In determining the application, the Commission took into account that it had not considered the work value of the teachers covered by the relevant awards since 1990. Other factors included that the wage increases that Catholic school teachers have received since 1990 did not compensate for the work value changes that have occurred in the last 13 years and the increasingly complex and demanding nature of teaching. The Full Bench determined that there had been far reaching and profound changes in teaching demonstrating a significant net addition to the work value of teachers under the work value principle.

A further increase in salary rates for Principals, Teachers and Advisers in the Catholic schools of 6.5 per cent (in line with increases granted to teachers in government schools) was awarded. This was to be delivered in two stages; a three per cent increase in salaries beginning on or after 1 July 2004 and a further 3.5 per cent salary increase beginning on or after 1 January 2005.

**Burgess and ors v Mount Thorley Operation Pty Ltd (No 2) [2004] NSWIRComm 180; (2004) 132 IR 400**

These proceedings involved consideration of a limited number of outstanding issues, the appellants having been unsuccessful in relation to their principal claims: *Burgess and Ors v Mount Thorley Operations Pty Ltd* [2003] NSWIRComm 432. The Full Bench's initial decision involved the appellants showing "how it was that the Full Bench could make an order declaring [the appellants']

employment contracts partly void, from commencement or some other time, as a consequence of those contracts being rendered unfair". The reason for which this issue being reserved was that during the initial hearing the manner in which both parties had argued their cases on appeal in respect of this issue had not provided complete assistance.

The Court granted leave to appeal and dismissed the appeal.

**Morrison v Coal Operations Australia Limited [2004] NSWIRComm 239; (2004) 137 IR 375**

In this matter, the Full Bench was asked to consider the ambit and proper construction of s 33(2) of the *Occupational Health and Safety Act 1983* as a defence to charges before the Court. At first instance, the trial judge dismissed the charges on the grounds that the s 33 defence had been made out and, in the alternative, the prosecution had not established a relevant failure by the defendant in relation to s 15(1) of the Act. The facts giving rise to the charges involved the collapse of a section of a roof causing one fatality and serious injury.

In considering the principles expressed by the Full Bench in *WorkCover Authority of New South Wales (Inspector Legge) v Coffey Engineering Pty Limited (No 2)* (2001) 110 IR 447 at 467, the Full Bench were unable to discern any basis whereby it was not practicable for the respondent to comply with those matters going directly to the breach of the Act as pleaded.

The Court found that it was clearly reasonably practicable for the respondent to be more definitively prescriptive both as to the indicia of an unstable roof and the process to be followed where unstable roof conditions existed. While a degree of discretion may be required dependant on the extent and nature of roof instability, the risk to safety that such a situation represented demanded more than a reliance on perceived industry practice or a particular person's experience at any given time.

In the Court's view, the respondent had not discharged the onus required to establish that it was not reasonably practicable for it to comply with s 15(1) of the Act relevant to the breaches alleged. Accordingly, the defence under s 53(a) failed. The Full Bench granted leave to appeal and upheld the appeal.

**Aveling v UBS Capital Markets Australia Holdings Ltd [2004] NSWIRComm 261; (2004) 135 IR 98**

In these proceedings, the Full Bench dealt with issues relevant to the amendments made to the *Industrial Relations Act 1996* by the *Industrial Relations Amendment (Unfair Contracts) Act 2002*. The Full Bench was required to determine whether s 108A of the *Industrial Relations Act* applied to the appellant's contract of employment. The relevant circumstances were that the appellant's contract of employment commenced on 1 April 2000 and was terminated on 24 July 2002 with effect from 23 August 2002 (the last two dates being subsequent to the relevant legislative amendment taking effect on 24 June 2002). As the Court noted, the consequence was that if s 108A had any relevant application, the appellant's remuneration package under his contract relevantly exceeded the cap fixed for the purposes of s 108A.

In determining the proper construction of s 108A of the Act, the Court analysed the judgments in *Crowe v UCS Developments Pty Ltd* (2003) 130 IR 266 and *Commander Australia Limited v Kerr* [2004] NSWIRComm 74 and noted that construction may often be resolved by ascertaining legislative intent from the express words of the instrument viewed in context. In that regard, the Court found that the opening words of s 108A demonstrate that the section is intended to operate *in futuro* from the enactment of the section. Furthermore, the provision was held to have no operation in respect of applications made before it commenced, the consequence being that s 108A prevents an application being made in respect of a contract with the indicia specified in the section.

The Court held that to accept the appellant's contentions would frustrate the plain intention of s 108A. Further, if those contentions were accepted, the consequence would be that any contract entered into prior to June 2002 could potentially be the subject of s 106 proceedings, subject only to it being held that the contract was (or was arguably) an unfair contract for the purpose of ss 105 and 106 either at inception, or it became unfair sometime between inception and 24 June 2002.

**Abigroup Contractors Pty Limited v WorkCover Authority of New South Wales (Inspector Maltby) [2004] NSWIRComm 270; (2004) 135 IR 317**

These proceedings concerned an appeal from three decisions of the trial judge. The first decision granted leave to the prosecutor to adduce further evidence after the close of the prosecution and defence cases in support of the time limitation specified in s 49(4) of the *Occupational Health and*

*Safety Act 1983*; the second found the charges proven; and the third recorded convictions and imposed consequent penalties.

The Full Bench considered the matter's complex procedural history. Before the hearing, the appellant filed a Notice of Motion in each matter which sought an order setting that matter aside. The grounds in support of the motion were that the prosecutor had failed to institute proceedings within the timeframe as specified by s 49(4) of the Act. The trial judge dismissed each motion with the appellant then making an application for extension of time to appeal the decision. Leave to appeal was refused and the appeal dismissed on the basis that the appellant failed to raise on appeal any of the primary issues which it sought to raise at first instance. At the trial, the appellant made further submissions similar to those already heard in its motion. After refusing the prosecution's application to call further evidence, the trial judge referred two questions to the Full Bench: one, whether the prosecutors failed to comply with r 219 of the IRC Rules in not referring to the fact of a Coronial Inquiry and/or s 49(4) of the Act; and two, if the first question is affirmed, whether some or all of the Summonses and/or proceedings should be dismissed.

While the Full Bench in the referred proceedings refused leave to appeal in light of the authorities as to the inappropriateness of interrupting criminal proceedings, it also noted that the trial judge's decision to allow the prosecutor to admit evidence after the closure of both sides' cases was essentially discretionary. The Full Bench further noted the caution that an appeal court must exercise in a challenge to discretionary decisions. The Court held that the trial judge made no error as an exercise of discretion or in terms of the judgment of the Divisional Court in *Price v Humphries* [1958] 2 QB 353 or the High Court in *The Queen v Chin* (1985) 157 CLR 671.

In relation to the second decision, the only ground pressed was that the trial judge erred in finding that the acts and omissions of the appellant led to a risk to the health and safety of employees and other persons contrary to ss 15(1) and 16(1) of the Act. The Full Bench held that the appellant's submissions should not be accepted as the trial judge correctly found that there was a relevant risk to the health and safety of employees and other persons, and that it was incumbent on the appellant to ensure that that risk was obviated.

In considering the third decision, the Full Bench was asked to consider the severity of the sentences imposed in light of the fact that the appellant complied with industry practice at the time of the breaches of the Act. It was the appellant's submission that the trial judge had erred in the application

of the totality principle by failing to make appropriate allowances for the commonality of each offence. Having noted that determination of an appropriate sentence is discretionary, as is the way in which the totality principle was applied, the Court considered the appropriate approach to the totality principle.

Next, the Court considered the common elements for the offences across the time periods in question, the key question being whether the risks in the three time periods were different so as to constitute a different criminality, or whether there was a single episode of criminality across the entirety of the period. In answering this question, the Court considered the High Court decision in *Pearce v The Queen* (1998) 194 CLR 610 and the Full Bench decision in *Crown in Right of the State of NSW (Dept of Education and Training) v Keenan* (2001) 105 IR 181.

The Court then proceeded to consider the consequence of common elements of charges brought under ss 15(1) and 16(1) of the Act, noting that charges brought under these sections raise different issues as to the nature of criminality. After setting out the nature of the relationship between the two sections as discussed in *Crown v Keenan*, the Court accepted the appellant's contention that there was a substantial degree of commonality between the various offences. Consequently, the Court held that the trial judge had not applied the doctrine of totality correctly, and that in sentencing, there had been a significant degree of double jeopardy imposed on the appellant.

The Court re-sentenced the appellant in accordance with the proper application of the totality principle. In so doing, the Court held that there was no basis for the appellant's contention that the penalties imposed were manifestly excessive. The Full Bench did not accept that the trial judge erred in not considering industry practice as a mitigating factor.

#### **Public Hospital Nurses (State) Award (No 5), Re [2004] NSWIRComm 326; (2004) 136 IR 477**

In *Re Public Hospital Nurses (State) Award (No 4)* [2003] NSWIRComm 442; (2003) 113 IR 17 the Full Bench determined a number of claims by the New South Wales Nurses' Association relating to wages and allowances. This matter concerned the inclusion of a Continuing Education Allowance for registered nurses and enrolled nurses with certain qualifications. The Full Bench was satisfied that the inclusion of such an allowance was warranted. It was held that "there is a greater need for highly qualified nursing staff with postgraduate qualifications, especially in specialty areas" and that "additional payments that recognise postgraduate qualifications will assist in

encouraging nurses to increase their knowledge and skills to meet the demands of a more acute hospital environment and will assist in the attraction and retention of nursing staff."

## **TIME STANDARDS**

In September 2004, in line with the process of reform currently being undertaken by the Commission and in recognition that time goals for the disposition of cases are integral in assessing the effectiveness of case management strategies, the Commission formally adopted time standards for the disposition of work in the major areas of the Commission's jurisdiction. In doing so, the Commission developed standards which reflect the unique jurisdiction which the Commission exercises. These standards are set out at Appendix 3 of this report.

At the same time the Commission released its policy on the delivery of decisions and judgments. That policy is set out below:

"The diverse nature of matters that come before the Commission for determination will often result in the decision of a presiding member or Full Bench being reserved. Until recently it was very rare for any decision to be delivered extempore. However, it has now become a common feature of the Commission's work- in appropriate cases – to deliver extempore judgments at the conclusion of a hearing.

The Commission has set a target for the delivery of judgments of three months from the date a judgment is reserved to the date when it should be delivered. Industrial disputes will generally require decision (particularly interim decisions or recommendations), within a shorter time frame, if one is necessary. In respect of unfair dismissal matters the Commission has set a target of 80 per cent of reserved judgments being delivered within two months and 100 per cent within three months. This policy will take effect with respect to decisions or judgments reserved after 30 September 2004.

The capacity for the Commission to achieve this target is dependent on the complexity of the matter for determination and other factors such as the availability of resources in relation to the workload of the Court, leave, timeliness in the replacement of appointments, etc. Because of their size and complexity major industrial cases fall outside the general target, however, every effort has been and is being made to deliver the judgment as soon as possible after the decision has been reserved consistent with the exigencies of the particular proceedings.

The President is provided with information on reserved judgments and will consult with any Member where the judgment is undelivered within the relevant timeframe.

If the legal representative or a party to proceedings in which there has been a reserved decision or judgment desires to complain about delays over delivery of the decision or judgment, the complaint should be made by letter and should be addressed to the President of the Commission or the Industrial Registrar.

The matter will then be taken up with the Member or Members involved in the reserved decision but this will be done without disclosing the identity of the party making the complaint. If the matter is not satisfactorily resolved, the President or the Registrar should again be informed."

Given that the time standards and policy on reserved decisions and judgments only took effect towards the end of 2004 there has been insufficient time or data to provide effective reports. However, anecdotal evidence would indicate that there has been a significant commitment within the Commission to ensure that there is compliance with those standards and, in the majority of areas, those standards are being met or exceeded. The Commission's intention is to report on the achievement as to the standards in future reports.

## **THE REGISTRY**

The Industrial Registrar, Mr Michael Grimson, has overall administrative responsibility for the operation of the Commission. The Registrar reports to the President of the Commission in terms of the day to day operational procedures and, as a Business Centre Manager within the Attorney General's Department with reporting and budgetary responsibilities, to the Assistant Director-General, Court and Tribunal Services.

The Registry provides administrative support to the Members of the Commission and focuses on providing high level services to both its internal and external clients. The major sections of the Registry are:

### **REGISTRY CLIENT SERVICES**

The Registry Client Services team provides assistance to users of the Commission seeking information about the work of, or appearing before, the Commission. This team is responsible for receiving all applications and claims, guiding applicants and claimants through the management of their matter, listing matters to be heard by Members and providing formal orders made by the Commission or Court Session. In addition, the team provides support to Members and their staff by providing infrastructure for the requisition of stores etc. It also has responsibilities under the *Public Finance and Audit Act 1983*.

Client Service staff are situated in six locations - 50 Phillip Street, Sydney (Principal Registry); 815-825 George Street, Sydney (Flight Centre); Hospital Road Court Complex, Sydney; Local Court, Cnr George and Marsden Streets, Parramatta; 237 Wharf Road, Newcastle; and 90 Crown Street, Wollongong.

The role of Client Service staff is crucial as they are often the initial point of contact for the Commission's users. The Commission is fortunate that the staff within this area approach their duties with dedication and efficiency.

### **ELECTRONIC SERVICES TEAM**

The Electronic Services Team is responsible for the preparation of industrial awards, enterprise agreements and other orders made by Members of the Commission, for publication in the New

South Wales Industrial Gazette, which is available in both electronic and hard copy format. This process is driven by legislative requirements and enables the enforcement and implementation of awarded or approved employment conditions for employees. This team is also responsible for the maintenance of records relating to participants to awards and records relating to the Industrial Committees and their members.

The preparation of enterprise agreement comparison reports for the Industrial Registrar is another aspect of the team's responsibilities which involves a detailed comparison of conditions of employment under the proposed agreement to those under the relevant industrial instrument and statutory requirements. This assists the Commission in its deliberation on these matters.

In respect of the triennial Award Review process outlined earlier in this report, this team was responsible for advising the respective parties to awards of the impending review and, also, coordinating and facilitating the listing of these matters for call-over before the Commission including the collation of all relevant information pertaining to the review.

During 2004 part of this team was relocated to the Information Management Section (see below) to ensure that there was an alignment of tasks to functions within the Commission.

#### **INDUSTRIAL ORGANISATIONS TEAM**

This team processes a diverse range of applications that are determined by the Industrial Registrar, which include:

- registration, amalgamation and consent to alteration of the rules of industrial organisations;
- election of officers of industrial organisations or for special arrangements in relation thereto;
- Authority to Enter Premises for union officials;
- Certificates of Conscientious Objection to membership of industrial organisations

(Relevant statistical information is set out below).

In respect to industrial organisations, the team also administers provisions relating to the regulation and corporate governance of industrial organisations under Chapter 5 of the *Industrial Relations Act*.

The team also processes applications for special rates of pay for employees who consider that they are unable to earn the relevant award rate because of the effects of impairment, either physical and/or intellectual, that impacts on their productive capacity and employment prospects. (See tables below).

<b>Applications / Renewals for Certificates of Conscientious Objections</b>				
<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>
217	203	214	199	191

<b>Special Wage Matters - Year End Current Files</b>					
	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>
Special Wage Permits	-	-	823	765	1213
* SWS - P	-	-	101	212	262
** SWP - MC	-	-	244	224	269
<b>TOTAL</b>	<b>1035</b>	<b>1150</b>	<b>1168</b>	<b>1201</b>	<b>1744</b>

<b>Special Wage Matters - Matters Lodged</b>				
<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>
1141	1063	1268	1281	1786

*	Applications in cases where a State award covers the employment provisions of the applicant and the employer participates in the "Supported Wage System" program conducted by the Federal Department of Family and Community Services (FACS).
**	Notification by FACS of cases where an employer is participating in the "Supported Wage System" and the employment provisions of the employee are covered by a State award that incorporates a "Model clause." NOTE: Permit not required to be issued as "Model clause" outlines provisions for employees with physical and/or intellectual impairment.

## **EXECUTIVE AND LEGAL TEAM**

This team includes the Deputy Industrial Registrar and the Assistant Deputy Industrial Registrar. The principal function of this team is to provide information, support and advice to the Industrial Registrar and other members of the Registry to ensure that services are maintained at a high level.

## **INFORMATION MANAGEMENT TEAM**

This team provides information management, technology services and support to the Commission, the Industrial Registrar and Registry staff. The demand for the provision of on-line services and information has continued to grow and this team's main functions include - caseload reporting; maintenance and support of the Commission's case management system - *CITIS* (Combined Industrial Tribunals Information System) and other internal systems; updating the Commission's *Intranet* and *Internet* sites and the maintenance of the *NSW Industrial Gazette* website.

During 2004 this team:

- redesigned and launched a "new-look" website as part of the Attorney General's Department's overall redesign of the *Lawlink* site ([www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)).
- published to the website Union Membership Rules for over 50 employee organisations.
- created a new index on the website of Registered and Contract Agreements where over 2500 agreements are listed (those from 2001 onwards are linked to their registration details in the on-line *NSW Industrial Gazette* and, for those registered from 2003 onwards, full text versions are available as a PDF download).
- created a new *Caselaw* database for Commissioners' decisions.
- reviewed the *NSW Industrial Gazette* website and proposed a number of changes to improve the navigation structure and to enhance the search facility (for example, to allow awards to be searched by Title, Code Number or Industry). These changes will be made to the website in the first half of 2005

## **THE ATTORNEY GENERAL'S DEPARTMENT**

The Commission and the Registrar acknowledge the continuing assistance of the Attorney General's Department and, in particular, the assistance of Mr L G Glanfield, Director General, and Mr T E McGrath, Assistant Director General, Court and Tribunal Services.

## OTHER

### ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 28 April to 30 April 2004. Presentations covered a range of topics. The first day covered a variety of topics with presentations by John Robertson, Secretary of the NSW Labor Council (*Labor Council*); Ms Pru Goward, Federal Sex Discrimination Commissioner (*Maternity Leave*); and Dr Mick Dodson AM, Chairman, AIATSIS Council (*Round Table Discussion*); and an informative and thought provoking workshop was also jointly presented by Justice Frank Marks and Commissioner Ray Patterson (*The Art of Conciliation*).

On the second day of the conference sessions were given by the Hon Justice Giudice, President of the Australian Industrial Relations Commission, who provided an update of initiatives within the federal Commission; Mr Paul Westwood OAM, Managing Director, Forensic Document Services, who presented a paper and provided a very informative practical demonstration on issues involved in *Forensic Document Examination*; and Ken Davidson, Columnist with the *Melbourne Age* and Co-editor of *Dissent Magazine*, who presented a very thought provoking paper on *Australia's Arbitration System - its impact on equity and efficiency*.

The Annual Conference was well attended. It continues to provide an invaluable opportunity for Members of the Commission to discuss matters relevant to their work. The presentations, forums and discussions proved relevant and practical. Appreciation should be expressed to the eminent presenters, to all those who contributed as participants and the officers of the Judicial Commission whose assistance is invaluable. The development of the Annual Conference, substantially assisted by the Judicial Commission of New South Wales exercising its mandate to advance judicial education, has proved to be a most successful initiative with the potential to add to the professionalism which the Commission seeks to advance in all its work.

### TECHNOLOGY

#### **Medium Neutral Citation**

Since February 2000 the Commission has utilised an electronic judgments database and a system of court designated medium neutral citation. The system is similar to that in use in the

Supreme Court and allows judgments to be delivered electronically to a database maintained by the Attorney General's Department (*Caselaw*). The judgment database allocates a unique number to each judgment and provides for the inclusion of certain standard information on the judgment cover page.

The adoption of the system for the electronic delivery of judgments has provided a number of advantages to the Commission, the legal profession, other users of the Commission and legal publishers. The system allows unreported judgments to be identified by means of the unique judgment number and paragraph numbers within the body of the judgment. The judgments are now available shortly after they are handed down through both the Attorney General's Department website (<http://www.lawlink.nsw.gov.au/ircjudgments>) and the Australian Legal Information Institute website (AustLII).

Prior to December 2004 only the decisions of Presidential Members of the Commission were available through *Caselaw*. From 1 December 2004 a separate database for decisions of commissioners was established.

Decisions of Presidential Members made in relation to industrial disputes where the Commission might make a statement, recommendation(s) and/or directions with a view to resolving the dispute, are not usually published on *Caselaw*.

All arbitrated decisions of commissioners (decisions made after taking evidence from the parties) are published. The exception to this rule is decisions that are read onto the record - these will only be published where the matter involves a particular matter of interest, topicality or noteworthiness

### **Practice Direction No 16**

*Practice Direction No 16* was published in the Industrial Gazette of 12 November 2004 and replaced *Practice Direction No 9*. The purposes of this Practice Direction are:

- to facilitate the processing of matters before the Industrial Relations Commission of New South Wales by providing for, encouraging and requiring

that documentation filed in certain classes of matters by a party be accompanied by a copy of that documentation in computer-readable format;

- to provide for and encourage the use of technology in matters before the Commission; and
- to provide an appropriate foundation for further use of technology in proceedings before the Commission

Practice Direction 16 also clarifies the types of matters that are exempt from the provisions of the Practice Direction and what constitutes "computer readable format".

The Practice Direction makes clear that any party seeking orders to be made (for example, in respect of a matter where judgment has been delivered or where the Commission directs short minutes of orders to be filed) must, when filing the hard copy version of the proposed orders, also provide the document in a computer-readable format.

Additionally, the Practice Direction provides for the filing of certain classes of documents by email in lieu of the lodgement of a diskette or CD-Rom.

## **COURT USERS' GROUP**

This Users' Group was established in 1998 to provide a forum for the major industrial parties, and others who regularly appear before the Commission, to provide feedback as to the Commission's practice and procedure and allow users to have input into the continuing development of the Commission's practice and procedure.

In 2002 it was decided that the Users' Group would meet annually and be complemented by *ad hoc* sub-group meetings to deal with particular areas such as unfair dismissals, unfair contracts and occupational health and safety matters.

In 2004 the full Users' Group met on the 24 November 2004. The unfair dismissal sub-group met on 1 June 2004.

These groups continue to fulfil the useful purposes for which they were established.

## **COMMITTEES**

A list of the committees in operation within the Commission are contained at Appendix 4.

## **COMMISSION RULES**

Pursuant to section 186 of the *Industrial Relations Act*, the rules of the Commission are to be made by a Rule Committee comprising the President of the Commission and two other Presidential Members appointed by the President. There is also scope for co-option of other Members. There were no amendments to the rules of the Commission in 2004.

## **COMMISSION PREMISES**

I have earlier reported on the significant benefits that would be gained by the co-location of Presidential and Commissioner Members in terms of efficiency and co-ordination. I previously reported that refurbishment of the Chief Secretary's Building (adjacent to the principal premises at 50 Phillip Street, Sydney) was under way with a view to relocation of Members and staff currently located at Flight Centre (Railway Square) to a united complex in late December 2004 or early January 2005. Unfortunately, delays associated with the project are now unlikely to see this important initiative realised until the later part of 2005.

As would be appreciated, the detail associated with ensuring that the refurbishment meets the needs of the Commission and its clients is significant. I take the opportunity to note my continuing appreciation for the efforts of the Building Committee chaired by the Vice-President, the Honourable Justice Walton, and also the Honourable Justice Kavanagh and the Industrial Registrar, Mr Grimson. I also wish to acknowledge the contribution made by the Attorney General's Department's Asset Management Services section who have been working closely with the Building Committee to ensure that the combined premises are functional and user friendly.

## **AMENDMENTS TO LEGISLATION ETC**

The legislative amendments enacted during 2004, or which came into force that year, affecting the operation and functions of the Commission are reported at Appendix 5.

Amendments to Regulations affecting the Commission are reported at Appendix 6.

## **PRACTICE DIRECTIONS**

Practice Directions published during the year have been reported on under the relevant area of the Commission's jurisdiction in the body of this report except for *Practice Direction No 15* (for details of *Practice Directions No 14* and *16* see pages 16 and 36 respectively).

*Practice Direction No 15* was published for the purpose of facilitating the processing of Awards and Contract Determinations of the Commission by emphasising and giving effect to the requirements of Rule 32 of the Industrial Relations Commission Rules. Additionally, the Practice Direction was designed to provide guidance to Members of the Commission and applicants appearing before the Commission on the steps necessary to ensure that Awards made by the Commission are publicly available in a timely manner and thus enforceable.

## **CONCLUSION**

Overall, 2004 has been a year in which the Commission, its Members and staff, consolidated achievements made throughout 2003 and faced a number of new challenges in terms of resource constraints and changing practices. The Commission remains responsive to the needs of the community which it has served for over 100 years.

The year ahead will present further and different challenges; however, I am confident that the Members of the Commission will continue to approach the changing environment in which they are required to discharge their duties in a spirit that will ensure that the Commission remains responsive to the objects and purposes of the Act under which the Commission is constituted.

## APPENDIX 1

### INDUSTRY PANELS

#### PANEL A

**Industries**

Brick, Tile and Pottery  
Building and Construction Industries  
Cement and Lime Industry  
Electrical  
Foremen and Supervisors  
Furniture  
Glass and Wood Industry  
Labouring  
Manufacturing (including drugs)  
Meat and Allied Industry  
Optical, Watchmakers and Jewellers  
Plant Operators, Engine Drivers and Allied Industries  
Printing  
Quarrying  
Steel Manufacturing and Allied Industries (other than establishments within N & S)  
Storemen and Packers

#### PANEL B/C

**Industries**

Clerks  
Clothing, Textile and Allied Industries  
Clubs  
Commercial Travellers/Sales (Salesmen, etc)  
Crown (except RTA and Prisons/Corrective Services, with Panel E and Police, with Panel D)  
Dental  
Education  
Funeral and Undertaking  
MSB, ports Authorities etc (except Newcastle with Panel N)  
Professionals  
Real Estate Industry  
Shop Employee and Allied Industries  
Universities/Colleges of Advanced Education

#### PANEL D

**Industries**

Fire Fighting  
Health Industry (except Health Surveyors Newcastle with Panel N)  
Leather, Rubber and Allied Industries  
Local Government (except Newcastle with Panel N)  
Mining (Coal and Southern Copper)  
Miscellaneous  
Nurses  
Police  
Water Supply  
Welfare

#### PANEL E

**Industries**

Baking and Allied Industries  
Breweries  
Domestic and Personal Services (Cleaning, Restaurants, Catering, Hotels)  
Gas Industry  
Grain Handling  
Household Commodities  
Journalists  
Oil Industry  
Prisons/Corrective Services (generally including regional areas)  
RTA  
Security Industry  
Theatrical (Entertainment, Darling Harbour, Carnivals)  
Transport

## APPENDIX 2

### OTHER SIGNIFICANT FULL BENCH DECISIONS

#### **Green v Barclay Mowlem Construction Pty Ltd [2004] NSWIRComm 69**

This appeal raised questions of consistency and parity of sentencing in relation to defendants charged for breaches arising out of the same incident, but under different sections of the *Occupational Health and Safety Act 1983*. Although the appellant invited the Court to issue a clarifying statement as to the manner in which a sentencing judge should deal with the higher penalty prescribes by s 51A of the *Occupational Health and Safety Act 1983* when dealing with the same incident involving defendants with a record and those without, the Court did not regard it appropriate to do so.

The Court also held that an examination of the decision of the sentencing judge and the reasons for the penalty imposed did not reveal imposition of a manifestly inadequate sentence. Furthermore, although there is a discretion even where error is demonstrated to dismiss the appeal, that was not the case in these proceedings. Accordingly, the appeal was dismissed.

#### **Randall v Baulkham Hills Shire Council [2004] NSWIRComm 86**

The Full Bench considered an appeal from a decision where the employee sought the payment of a gratuity denied to him by the respondent. The appellant submitted that the trial judge reached conclusions for which there was no basis in evidence, that there was a denial of procedural fairness, and an alleged breach of the rules in *Brown v Dunn* (1894) 6 The Reports 67 and *Jones v Dunkel* (1956) 101 CLR 298. On examination of the proceedings at first instance, the Full Bench found no error in the trial judge's reasoning. Leave to appeal was refused and the appeal was dismissed.

#### **Edwards Madigan Torzillo Briggs Pty Ltd v Mansell [2004] NSWIRComm 162**

At first instance the prosecutor brought charges relating to an accident that occurred at Kogarah Railway Station on 4 December 1995, which caused the death of two people and injury to several others. Proceedings seeking a permanent stay of the action under s 17 of the *Occupational Health and Safety Act 1983* were dismissed.

On appeal, the Full Bench considered that the trial judge was correct in following the approach in *Inspector Forster v Osprey Manufacturing Pty Ltd* [2003] NSWIRComm 161 and applying s 107(3) of the *Occupational Health and Safety Act 2000* to the present proceedings even though the proceedings had been brought under the 1983 Act. As to the proper construction of s 49(4) of the 1983 Act, their Honours upheld the trial judge's application of *Page v Walco Hoist Rentals Pty Ltd* (1999) 87 IR 286. The trial judge was correct to conclude that upon the proper construction of s 49(4) of the 1983 Act, an offender does not need to be identified within the Coroner's report; nor does a *prima facie* breach of the *Occupational Health and Safety Act* need to be established. The Full Bench cited with approval *Morrison v Joy Manufacturing Co Pty Ltd* [2004] NSWIRComm 107 as authority for the proposition that the Commission in Court Session does not have jurisdiction to hear appeals from interlocutory judgments and orders in its summary jurisdiction. Accordingly, the appeal was dismissed.

### **Health Administration Corporation and others v Crocker and other [2004] NSWIRComm 163**

The appeal was lodged by the Health Administration Corporation and a number of Area Health Services. At first instance the unfair contract claims against the HAC were upheld. On appeal, the majority of the Full Bench found itself unable to discern any public interest in these proceedings that would militate towards the grant of leave, nor did they detect any error in the trial judge's exercise of discretion. There was also a dissenting judgment on the issue of the proper interpretation to be given to s 115 of the *Health Services Act 1997*. It was considered that leave to appeal should be granted on this issue.

### **Re Bluescope Steel (AIS) Pty Ltd - Port Kembla Steelworks Employees Award 2004 and other matters [2004] NSWIRComm 185**

This matter concerned the culmination of a protracted process of dispute resolution at the Port Kembla steelworks. The dispute concerned whether critical provisions of the enterprise agreement should be retained. The Commission intervened at an early stage of that process and handed down the Bluescope Steel (Regulation of Disturbance to Production and Supply) Interim Award 2004. The Full Bench considered the resolution of the present industrial dispute as a watershed for industrial relations in the steel industry, laying the foundation for a harmonious industrial climate.

The matter concerned the stacking of slabs and whether such slabs were to be stacked two hours after the giving of notice as to an industrial dispute. The existing clause of the Interim Award provided that all iron at the time the industrial action was commenced was to be processed as normal. The Union sought to have the words “until two hours after notice of the commencement of the industrial action is provided” added to the clause. On balance, the Full Bench considered that the Union's claim should be rejected and the existing provision retained.

The Full Bench reached this conclusion on the basis that there was a real prospect that industrial action of a more extensive duration would result in lost of production and the dumping of metal. It was determined that the Unions had not by their approach to industrial disputation demonstrated that some alleviation of the present regime was warranted or that some further re-balancing of the regulatory mix should occur. The Full Bench acknowledged that the expiration of the award and the implementation of new dispute settlement procedures might give rise to the need to review current arrangements. The matter was concluded.

### **NKS Enterprises Pty Ltd v Mekary [2004] NSWIRComm 210; (2004) 135 IR 301**

These proceedings concerned an application for leave to appeal and an appeal against a decision of the Chief Industrial Magistrate in which the appellant was ordered to pay the respondent \$44,687. There were three issues on appeal: first, whether the Chief Industrial Magistrate correctly found that there was an industrial instrument providing a minimum rate of remuneration for work under the contract pursuant to s 366(2) of the *Industrial Relations Act*; second, whether an order could be made under the section in respect of the loss of the use of the motor vehicle; and third, whether an order could be made under the section in respect of the loss of superannuation.

In considering the first issue, the Full Bench noted the frequency with which the issue arises, and held that the Magistrate had not erred in the approach taken, and did not reach a conclusion that was not open to him.

After setting out the statutory context in which s 366 is to be understood, the Court stated that resolution of the second and third issues depended on whether there was "any amount payable" under s 366(1) in respect of the relevant matters. Although it was a technical point, the second issue revolved around whether the loss of the motor vehicle could be said to be an "amount payable" under the Act. Although the Court approached the construction of s 366 on the basis that the expression "amount payable" was to be given a uniform meaning throughout Part 2 of Chapter 7 of the Act, that meaning could not be extended to include loss of use of the motor vehicle. Therefore, the Chief Industrial Magistrate was held to have erred in this respect.

In determining the superannuation issue, the Court considered the construction of s 366 having regard to the terms of s 368. Having regard to the terms and purpose of s 366 and to the beneficial approach to be adopted in the construction of s 368, the Court found that the phrase "amount payable" in s 366 was sufficiently wide to encompass the making of orders in favour of an employee as to unpaid superannuation contributions.

The Court granted leave to appeal in respect of the second and third issues. The appeal was dismissed in relation to the superannuation issue but was upheld in relation to the value of the loss of use of the motor vehicle.

**Bluescope Steel Limited (Formerly BHP Steel Limited) v The Australia Workers' Union, New South Wales [2004] NSWIRComm 222; (2004) 137 IR 176**

In these proceedings, the Full Bench was asked to consider whether the trial judge erred in refusing to grant an application for relief pursuant to s 139 of the *Industrial Relations Act* 1996 alleging that the respondent had contravened dispute orders made by the Commissioner in the initial proceedings. The initial proceedings resulted from an industrial dispute in the Finishing section of the Painting and Finishing department of the appellant's Port Kembla operation. At first instance, the judge found that the words "kinds of dispute orders" in s 137 of the Act did not operate to expand the four orders specified in s 137(1)(a) to (d). As a result, the trial judge held that the second order made by the Commissioner was not within the kind or type of orders available under s 137. The trial judge then considered whether there were breaches of the dispute orders by the respondent if all the orders were supportable under s 137 of the Act, particularly the second order made by the Commissioner.

The trial judge did not find a breach of the orders as a result of a representative of the respondent's failure to take "all reasonable steps" to ensure compliance with the dispute orders. His Honour also found that the term "reasonable steps" was "too vague and imprecise", finding that if particular steps were required to be taken by the respondent, such steps should have been specified in the order. His Honour also held that on the evidence there was no breach of the dispute orders by the respondent's failure to ensure the urgent despatch of product. Finally, his Honour found no breach of the dispute orders as a result of the respondent's failure to hold "immediate" discussions with the appellant in relation to the urgent despatch of product.

The Full Bench granted leave to appeal, noting that the appeal raised issues which were "essential to the proper administration of the Commission's dispute resolution powers under the Act". The Court then proceeded to deal with the three findings made by the trial judge as detailed above.

The Court held that the Commissioner's second order to "take all reasonable steps necessary" for compliance with the first order to refrain from taking further industrial action was sustainable under s 137 as an ancillary order, or an order in aid of the first dispute order. Consequently, the second order was within the type of order contemplated by s 137(1), and therefore, the approach of the trial

judge was incorrect. As a matter of principle, the Court held that the power to make ancillary orders against the officers of a union is consistent with the scheme of the Act; and that scheme contemplates a union being a party to an industrial dispute, thereby recognising that a union is the instrument through which the industrial conduct of its members may be regulated. The Court also held that the second limb of the second dispute order, namely to hold "immediate discussions" was not invalid and that even if it were, such invalidity would not invalidate the order otherwise.

In finding that the trial judge erred in deciding that the second dispute order was "too vague and imprecise", the Court found that the phrase "all reasonable steps" was "both conventional and well-known in industrial parlance".

The Full Bench then turned its attention to whether the second dispute order was, in fact, breached. The Court held that relevant case law establishes that the extent of the obligation to take "reasonable steps" depends on the particular circumstances existing at the time the obligation arises and is, therefore, a question of fact. The Court then applied the usual test in relation to appeals from findings of fact, deciding that there was no demonstrable error in the trial judge's findings as to whether the relevant union official took all reasonable steps. Consequently, this aspect of the appeal failed.

The Court next considered the correctness of the trial judge's findings that the failure to arrange for immediate dispatch of urgent product was not a breach of the dispute orders and further, that the refusal to carry out particular work, being industrial action within the meaning of the Act, did not amount to a contravention of those dispute orders. The Full Bench took a twofold approach: first, whether by reference to "industrial action", the first order compelled the despatch of urgent product; and second, whether the second order operated so as to require the respondent to take reasonable steps to facilitate such despatch.

The Court noted that the respondent agreed that the definition of "industrial action" referred to actions which affected the performance of work that was lawfully required. The Court also considered the clause in the enterprise agreement relevant to urgent product, ultimately holding that it was open to the Commissioner to order the cessation of "industrial action"; and such an order required the cessation of any action which affected the performance of work, including the urgent despatch of product. The Court gave further consideration to the agreement, noting the presence of a clause specifically intended to compel dispatch of product deemed urgent irrespective of any industrial action. The Court then held that there was "compelling" evidence to indicate that the respondent had breached the second order in not taking reasonable steps to facilitate urgent dispatch. Hence, this aspect of the appeal was successful.

In determining whether the respondent had failed to hold "immediate discussions" in relation to the urgent dispatch of product, the Court set out the extensive chronology of the respondent's discussions. It was noted that the term "immediate" has a "strong temporal connection". The Court held that there was a delay by the respondent in holding discussions as to the implementation of urgent dispatch given that the relevant clause in the Agreement (and by association, the second dispute order) required strict compliance.

Ultimately, the Full Bench ordered the appeal upheld in part as indicated and declared that the respondent contravened the original dispute orders of the Commissioner. The matter was listed for directions for the hearing of penalty.

**Western Sydney Area Health Service v Australian Salaried Medical Officers' Federation (NSW) [2004] NSWIRComm 246**

These proceedings involved two applications for leave to appeal against two interlocutory decisions given by two members of the Commission in relation to the threatened dismissal of the respondent. The first judgment made orders in relation to reinstatement; the second, made orders pursuant to s 89(8) of the *Industrial Relations Act 1996* attempting to give effect to one of the earlier judgment's directions in relation to the distribution of research funds. The Full Bench noted that the Commission had power to grant interlocutory relief in relation to a threatened dismissal, but there remained an issue about the nature and extent of any interim order which the Commission could make.

After considering the authorities concerning the powers of the Commission to make interim orders, the Full Bench identified the key issue as: what interim orders, if any, were necessary to ensure that the final orders sought by the respondent under s 89(7) of the Act in relation to an alleged threatened dismissal were not frustrated? The Full Bench held that any power in the Commission to make such interim orders must be limited to preserving the employment of the employee from dismissal in accordance with an alleged threat until the substantive application has been heard and determined; and that there was no basis, either within the statute, or on equity or fairness principles, for considering that the Commission had any wider power in this respect. After considering the facts, the Commission found that the first decision did go beyond preserving the employment of the respondent from dismissal. The decision also went so far as to prevent the appellant from dismissing or varying the employment of the respondent for any reason, thereby exceeding the limit available as final relief under s 89(7).

In relation to the second decision, the Full Bench noted that the principal issue for determination was whether the interim order sought by the respondent was an order necessary to preserve the employment of the respondent from dismissal in accordance with an alleged threat until the substantive application had been heard and determined. The Full Bench held that there was error in relying on s 89(8) of the Act and failure to apply the tests applicable to interlocutory orders. The Full Bench granted leave to appeal, upheld the appeal in part and made substituted orders.

**WorkCover Authority of New South Wales (Inspector Mansell) v Chen [2004] NSWIRComm 247; (2004) 137 IR 33**

The WorkCover Authority appealed a first instance decision of the Chief Industrial Magistrate on the basis that the sentence was manifestly inadequate. The defendant conducted a business in the manufacture of furniture which contained a number of woodworking machines which included, inter alia, power saws, panel saws, work benches, spray booth, an office area and a kitchen and amenities area. The second defendant was a working director of the first defendant with day to day control of the company.

WorkCover inspectors on two inspections (January and August 2002) noted various infringements including waste timber as trip hazards, toilets being in an unsanitary state, guarding on saws not conforming with the relevant Australian Standard and unsafe storage of flammable and combustible liquids. Infringement notices were issued and a subsequent inspection in August showed little improvement. At first instance, the Chief Industrial Magistrate imposed a global penalty on the corporate defendant of \$13,500 in respect to the fifteen breaches in the January period (\$900 for each offence) and \$15,000 on the corporate defendant (\$1666.66 for each offence) for the August breaches. In relation to the personal defendant, his Honour determined a global figure of \$1500 for the fifteen offences (\$90 for each offence).

The respondents conceded the appeal. The Full Bench agreed that in all of the circumstances the penalties imposed were inadequate. The Full Bench were mindful of the appeal being a prosecution appeal. The Full Bench took into account the respondent's prior convictions and found the infringements to be objectively serious. Further, the Full Bench considered that it was appropriate to have regard to specific deterrence.

In relation to the early guilty pleas, the Full Bench applied a 25 per cent discount. There was no discount for other subjective factors as there was limited cooperation by the defendants with the WorkCover Authority. The Full Bench increased the penalties imposed at first instance. In relation to the corporate defendant, a penalty of \$4000 was imposed for each of the 24 breaches giving a total penalty of \$96,000. After the application of the principle of totality and discounts, a total penalty of \$37,500 was imposed (\$1562.50 for each offence).

In relation to the personal defendant, the Full Bench had regard to the personal defendant's status as the controlling mind of the corporate defendant. Their Honours determined a penalty in respect of each offence of \$1000, giving a total penalty of \$23,000 for twenty-three breaches. After the application of the principle of totality and discounts a total penalty of \$11,250 was imposed (\$489.13 for each offence).

#### **Hansen Yuncken Pty Ltd v Andreas Costopoulos [2004] NSWIRComm 249; (2004) 136 IR 61**

This appeal determined whether the trial judge erred in finding that the employment contract entered into between the appellant and respondent (a former employee) operated unfairly in circumstances where the employment of the respondent was terminated and appropriate notice was not given.

The respondent was employed as a builder's labourer/construction worker for some 23 years and was dismissed on grounds of lack of work. At the time of termination, an enterprise agreement and a federal award made by the AIRC applied to the respondent's employment. The award and agreement both contained extensive provisions relating to classifications and wages, redundancy and termination of employment. The trial judge held that the contract of employment operated separately from the award and agreement, and that the award and the agreement's terms were not to be automatically inferred in the contract of employment as their implication were not necessary for the effective operation of the award and agreement. The trial judge also held that as the award and agreement did not cover the field of the respondent's contract of employment, orders under s 106 would not create any inconsistency where such orders related to the terms of the contract.

In granting leave to appeal, the Full Bench held that the appeal raised substantial issues as to the relationship between awards and agreements made pursuant to the *Workplace Relations Act 1996* (Cth) and the scope of the jurisdiction of the Commission in Court Session to set aside or vary contracts of employment or arrangements relating to the performance of work in an industry in New South Wales.

In finding that the trial judge erred, the Full Bench held that the respondent was in fact employed on a weekly hire basis pursuant to the relevant clause in the agreement and was therefore entitled to only one week's notice of termination of employment. In arriving at that conclusion, the Court noted that the adjective "permanent" in the respondent's employment description was only used to distinguish it from casual employment as prescribed in the Award. Furthermore, although the respondent was classified at a level higher than his skills may have warranted, that did not necessarily mean that the award or agreement had no application to his classification. In this instance, it was held that there was no basis for considering that notice of termination was to be

derived from the respondent's contract of employment, as opposed to the agreement. Consequently, an order under s 106(5) of the Act requiring payment in relation to notice in excess of, or above that provided for in the agreement would be invalid as being inconsistent with the federal industrial instrument. Having granted leave to appeal, the Full Bench upheld the appeal, set aside the trial judge's decision and quashed the orders made.

### **Bradley George Hosemans v Commissioner of Police [2004] NSWIRComm 253**

In this matter, the appellant sought the setting aside of the decision at first instance and reinstatement to the New South Wales Police Service with back-pay. The Full Bench found three errors of principle with the decision at first instance. First, his Honour incorrectly approached the matter as being a judicial review of an administrative decision rather than a full merits review. Secondly, his Honour adopted the wrong approach to the receipt of new evidence contrary to s181G(1)(f) of the *Police Act* 1990. Thirdly, having admitted new evidence tendered by the appellant, his Honour failed to properly determine whether the respondent had discharged the evidentiary burden of meeting the case which had been presented by the appellant and receive back pay to the date of his removal. The Full Bench granted leave to appeal, upheld the appeal and remitted the matter for re-hearing.

### **State of New South Wales v Banas [2004] NSWIRComm 255**

In this matter the Full Bench was asked to consider whether the trial judge erred in his consideration of the Court's jurisdiction and its exercise of discretion in relation to claims brought pursuant to s 106 of the *Industrial Relations Act* 1996 by public servants employed under the provisions of the *Public Sector Management Act* 1988 (*PSM Act*). In the proceedings at first instance, the respondent brought a claim which sought to challenge the operation of the "Managing Displaced Employees Policy" by departmental heads pursuant to ss 50 to 53 and 55 of the *PSM Act*. There were 13 grounds of appeal.

The first two grounds of appeal went to the trial judge's finding that the relevant provisions of the *PSM Act* did not preclude the Commission in Court Session from exercising jurisdiction under s 106 of the *Industrial Relations Act*. After careful consideration of the trial judge's reasoning, the Full Bench held that his Honour's orders were not inconsistent or contradictory to the relevant specific provisions of the *PSM Act*. The appellant argued that the *PSM Act* had to be understood in concert with the department's Displaced Persons Policy. The Court disagreed, finding that the Policy, whilst complementary with the relevant provisions of the *PSM Act*, was not part of the *PSM Act* itself or delegated legislation. As the Policy was therefore an "arrangement", for the purposes of ss 105 and 106 of the *Industrial Relations Act*, it was susceptible to the Commission's jurisdiction. The Court also failed to find that the trial judge erred as a matter of discretion in failing to apply the Displaced Persons Policy.

The following grounds of appeal concerned the trial judge's finding that the *Workers' Compensation Act* 1987 did not preclude orders under s 106 for any psychological illness suffered by the respondent. The Court upheld the findings of the trial judge deciding that on the evidence it was open for the trial judge to conclude that the contract became unfair because of the conduct of the appellant, and that the respondent suffered a loss of income due to illness caused by that conduct. It was this finding of unfairness that led the trial judge to declare the respondent's contract partly void; and there was no error in his Honour's reasoning, his findings as to the facts and his application of the law to the facts. The Court also held that there was no error in the trial judge's discretion to award compensation as was just in the circumstances of the case.

Whilst the Court did not disturb the trial judge's decision to award two types of compensation given that both amounts were awarded on two separate and distinct bases, the Court did note the failure of the trial judge to provide any indication as to how the figure for stress and suffering was determined. However, the Court declined to interfere with the amount ordered.

The appellant also contended that the trial judge erred in finding that the contract was unfair. The Full Bench found that it was open to the trial judge on the evidence to make such a finding. The Court also held that it was open to the trial judge to find that it was unconscionable to retain an employee in a number of *ad hoc* positions when no suitable employment had yet been found. The Court also found that it was open to the trial judge to find that the two new positions offered to the respondent were unsuitable. The final issue the Full Bench dealt with was whether the appellant's withdrawal of an offer of redundancy was an extreme over-reaction. The Court held that this issue of itself did not make any difference to the outcome of the appeal. Nevertheless, the withdrawal was an "ill considered move" given the extent to which relations had soured between the parties. Ultimately, the Court held that it was unable to discern any error of fact or law, or any error in the exercise of the trial judge's discretion.

As the matter raised important questions going to the interrelationship between the provisions of ss 105 and 106 of the *Industrial Relations Act* on the one hand, and the *PSM Act* and *Workers' Compensation Act* on the other, leave to appeal was granted. However, the Court dismissed the appeal.

#### **Webb v Goulburn Masonic Village [2004] NSWIRComm 258**

The appellant sought compensation in relation to an alleged unfair dismissal. On consideration of the decision at first instance, the Full Bench found error on the basis of inadequacy of errors. The Full Bench held that whilst it did not automatically follow that a breach of procedural fairness would lead to the decision being quashed or a new hearing ordered (see *D & R Commercial Pty Ltd v Flood* (2002) 113 IR 344 at 358), this was a case in which such a result could not be avoided. Leave to appeal was granted, the appeal was allowed and the matter was remitted for hearing and determination by another member of the Commission.

#### **Inspector Downie v Menzies Property Services Pty Limited [2004] NSWIRComm 259**

This matter concerned an appeal from a decision of the Deputy Chief Magistrate which unconditionally dismissed the charge under s 8(1) of the *Occupational Health and Safety Act 2000* pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*. The appellant submitted that the Deputy Chief Magistrate erred in the exercise of discretion, failing to give sufficient weight to general and specific deterrence and also to the objective seriousness of the offence. The Full Bench granted leave to appeal on the basis that the case raised significant questions as to the proper administration of justice under the *Occupational Health and Safety Act 2000*.

The Full Bench determined that considering the objective and subjective elements of the offence, the dismissal of the charge under s 10 of the *Crimes (Sentencing Procedure) Act* represented a manifestly inadequate penalty and the misapplication of established principles. That is, the Magistrate's failure to give proper weight to the objective features of the offence, and an inappropriate emphasis on subjective features, constituted an error of the type exemplified by *House v The King* (1936) 55 CLR 499. The appeal was upheld and a fine was imposed.

**U-RECT-IT Pty Ltd v WorkCover Authority of New South Wales (Inspector de Silva) [2004] NSWIRComm 266**

These proceedings involved an application for leave to appeal and appeal from a penalty imposed by an Industrial Magistrate in a prosecution for a breach of s 8(1) of the *Occupational Health and Safety Act 2000*. At first instance, the appellant pleaded guilty. The bulk of the evidence at first instance was an agreed statement of facts, photographs and affidavit evidence. Even though both parties submitted that a penalty in the region of \$5,000 to \$10,000 was appropriate for the particular offence, the trial judge imposed a fine of \$44,000. The reasons given for such an amount were that the maximum penalty was \$55,000, and that a maximum 20 percent discount for subjective factors could be granted.

The Full Bench referred to the sentencing principles applicable to occupational health and safety prosecutions and held that the Magistrate at first instance erred in the approach taken. On that basis, leave to appeal was granted. As a matter of practice, the Full Bench also held that in assessing penalty by reference to the objective seriousness of the offence, the Industrial Magistrate is required to have regard to the maximum penalty fixed under the Act rather than the jurisdictional limit imposed by s 105. Therefore, the maximum penalty was not \$55,000 but in fact, \$550,000.

The Court then dealt with the issue whether the penalty imposed was, in fact, appropriate. The Court declined to uphold the appeal. The Court agreed with the observations of the magistrate that the offence was serious and that the appellant's failure was obvious and easily remedied. Nevertheless, the Court accepted the appellant's submission that it was entitled to a 25 per cent discount for its early guilty plea and a further 10 per cent for subjective factors. Although the Court noted that if the magistrate's final penalty was seen as reflecting a discount of 35 per cent, the penalty assessed by reference to the objective seriousness of the offence and deterrence would be \$68,000. Given that the maximum penalty was in fact \$550,000, the Court held that the magistrate's penalty was not excessive.

**Anderson v Northern Co-operative Meat Company Pty Ltd (NCMC - Butchering Pty Ltd) [2004] NSWIRComm 300**

The appellant sought the setting aside of the Commissioner's decision at first instance and his reinstatement. The appellant was employed at the respondent's abattoir business for some 17 years when he suffered serious spinal injuries. The appellant took part in a graded work-based rehabilitation programme which assisted him to return to normal duties as a slicer but was summarily dismissed.

The Full Bench granted leave in this matter as it raised significant issues concerning the application of Chapter 2 Part 6 of the *Industrial Relations Act 1996* where an employee is dismissed solely due to an alleged incapacity for work due to injuries sustained at work and where the employee has previously performed work under a modified work programme to accommodate that incapacity.

The Full Bench held that the Commissioner failed to properly consider the statutory test for determining whether the appellant's dismissal was harsh, unreasonable or unjust under s84 by considering first whether it was impracticable to reinstate the appellant under s89 and then using his findings made in relation to that section as a surrogate test for the findings required under s84.

The Full Bench found that the Commissioner failed to apply the principles relating to procedural unfairness leading up to termination of employment. As a result the Commissioner fell into error. The Full Bench considered the breaches of procedural fairness by the respondent employer to be

sufficiently serious to require a finding that the dismissal was harsh, unjust or unreasonable. The appellant's reinstatement was ordered without loss of continuity of service.

### **Director General of the Department of Environment and Conservation v Ryan [2004] NSWIRComm 310**

This matter dealt with an application by Susanne Kay Ryan for declaratory relief under s 154 of the *Industrial Relations Act 1996*. The application arose out of Ms Ryan's employment and an inquiry conducted under the *Public Sector Management Act 1988* and the Public Sector Management (General) Regulation 1996 in relation to whether Ms Ryan had committed certain breaches of discipline. The respondent's breach of discipline related to protected disclosure which became the subject of an Independent Commission Against Corruption inquiry at which the appellant gave evidence. A public report recommended that consideration be given to the laying of certain criminal and disciplinary charges against the appellant.

At first instance, the trial judge found deficiencies in the way in which the National Parks and Wildlife Service handled the investigation and the respondent's purported termination. The trial judge held that the appellant had at all times been employed by the second respondent and her purported termination was void. The applicant was held entitled to all her superannuation, wages and emoluments.

On appeal, the Full Bench considered that the appeal raised matters of importance relating to the manner and conduct of disciplinary proceedings against public servants. The Full Bench found it open to the trial judge to hold that the manner in which the appellant's investigation was conducted was contrary to and undermined the disciplinary scheme as set out in the *Public Sector Management (General) Regulation 1996*.

Other first instance findings were upheld. For instance, the trial judge concluded that the appointment was limited to conducting a preliminary inquiry only into the charges specified in the instrument of appointment. Her appointment did not require the investigation of any new or additional matters. Their Honours considered that it was open to the trial judge to find that the two new recommended charges went beyond the subject of the inquiry. Leave to appeal was granted and the appeal was dismissed.

### **Smith and New South Wales Police Service (No 2) [2004] NSWIRComm 311**

These proceedings concerned an appeal from a decision where the trial judge declined to exercise the discretion pursuant to s 85 of the *Industrial Relations Act 1996* to admit the application by the appellant for relief from unfair dismissal out of time. The Full Bench was of the opinion that leave to appeal should be allowed as the matter raised the application of s 85(3) of the Act in a timeframe not previously encountered, and in a very unusual set of factual circumstances.

Nevertheless, the Full Bench observed that the trial judge accepted and acted upon a factual matrix which involved the acceptance of a number of factors in favour of the appellant. In rejecting the appellant's application seeking to admit further evidence under s 191(2) of the Act, the Court held that the additional evidence to be relied on would not, if admitted, add to or affect the nature of the case the appellant put before the trial judge. The Full Bench also considered the reasoning of the trial judge, finding that there was no apparent error of reasoning or application. Further, although there was considerable sympathy for the appellant's personal situation, the Full Bench held that the discretion to be exercised by the Commission under s 85(3) must be viewed within the framework of legislative intention, where time is of the essence in the filing of an application for relief from

unfair dismissal pursuant to Part 6 of Chapter 2 of the Act. Accordingly, although leave to appeal was granted, the appeal was dismissed.

### **Inspector Maddaford v Coleman & Anor [2004] NSWIRComm 317**

Inspector Maddaford appealed a decision of the Chief Industrial Magistrate in which the respondents were each fined \$1,000 in respect of breaches of s26 of the *Occupational Health and Safety Act* 2000. The breaches related to an incident at a factory where a 16 year old employee of the Company was physically restrained by a group of other employees and subjected to a violent ordeal. The respondents were at the time of the incident directors of the Company. The Full Bench held that the Chief Industrial Magistrate fell into appealable error by failing to give sufficient weight to the objective seriousness of the offence and by placing too much weight on subjective elements. Conscious of the need to adopt a conservative approach to a review of penalty due to the potential for double jeopardy, the penalties imposed by the Chief Industrial Magistrate were set aside and penalties of \$9,000 and \$12,000 were imposed on the two directors.

### **Quality Bakers v ALHMWU [2004] NSWIRComm 318**

Quality Bakers appealed the first instance decision as to the proper interpretation to be given to an award which would bind them. The application arose because Quality Bakers proposed a new model whereby instead of employing drivers, it would engage companies as independent contractors. The companies would be obliged to employ drivers who would be covered by the Bread Industry (State) Award 1999. The Union sought an interpretation of the award so that persons carrying out the work of bread delivery and merchandising of Quality Bakers' products were remunerated in a manner no less favourable than if those persons had been employees whose conditions of employment and remuneration were governed by the Quality Bakers Australia Limited (NSW) Enterprise Award 2002.

The appeal turned upon the interpretation of the definition of "employee" in the *Industrial Relations Act* 1996. On appeal, Quality Bakers submitted that s5(3) did not apply to the persons who delivered bread, because they were employees of the corporations which Quality Bakers had required them to establish. The Union submitted that s5(3) could apply to people who were not employees of the bread manufacturer by deeming them to be employees of the bread manufacturer.

Granting leave to appeal, the Full Bench determined that the appeal turned upon the ordinary meaning of the word "or" in s5(1) of the Act. Quality Bakers submitted that s5(1) makes a clear distinction between employees and deemed employees: the use of the disjunctive "or" denoted true alternatives with no overlap. Their Honours held that the use of the word "or" in s5(1) allowed for inclusion of the other, as in this case where the first alternative is extended by the second, eg, "this university accepts wealthy or intelligent students."

The Full Bench confirmed the findings at first instance that the clear purpose of the deemed employee provisions in the Act was to prevent bread manufacturers from avoiding responsibilities to workers involved in the delivery of bread as employees by means of creating contracts or other arrangements. Their Honours found that the union's interpretation conformed to the ordinary meaning of the text and promoted the purpose of the provision. Leave to appeal was granted and the appeal was dismissed.

**WorkCover Authority of New South Wales (Inspector Mansell) v Josef [2004] NSWIRComm 323**

The Crown appealed against the inadequacy of the sentence imposed at first instance in relation to charges arising out of a gas explosion at Kogarah railway station on 4 December 1995. The trial judge imposed a \$45,000 fine against Robert Josef as penalty for the charges laid. The Full Bench held that his Honour erroneously and inadequately determined the final penalty, given that the offences were categorised as "of the most extreme order". In redetermining penalty, the Full Bench noted its duty to exercise restraint and to take into account the principle of double jeopardy. The Court also restated the totality principle. In upholding the appeal, a recalculated fine totalling \$70,000 was imposed. No order was made as to costs.

**Orange Community Accommodation Service Incorporated and Roddenby [2004] NSWIRComm 333**

The appellant sought to overturn a costs decision at first instance. The Full Bench affirmed the principles relating to costs established in *Bankstown City Council v Paris* (1999) 93 IR 209 and *Four Sons Pty Limited v Sakchai Limsiripothong (No 2)* (2000) 100 IR 400. Having been satisfied that the issues in this appeal raised important matters for the disposal of costs applications in unfair dismissal proceedings, the Full Bench granted leave to appeal. The Full Bench found two errors in the Commissioner's decision at first instance. First, the Commissioner's focus on the initial offer of the appellant did not pay sufficient regard for the later offers. The second error was the Commissioner's evaluation of whether the party had unreasonably failed to agree to a settlement of a claim by reference to the extent of costs expended by the other party. The Full Bench held that the Commissioner had not applied the relevant test under s181(2)(c) of the Act. Given these errors, the appeal was upheld and the parties were ordered to pay their own costs.

**Veta Limited v Evans [2004] NSWIRComm 336**

In these proceedings, the Full Bench was asked to determine whether the trial judge erred in the manner in which separate yet related applications were procedurally dealt with. The respondents filed applications in the Court Session under s 106 of the Act seeking variation or avoidance of their employment contracts. Subsequent to the commencement of those proceedings, the appellants commenced an action by way of summons invoking the original jurisdiction of the High Court. The summons sought referral of certain questions to the Full Court of the High Court.

In the High Court proceedings, *McHugh J* ordered that the further actions of the summons be remitted to the Commission in Court Session, and that the action proceed in the Commission in Court Session as if the steps already taken in the High Court had been taken in the Court Session. The current proceedings arose out of a notice of motion filed by the respondents which sought to have the remitted proceedings joined to the original s 106 claims. At first instance, the trial judge decided that pursuant to *Nagle (t/as WD and JL Nagle and Sons) v Tilburg* (1993) 51 IR 8, the remitted proceedings should be joined to the principal proceedings, in the sense that they be heard together. In opposing the motion, the appellants argued that joining the remitted proceedings would lead to a conflation of arbitral and judicial powers. Her Honour disagreed, referring to the principle in *Taudevin v Egis Consulting Australia Pty Limited (No 1)* (2001) 131 IR 124, and considering the nature of the power exercised by the Commission in Court Session under s 106 of the Act.

While the Full Bench noted the usual reluctance to grant leave to appeal interlocutory procedural motions, leave to appeal was nevertheless granted as this matter was the first occasion on which the Court was asked to consider its procedures in respect of a matter remitted to it by the High Court.

There were two essential issues for determination: first, whether the Court had jurisdiction to hear and determine judicial and non-judicial proceedings in the same set of proceedings; and second, whether her Honour's exercise of discretion miscarried.

In considering the first issue, the Full Bench considered the judgment in *Taudevin*; specifically the principle that there was no legal or constitutional impediment to this Court, as with other New South Wales courts, exercising non-judicial power when also exercising federal judicial power. The Full Bench found no reason to reconsider the correctness of *Taudevin* in the present appeal. The Court also noted that the High Court decisions in *Fardon v Attorney General for the State of Queensland* (2004) 210 ALR 50 and *Baker v The Queen* (2004) 210 ALR 1 confirmed the conclusions in *Taudevin* as to the power of the Commission in Court Session to hear matters of a judicial and non-judicial nature together in appropriate circumstances. The Court also noted that the decisions in *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 and *R v The Federal Court of Bankruptcy, ex parte Lowenstein* (1938) 59 CLR 556 were not relevant to the disposition of this appeal.

In determining the second issue, the Full Bench considered the appellants' submission that there existed a right under rule 82(1)(a). The Court found no basis for such a right, but it did note that rule 82 does require the Court, if the issue is raised, to exercise its procedural discretion as to the way in which the jurisdictional issue is to be dealt with in terms of the overall proceedings. The Full Bench then observed that the jurisprudence as to the proper case management of s 106 proceedings in which jurisdictional questions are raised has been the subject of detailed consideration within this jurisdiction. And it was within the context of proper case management that the Court had to determine whether the discretion exercised by the trial judge was reasonably open to her. The Full Bench held that it was, also noting that the trial judge's decision was correct in the sense that the Full Bench would have reached the same conclusion. Consequently, the appeal was dismissed.

#### **McColl v John Watson Building Services Pty Ltd and Dowdon Contracting Pty Ltd [2004] NSWIRComm 353**

These proceedings concerned an appeal by the appellant against the inadequacy of the fines imposed against each respondent. The fines imposed at first instance took account of the relevant factual as well as financial circumstances of each respondent. The breach of the first defendant was classified "very serious" by the trial judge, the breach of the second less so. Her Honour also noted the scant detail contained in the financial information provided by the first defendant, as well as some apparent inconsistencies in the second defendant's information. Nevertheless, pursuant to s 6 of the *Fines Act* 1996, the trial judge imposed "notional penalties" on both defendants without identifying the factors that led to the imposition of such penalties. The Full Bench held that the description, "notional penalty", was intended not to refer to the imposition of nominal or token penalties, but rather to indicate the initial penalty against which the relevant discounts were to be applied. The Full Bench further held that the penalties imposed were manifestly inadequate for several reasons, principally the trial judge's incorrect application of s 6 of the *Fines Act*.

The Full Bench adopted the principles set out in *Inspector Mansell v Eleven Lighting Pty Ltd* [2002] NSWIRComm 339, particularly the principle that the onus rests on the defendant seeking to receive the benefit of the discretion under s6 of the *Fines Act* to provide adequate financial information if it wishes to receive that benefit. The Court noted that in this case, the defendants' failure to provide adequate information, as evinced by the trial judge's description of the relevant information as scant, resulted in circumstances where the appropriate application of s 6 could not be undertaken.

The Full Bench then considered the discretion under s 6 of the *Fines Act* within the context of a Crown appeal, noting the appellate court's obligation to act with restraint, given the principle of double jeopardy, and the Court's overriding discretion not to intervene. The Full Bench also adopted the principle in *The Queen v Tait* (1979) 46 FLR 386 of a prosecutor's duty to assist a court in avoiding appealable error, finding that the proper application of s 6 of the *Fines Act* would come within the *Tait* principle. The Court noted the appellant's failure in oral submissions to question the nature and extent of the respondents' submissions in relation to their financial circumstances. The Court consequently held that the appellant failed in its duty to assist the trial judge in assessing the financial material upon which the respondents sought to rely in relation to a s 6 application. Such a failure was held not only to contribute to an appealable error, but also to deprive the respondents of a fair opportunity of meeting a case which the appellant sought to make out against them on appeal.

Whilst this was held, on a prima facie basis, to deny the appeal, the Court held that it had to be viewed within the context of the trial judge's failure to indicate the manner in which each penalty was determined. On balance, the Court held it appropriate to approach the matter on the basis that the penalty was manifestly inadequate. The Court then fixed appropriate penalties, taking into account firstly the failure of the appellant to deal adequately with, and assist the trial judge in, the application of s 6 of the *Fines Act*; and also the leniency which needs to be afforded to the respondents by reason of the fact that they have been compelled to participate in more than one set of proceedings to determine the level of penalty. The appeal was therefore upheld, and increased fines were imposed.

#### **New South Wales Technical and Further Education Commission v Kerrison [2004] NSWIRComm 369**

Ms Kerrison was employed by TAFE as a teacher of business studies and other subjects at the North Coast Institute of TAFE's campus in Kempsey. In the course of her employment, Ms Kerrison made complaints related to various workplace matters which were the subject of numerous meetings, discussions, investigations documents and reports - a process which extended over many years and which the Full Bench acknowledged, impacted on her health. Subsequently, Ms Kerrison underwent a health examination which declared that she suffered from a "personality disorder" and that "she was in consequence unable to discharge the duties of her office." Consequently, her employment was terminated.

At first instance, the trial judge determined that Ms Kerrison had not been medically retired from her employment with the New South Wales Technical and Further Education Commission in accordance with the provisions of the *Technical and Further Education Commission Act 1990*.

On appeal, the Full Bench found the case to be of sufficient importance to grant leave to appeal as a refusal of leave to appeal could lead to a miscarriage of justice. Further, the existence of the expressions "the [TAFE Commission] may cause the member to be retired" in at least nine statutes which regulating the public sector gave the case significant importance.

As to the proper interpretation to be given to s 20 of the Act, the Full Bench agreed with the submission by the TAFE that the words "may cause" of s 20 of the Act could be interpreted to mean "to bring about." Applying this interpretation to the circumstances of the case, the Full Bench held that Ms Kerrison's employment was validly terminated. It was held that the trial judge fell into error by imposing a condition on the making of a decision under s 20 of the Act which was far greater than what the Act required or contemplated. Accordingly, the trial judge's finding that Ms Kerrison was not properly retired arose from a misconstruction of s 20 of the statute.

### **Keycorp Limited v Thomes [2004] NSWIRComm 376**

These proceedings were an appeal against the whole of the judgment at first instance. The respondent was the chief executive officer of the appellant, a company engaged in the design, manufacture, installation and service of machines associated with the electronic transfer of funds. The respondent commenced proceedings under s 106 of the *Industrial Relations Act 1996* alleging that he gave up secure and well remunerated employment to accept employment on the basis of misrepresentations that were deceptive and misleading as to the appellant's products, the state of its business, the prospects for expansion, the strength of its share price, the future role of the managing director, the operation of arrangements for incentive bonuses and the trustworthiness of the appellant and certain directors of Keycorp. Such was the state of the business, it was alleged, the respondent spent his time attempting to ensure its survival and not its expansion and consequently his capacity to earn his expected income was unfairly affected. This, it was contended, gave rise to unfairness within the meaning of s 106 of the Act.

While the respondent opposed the grant of leave, arguing that the case turned on its own set of facts, the Full Bench found otherwise. It was held that there were a number of issues raised by the appeal which had wider implications for the Commission's jurisprudence relating to unfair contracts in the context of employment. The Court also held as a preliminary point that the trial judge erred in relation to the period over which severance payment was calculated, and the basis on which the severance payment was calculated. Nevertheless, the Court noted that the findings of the trial judge had to stand unless it could be shown that the trial judge had palpably misused his advantage, or acted on evidence which was inconsistent with facts incontrovertibly established by the evidence, or which was glaringly improbable.

There were essentially six grounds of appeal. First, that his Honour overstepped the line between advocate and judge. The Full Bench examined the transcript and the relevant authorities and found that whilst his Honour's interventions were excessive and inappropriate at times, there was no sustainable basis upon which to conclude that his Honour conveyed an appearance of bias or partiality against the appellant.

The second ground of appeal was his Honour's finding that pre-contractual misrepresentations by the appellant rendered the contract unfair. In finding that his Honour did not err in this respect, the Full Bench first examined the weight attributable to the lack of complaint by the respondent about pre-contractual misrepresentations. Second, the Court examined whether the respondent entered into the contract with his "eyes open". The Court distinguished the present case from the situation in *Westfield Holdings v Adams* (2001) 114 IR 241 as in this case, the respondent had made inquiries about the state of the company and about the terms of his employment. The evidence indicated that the respondent sought information about the company's financial state and the terms of his employment from the respondent, its agent and public sources, and that there was significant information withheld from the respondent which would have been relevant to him making his decision to leave highly secure employment. The Court also found that his Honour did not err in finding that the respondent was induced to leave his employment by further misrepresentations regarding the effectiveness of the appellant's products or by misleading statements concerning the probability of a large increase in the appellant's share price. The Court also found that it was open on the evidence for the trial judge to find misrepresentation as to agreement in advance of performance parameters, and to find that it was represented to the respondent that the cash value of the shares component was \$200,000.

The third ground of appeal was his Honour's finding that the appellant had breached the terms of the contract with the respondent, and that that breach constituted a repudiation. The Court first

considered whether there was an agreement reached as to the respondent's performance parameters. After considering the evidence and his Honour's credit findings, the Full Bench held that in the circumstances, it was open to the trial judge to find that the respondent had not agreed to performance parameters. After consideration of the evidence and relevant authorities, the Full Bench also held that it was open to his Honour to find that the appellant had repudiated the contract by failing to agree on performance parameters and by failing to review in writing the respondent's performance criteria at the end of his first year of service.

The issue in the fourth ground of appeal was whether his Honour's variation of the contract in relation to incentive or bonus payments was, as the appellant contended, at odds with the findings of unfairness and secondly, not one sought by the respondent. As to the first contention, the Court held that the order fell within the scope of his Honour's discretion to vary the contract in a way that was connected to the unfairness. In relation to the second contention, the trial judge stated he was entitled to make "robust findings" based on the decision in *Armory v Delamirie* (1722) 1 Stra 505, 93 ER 664. The Full Bench held that "whether or not a trial judge takes a 'robust view' about the remedy that should be accorded to an applicant is neither here nor there provided that it does not lead to an outcome that inappropriately or unjustifiably travels beyond providing a remedy for the unfairness found." The Court restated the principle in relation to a money order under s 106 as being that which is just in the circumstances of the case. After restating that there was no error in the trial judge's findings, the Full Bench held that his Honour's variation of the contract was also without error.

The Full Bench then considered whether his Honour erred in determining that the respondent's bonus "ought to have been" the maximum possible by considering what was just in the circumstances of the case. The Court considered the complexity of the evidence before the trial judge and noted that as the goal of the company was survival - in contradistinction to the appellant's pre-contractual misrepresentations - it could not be said that his Honour erred in making orders in respect of the bonus for the year 2000. In relation to the bonus payment for 2001, the Full Bench considered various factors before the trial judge, namely containment of costs, profitability and the objective of securing a major strategic alliance. The Court noted that the trial judge resolved the amount of the 2001 bonus in circumstances where the appellant had made the issue of performance parameters problematic by its failure to meet its legal obligations. Consequently, the robust view taken by the trial judge could not be held as not being just in the circumstances of the case. There was, therefore, no error with the trial judge's orders in respect of the respondent's bonus.

In relation to severance pay, the appellant submitted that there was no foundation for linking pre-contractual representations to the fairness or otherwise of the severance pay provision. The Full Bench held that unlike the position regarding remuneration, the respondent did not, in fact, apply his mind to the issues of notice and severance in negotiating the terms of his contract. However, the Court accepted the respondent's submission that the misrepresentations were not the only source of unfairness that was relevant to the variation of the contract in respect of notice/severance payments. The Court then turned to whether the trial judge was correct in ordering an 18 months severance pay provision. It was held that his Honour erred by placing too much weight on the period of the respondent's unemployment. In determining what was just in the circumstances of the case, the Full Bench examined the relevant subjective factors such as age, degree of job mobility, and the expectation regarding the period of time it may take the person to find alternative employment. The severance pay provision was reduced to ten months. The Court nevertheless considered it open to his Honour to conclude that the severance pay for the first six months (which was to be regarded as payment in lieu of notice) should include the full value of the respondent's prospective bonus.

The Court also considered whether the trial judge erred in finding that the respondent should receive bonus entitlement payments for the balance of the 18 month period (12 months) calculated on the basis of the bonus payments actually made to the respondent's successor. Given the revised severance pay period, the Court calculated the rate of pay over four rather than 12 months. The Full Bench held that in the circumstances, his Honour erred in inferring that the respondent would have achieved the 60 per cent component of his successor's bonus related to financial targets. There was no proper foundation for such an inference to be drawn, especially in circumstances where the respondent's successor only achieved 22.5 per cent of the 60 per cent component. For the relevant four month period, the Court awarded the respondent one third of his annual base salary and 62.5 per cent of one third of the annual bonus. Having granted leave to appeal, the appeal was upheld in part.

## APPENDIX 3

### TIME STANDARDS

#### Industrial Relations Commission

##### Applications for leave to appeal & appeal

Time from commencement to finalisation	Standard for 2004
Within 6 months	50%
Within 12 months	90%
Within 18 months	100%

##### Award Applications

Time from commencement to finalisation	Standard for 2004
Within 2 months	50%
Within 3 months	70%
Within 6 months	80%
Within 12 months	100%

##### Enterprise Agreements

Time from commencement to finalisation	Standard for 2004
Within 1 month	75%
Within 2 months	85%
Within 3 months	100%

##### Industrial Disputes

Time to first listing	Standard for 2004
Within 72 hours	50%
Within 5 days	70%
Within 10 days	100%

##### Applications relating to Unfair Dismissal

Time from commencement to finalisation	Standard for 2004
Within 2 months	50%
Within 3 months	70%
Within 6 months	90%
Within 9 months	100%

## TIME STANDARDS

### Commission in Court Session

#### Applications for leave to appeal and appeal

Time from commencement to finalisation	Standard for 2004
Within 9 months	50%
Within 12 months	90%
Within 18 months	100%

#### Prosecutions under OHS legislation

Time from commencement to finalisation	Standard for 2004
Within 9 months	50%
Within 12 months	75%
Within 18 months	90%
Within 24 months	100%*

#### Applications for relief from Harsh/Unjust Contracts

Time from commencement to finalisation	Standard for 2004
Within 6 months	30%
Within 12 months	60%
Within 18 months	80%
Within 24 months	100%*

\*The Commission has set a target of 100% of finalisations within 24 months, however, recognises that this target may take some time to achieve given the current state of the Commission's lists in these areas and its presently available judicial resources.

## APPENDIX 4

### COMMITTEES

#### Library Committee

The Hon. Justice Wright, President  
The Hon. Justice Walton, Vice President  
The Hon. Justice Kavanagh (Chair)  
The Hon. Justice Staunton  
Commissioner Alastair Macdonald  
Mick Grimson, Industrial Registrar  
Yvonne Brown, Director, Library Services, Attorney General's Department  
Jack Hourigan, Manager, NSW Law Libraries  
Juliet Dennison, Librarian, IRC of NSW

#### Education Committee

The Hon. Justice Wright, President  
The Hon. Justice Walton, Vice President  
The Hon. Justice Schmidt (Chair)  
Commissioner Connor  
Commissioner McLeay  
Mick Grimson, Industrial Registrar  
Ruth Windeler, Judicial Commission of NSW  
Charlotte Dennison, Judicial Commission of NSW

#### Section 106 Committee

The Hon. Justice Walton, Vice President (Chair)  
The Hon. Justice Marks  
The Hon. Justice Schmidt  
The Hon. Justice Kavanagh  
The Hon. Justice Haylen

#### Award Review Committee

The Hon. Justice Walton, Vice President (Chair)  
The Hon. Deputy President Harrison  
Deputy President Sams  
Deputy President Grayson  
Mick Grimson, Industrial Registrar  
Patricia Imbert, Co-ordinator, Electronic Services  
Tome Simonovski, Information Manager

#### Building Committee

The Hon. Justice Walton, Vice President (Chair)  
The Hon. Justice Kavanagh  
Mick Grimson, Industrial Registrar  
Bill Brown, Director, Asset Management Services, Attorney General's Department  
Peter Broderick, Senior Development Architect, Asset Management Services, Attorney General's Department  
[This committee co-opts other members as circumstances require]

## APPENDIX 5

### LEGISLATIVE AMENDMENTS

#### ***Workers' Compensation and Other Legislation Amendment Act 2004, Act No 111 of 2004***

This Act commenced upon assent on 22 February 2005, and contained six schedules. Schedule 1 amends the *Occupational Health and Safety Act 2000* to ensure that where WorkCover has not been notified of a serious incident, the time limit in which the authority can bring a prosecution is extended by six months. Schedule 2 gives effect to miscellaneous amendments to the *Workers Compensation Act 1987*, including to permit WorkCover to issue stop-work orders to uninsured employers and to increase and extend the payment of funeral expenses for work-related deaths. Schedule 3 contains amendments to the *Workplace Injury Management and Workers Compensation Act 1998* to provide for the appointment of acting deputy presidents of the Workers Compensation Commission of New South Wales, to make procedural changes to the method of appointment of approved medical specialists, to permit the Workers Compensation and Workplace Occupational Health and Safety Council of New South Wales to establish committees, and to ensure that WorkCover may issue guidelines that specify the qualifications required by a medical practitioner to be permitted to assess the degree of permanent impairment of an injured worker. Consequential amendments were also made to the *Statutory and Other Offices Remuneration Act 1975* and the *Workers Compensation (Dust Diseases) Act 1942*.

#### ***Workers Compensation Legislation Amendment Act 2004, Act No 56 of 2004***

This Act commenced upon assent on 31 August 2004, and contained four schedules. Schedule 1 gives effect to miscellaneous amendments to the *Workers Compensation Act 1987* to reverse an aspect of the decision of the Court of Appeal in *Orica Ltd v CGU Insurance Ltd*, reported in [2003] NSWCA 331. The amendment ensures that the relevant employer is indemnified under statutory workers compensation policies for common law claims despite damage being suffered by the relevant worker many years after the initial injury was sustained. The amendment also ensures that WorkCover can make guidelines regarding payment for both gratuitous and non-gratuitous domestic assistance. Schedule 2 contains amendments to the *Workplace Injury Management and Workers Compensation Act 1998* to provide presidential members of the Workers Compensation Commission with an additional power on appeal, and establish the Workers Compensation Insurance Fund Investment Board, which will determine the investment policies of the new Workers Compensation Insurance Fund. The amendment to the *Sporting Injuries Insurance Act 1978* contained within Schedule 3 provides that if a person unreasonably refuses medical treatment, the medical panel or referee may assess that person's permanent injury on the assumption that the person's injury was improved by such treatment.

#### ***Mine Health and Safety Act 2004, Act No 74 of 2004***

This Act commenced upon assent on 19 October 2004. The basic purpose of the Act is to protect those employed in an industry with an unacceptably high rate of fatalities and injuries. The Act repeals and replaces the *Mines Inspection Act 1901*. Unlike the last scheme, the new Act will not constitute associated legislation of the *Occupational Health and Safety Act 2000*, but should be read in conjunction with the *Occupational Health and Safety Act*. However, the relationship between the *Occupational Health and Safety Act* and the mining-specific legislation will be similar to the current arrangement in that the *Occupational Health and Safety Act* will continue to prevail in the case of any inconsistency. This arrangement makes it clear that employers have fundamental duties towards employees and that the employees, in turn, have fundamental rights relating to their health, safety and welfare in employment.

***Motor Accidents Legislation Amendment Act 2004, Act No 77 of 2004***

This Act commenced upon assent on 19 October 2004. The legislation is intended to remedy an anomaly in workers compensation entitlements that emerged as a consequence of the decision of the New South Wales Supreme Court in *Pender v Powercoal Pty Ltd*. That case dealt with a motor vehicle accident which took place in an underground coal mine and involved no vehicle required to have (compulsory) third party insurance; nor did the accident occur on a public road. The judge considered the interaction of the workers compensation and motor accidents legislative schemes in respect of a work injury damages claim by a coalminer. *Pender* redefined the scope for the type of motorised equipment, and consequently the accidents, that now come within the *Motor Accidents Compensation Act 1999*, with the consequence that a motor accident can now involve unique pieces of equipment used on mining sites.

The amendments are restricted to the coalmining industry, and ensure that there is adequate compensation for categories of employees and motor accident victims. The amendments also ensure that the relevant premium that is paid by an employer in a workers compensation context, or a motor vehicle owner in a motor vehicle accident context, is the premium that is used to compensate the relevant victim.

***Occupational Health and Safety Amendment (Prosecutions) Act 2004, Act No 83 of 2003***

This Act commenced upon assent on 3 December 2003 and corrected a technical defect that affected certain prosecutions in relation to the deaths of four miners on 14 November 1996 at the Gretley colliery.

## APPENDIX 6

### AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

#### ***Coal Mines Amendment Regulation 2003***

The *Coal Mines Amendment Regulation 2003* commenced on 4 October 2003 although Schedule 2 [3] and [4] were to commence on the day that Schedule 1 [2] to the *Mining Legislation Amendment (Health and Safety) Act 2002* was to commence.

The principal purposes of the Regulation were to amend the *Coal Mines (General) Regulation 1999* to clarify existing provisions dealing with mine safety management plans and safety notices for electrical switchgear; amend the *Coal Mines (Investigation) Regulation 1999* to apply the Regulation to declared plants, to insert an extended definition of the term *inspector* and to make other minor amendments; to amend the *Coal Mines (Open Cut) Regulation 1999* to ensure that the requirement for flexible cables to be referenced to earth applies only to mobile apparatus; to amend the *Coal Mines (Underground) Regulation 1999* to restrict the employment of minors underground at a mine in accordance with ILO Convention No 138 and to clarify the intent of certain other provisions.

#### ***Building and Construction Industry Long Service Payments Amendment Regulation 2004***

This Regulation was made under the *Building and Construction Industry Long Service Payments Act 1986* and published in Gazette no 75 of 23 April 2004. The object of the Regulation is to amend the *Building and Construction Industry Long Service Payments Regulation 2000* in order to update references to awards; and remove the requirement to pay the long service levy in respect of the erection of buildings, commenced after 1 May 2004, that are not subject to consent requirements under the *Environmental Planning and Assessment Act 1979* or subject to consent requirements under any other Act or regulation.

#### ***Child Protection (Prohibited Employment) Regulation 2004***

The Regulation was made under the *Child Protection (Prohibited Employment) Act 1998* and was published in Gazette no 83 of 14 May 2004. The object of the Regulation is to make it clear that the provision of foster care or out-of-home care constitutes employment for the purposes of the Act.

#### ***Children and Young Persons (Care and Protection - Child Employment) (Savings and Transitional) Regulation 2004***

The Regulation was made under the *Child Protection (Prohibited Employment) Act 1998*, was published in Gazette no 16 of 23 January 2004 and commenced for a period of 12 months on 1 February 2004.

The effect of the Regulation is to prescribe the matters necessary to complete the legislative scheme contained in Chapter 13 (Children's employment) of the *Children and Young Persons (Care and Protection) Act 1998*. In particular, the Regulation continues the effect of the existing Code of Practice governing children's employment. The provisions of Chapter 13 of the 1998 Act are substantially the same as the provisions of Part 4 (Employment of children) of the *Children (Care and Protection) Act 1987* which they replace.

### ***Commission for Children and Young People Amendment (Employment Screening) Regulation 2004***

The Regulation was made under the *Commission for Children and Young People Act 1998*, was published in Gazette no 75 of 23 April 2004 and commenced on 23 April 2004.

The purpose of the Regulation is to remove the references and provisions to the original Act which have since been made redundant by the *Child Protection Legislation Amendment Act 2003*. The original Act, the *Commission for Children and Young People Act 1998* provided for employment screening for child-related employment administered by the Commission for Children and Young People and other agencies.

### ***Legal Profession Amendment Regulation 2004***

This Regulation was made under the *Legal Profession Act 1987*, published in Gazette no 69 of 2 April 2004 and commenced on 2 April 2004.

In addition to a number of amendments as to costs (amongst other things), the Regulation was intended to change the mandatory continuing legal education requirements relating to equal employment opportunity, discrimination and occupational health and safety.

### ***Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2004***

This Regulation was made under the *Occupational Health and Safety Act 2000*, published in Gazette no 58 of 19 March 2004 and commenced on 29 March 2004.

The Regulation amended the *Occupational Health and Safety Regulation 2001* so as to make provision with respect to OHS induction training and, in particular, to enable WorkCover to issue OHS induction training certificates and require persons carrying out construction work to be in possession of such a certificate; and to limit to 5 years the (currently unlimited) duration of a certificate of competency issued under Part 9.1 or 9.2 of that Regulation; and to increase the penalties that may be imposed with respect to false assessments of a person's competency to carry out certain work; and to omit provisions that assign specific "short descriptions" to offences with respect to occupational health and safety.

### ***Occupational Health and Safety Amendment (Electrical Work) Regulation 2004***

This Regulation was made under the *Occupational Health and Safety Act 2000* and was published in Gazette no 135 of 20 August 2004.

The object of the Regulation is to amend the *Occupational Health and Safety Regulation 2001* to clarify and strengthen safety requirements for undertaking electrical work, or conducting tests, on electrical installations. In particular, the Regulation has: updated the definition of ***electrical installation*** to reflect changes in AS/NZS 3000:2000, *Electrical installations* (the Australian/New Zealand Wiring Rules); and made it clear that where work is being done on an electrical installation, only the part of the installation that is being worked on must be isolated from the electricity supply, rather than the whole installation; and has expanded and clarified the precautions that must be observed before work can be done on parts of an electrical installation that are energised; and has also expanded the precautions that must be observed when conducting tests on an electrical installation; and updated a reference to a repealed Regulation.

### ***Occupational Health and Safety Amendment (Mines) Regulation 2004***

This Regulation was made under the *Occupational Health and Safety Act 2000*, was published in Gazette no 83 of 14 May 2004 and commenced on 17 May 2004, subject to certain exemptions.

The object of the Regulation is to amend the *Occupational Health and Safety Regulation 2001* in order to implement hazard-specific International Labour Organisation Conventions in relation to mines by applying certain provisions of the Regulation to mines; to change references in certain provisions of the *Occupational Health and Safety Act 2000* to WorkCover (in so far as those provisions apply to a mine) to references to the Department of Mineral Resources, the Director-General of that Department, officers of that Department and the Minister for Mineral Resources; and to make a number of miscellaneous amendments.

#### ***Occupational Health and Safety Amendment (Transitional) Regulation 2004***

This Regulation was made under the *Occupational Health and Safety Act 2000* and was published in Gazette no 200 of 17 December 2004.

The purpose of the Regulation is to amend the *Occupational Health and Safety Regulation 2001* to confirm that WorkCover may suspend or cancel the accreditation of a person who is accredited to provide OHS induction training under clause 217A(3) in respect of matters that occurred before, on or after the commencement of that provision.

#### ***Occupational Health and Safety Amendment (Work Experience Accreditation) Regulation 2004***

The Regulation was made under the *Occupational Health and Safety Act 2000* and was published in Gazette no 91 of 28 May 2004.

The purpose of the Regulation is to amend the *Occupational Health and Safety Regulation 2001* so that employees and self-employed people who have been working in the construction industry since 1 April 1999 without a continuous break of 2 years or more (and who also had work experience in that industry before that date) will be treated as having undergone OHS induction training and will be able, until 30 September 2004, to apply to WorkCover for an OHS induction training certificate that will be issued on the basis of their work experience.

#### ***Industrial Relations (General) Amendment (Subcontractor's Statement) Regulation 2003***

The *Industrial Relations (General) Amendment (Subcontractor's Statement) Regulation 2003* commenced on 17 October 2003. Under section 127 of the *Industrial Relations Act*, principal contractors are liable for unpaid remuneration that is payable in connection with work done by employees of their subcontractors unless the subcontractors supply written statements to the effect that the remuneration has been paid. The amending Act inserted s 43A into the *Industrial Relations (General) Regulation 2001* to clarify the form of the written statements required.

#### ***Occupational Health and Safety Regulation 2001***

There were four amendments made to the *Occupational Health and Safety Regulation 2001* that commenced in 2003. The *Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2003* amended the Regulation so as to allow the WorkCover Authority to accredit a person as an assessor, refuse an application for accreditation as an assessor and to require a person who holds a certificate of competency to have his or her competency assessed. The *Occupational Health and Safety Amendment (Chrysotile Asbestos) Regulation 2003* amended the status of the use of chrysotile (otherwise known as white asbestos) from a restricted to a prohibited substance. The *Occupational Health and Safety Amendment (Incident Notification) Regulation 2003* made various amendments as to the procedure for notification of workplace incidents and workplace injuries as well as making minor amendments to the list of workplace incidents that must be reported to WorkCover. The *Occupational Health and Safety Amendment (Sentencing Guidelines) Regulation 2003* commenced on 28 February 2003. It inserted transitional provision making it clear that offences under the former *Occupational Health and Safety Act 1983* may be taken into account by the Full Bench of the Industrial Relations Commission in Court Session in issuing sentencing guidelines for offences under the *Occupational Health and Safety Act 2000*.

## APPENDIX 7

### MATTERS FILED IN INDUSTRIAL RELATIONS COMMISSION (OTHER THAN IN COURT SESSION)

Matters filed during period 1 January 2004 to 31 December 2004 and matters completed and continuing as at 31 December 2004 which were filed under the *Industrial Relations Act 1996*.

#### INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES (other than in Court Session)

Nature of Application	Filed 1.1.2004 – 31.12.2004	Completed 1.1.2004 – 31.12.2004	Continuing as at 31.12.04 (including previous years)
<b>APPEALS</b>	<b>46</b>	<b>47</b>	<b>21</b>
Appeal - from Industrial Registrar	1	1	0
Appeal - from an Award matter	1	2	0
Appeal - from a Child Protection matter	0	1	0
Appeal - from a dispute matter	3	7	2
Appeal - from an Enterprise Agreement matter	0	0	0
Appeal - from an unfair dismissal matter	36	29	16
Appeal - other	5	7	3
<b>AWARDS</b>	<b>883</b>	<b>954</b>	<b>188</b>
Application create new Award	134	113	62
Application vary an Award	296	279	85
Application vary – nominal term	5	4	1
Application – State Wage Case	1	1	0
Rescission of Award	6	4	3
Review of Award	431	541	33
Application for exemption (s.18)	8	12	2
Award - other	2	0	2
<b>DISPUTES</b>	<b>1122</b>	<b>1221</b>	<b>561</b>
s130 of the Act	1094	1171	549
s130, s380 of the Act	7	7	4
s332 contract determination	20	35	8
s332, s380 of the Act	1	5	0
Other	0	3	0
<b>ENTERPRISE AGREEMENTS</b>	<b>336</b>	<b>349</b>	<b>40</b>
Approval (Employees and Union)	43	55	1
Approval (Employees)	23	22	6
Principles for approval of Enterprise Agreements	0	0	0
Approval (Union)	270	272	33
<b>UNFAIR DISMISSALS</b>	<b>4222</b>	<b>4589</b>	<b>1127</b>
Application (by individual only)	1817	1922	430
Application (representative)	1920	2117	515
Application (organisation representative)	472	528	177
Application (organisation – multiple)	13	22	5
<b>OTHER</b>	<b>163</b>	<b>190</b>	<b>54</b>
Contract Agreements	6	8	0
Contract Determinations	10	8	8
Contract of Carriage (claim for compensation)	1	2	9
Application under Child Protection (Prohibited Employment) Act	0	0	2
Application for Demarcation Order	2	0	4
Application under <i>Employment Protection Act 1992</i>	2	2	1
Registration pursuant to Clothing Trades Awards	72	73	1
Application extend duration of Industrial Committee	1	1	0
Application for reinstatement injured employee (by individual)	9	18	5
Application for reinstatement injured employee (by organisation)	8	12	4
Application for Review of Order under s181D <i>Police Service Act</i>	6	6	5
Application for Rescission of Order under s173 <i>Police Service Act</i>	3	3	1
Application for Relief from Victimisation s213 of the Act	33	35	9
Miscellaneous (not categorised)	10	22	5
<b>SUB-TOTAL</b>	<b>6772</b>	<b>7350</b>	<b>1991</b>

## APPENDIX 8

### MATTERS FILED IN INDUSTRIAL RELATIONS COMMISSION (IN COURT SESSION)

Matters filed during period 1 January 2004 to 31 December 2004 and matters completed and continuing as at 31 December 2004 which were filed under the *Industrial Relations Act* 1996.

#### INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES (in Court Session)

Nature of Application	Filed 1.1.2004 – 31.12.2004	Completed 1.1.2004 – 31.12.2004	Continuing as at 31.12.04 (including previous years)
<b>APPEALS</b>	<b>73</b>	<b>103</b>	<b>66</b>
Appeal from Local Court (Industrial Magistrate)	33	34	19
Appeal – superannuation	8	10	10
Appeal – OHS prosecution	15	16	19
Appeal – against decision of VETAB	1	2	0
Appeal – s106 matter	11	38	13
Appeal – other	5	3	5
<b>CONTRAVENTION</b>	<b>10</b>	<b>0</b>	<b>11</b>
Contravention of Dispute Order s139 of the Act	10	0	11
<b>HARSH CONTRACTS</b>	<b>550</b>	<b>713</b>	<b>847</b>
Application under s106 of the Act	550	713	847
<b>PROSECUTIONS</b>	<b>186</b>	<b>185</b>	<b>342</b>
Offences under <i>Industrial Relations Act</i> or <i>Regulations</i> (s.397)	0	0	1
Prosecution – s8(1) <i>OHS Act</i> 2000	52	19	77
Prosecution – s8(2) <i>OHS Act</i> 2000	48	9	55
Prosecution – s9 <i>OHS Act</i> 2000	5	3	6
Prosecution – s10(1) <i>OHS Act</i> 2000	10	4	10
Prosecution – s10(2) <i>OHS Act</i> 2000	3	1	6
Prosecution – s11 <i>OHS Act</i> 2000	6	0	6
Prosecution – s13 <i>OHS Act</i> 2000	1	0	2
Prosecution – s20(1) <i>OHS Act</i> 2000	2	0	2
Prosecution – s26(1) <i>OHS Act</i> 2000	15	5	16
Prosecution – s92 <i>OHS Act</i> 2000	28	27	1
Prosecution – s94 <i>OHS Act</i> 2000	8	6	2
Prosecution – s15(1) <i>OHS Act</i> 1983	1	56	61
Prosecution – s16 <i>OHS Act</i> 1983	1	2	3
Prosecution – s16(1) <i>OHS Act</i> 1983	0	33	24
Prosecution – s16(2) <i>OHS Act</i> 1983	0	3	0
Prosecution – s17(1) <i>OHS Act</i> 1983	3	4	13
Prosecution – s18(1) <i>OHS Act</i> 1983	1	4	3
Prosecution – s18(2)(a) <i>OHS Act</i> 1983	1	1	2
Prosecution – s19(a) <i>OHS Act</i> 1983	0	0	1
Prosecution – s27(1) <i>OHS Act</i> 1983	1	2	2
Prosecution – s50(1) <i>OHS Act</i> 1983	0	6	49
<b>OTHER</b>	<b>27</b>	<b>34</b>	<b>43</b>
Declaratory jurisdiction (s154, s248)	11	14	8
Cancellation of registration industrial organisation	0	1	0
Civil Penalty for breach of industrial instrument	5	5	14
Monetary claim s357 of the Act	1	3	1
Monetary claim s365 of the Act	4	5	17
Monetary claim under <i>Long Service Leave Act</i> 1955	0	0	0
Miscellaneous (not otherwise categorised)	6	6	3
<b>SUB-TOTAL</b>	<b>846</b>	<b>1035</b>	<b>1309</b>
<b>TOTAL (IRC &amp; CICS MATTERS)</b>	<b>7618</b>	<b>8385</b>	<b>3300</b>