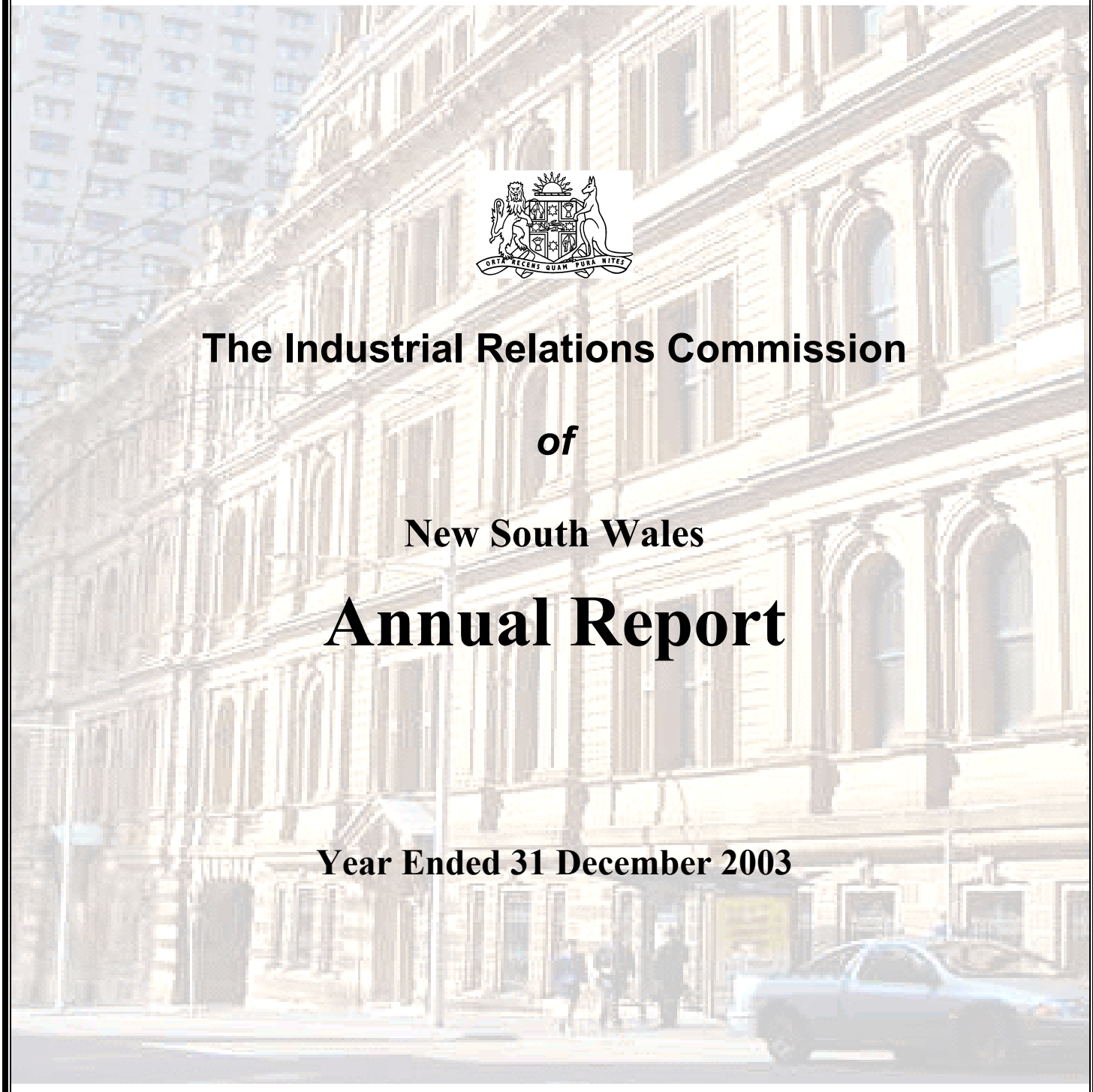

The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2003

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of

New South Wales

Annual Report

Year Ended 31 December 2003

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, Assistant Treasurer,
and Minister for the Central Coast
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 Eighth 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 2003.

Yours faithfully,

The Honourable Justice F. L. Wright
President

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The principal place of business of the Commission is 50 Phillip Street, Sydney. The Commission acknowledges that this land is part of the traditional lands of the Eora people and respects their spiritual relationship with their country. The Industrial Relations Commission of New South Wales also conducts proceedings in other locations across the State and acknowledges the traditional custodians of these regions.

INTRODUCTION

The Eighth 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 13 Commissioners. There was also one acting judicial Member and one commissioner was on pre-retirement leave.

During the year the Honourable Justice Leone Carmel Glynn retired. Her Honour's service with the Commission commenced with her appointment as a Conciliation Commissioner under the *Industrial Arbitration Act* 1940 on 16 February 1976 becoming the first woman appointed to the office of Commissioner. On 14 April 1980 her Honour was appointed as a judge of the Industrial Commission of New South Wales becoming the first woman in New South Wales, and one of the first women in Australia, to be appointed as a judge of a superior court of record.

Her Honour was known for her compassion, attention to detail and dedication to the proper performance of her office. Whilst she heard many different kinds of cases in her time on the bench, her Honour will be particularly remembered for her important work in the Pay Equity Inquiry during 1997 and 1998. Her Honour's report to the Minister set the important framework for future consideration in industrial cases dealing with differences between the rates of pay of men and women in the State of New South Wales. Her Honour retired on 8 December 2003 following 27 years of dedicated service.

On 15 September 2003 his Honour Judge James Patrick Curtis, a judge of the Compensation Court of New South Wales, received an acting commission as a Deputy President and judicial Member of the Industrial Relations Commission of New South Wales. His Honour's appointment and the experience he brought to the Commission was of invaluable assistance in a time when the Commission was facing considerable resourcing constraints. His Honour's acting appointment will continue into 2004.

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 Tony Howell and Ms Sue-Ern Tan, for their valuable assistance throughout the year, often providing research assistance at very short notice.

The Commission continues to be ably assisted by its Librarian, Ms Juliet Dennison, and the library staff. The services they provide to the Commission and practitioners are remarkable considering the severe resource constraints in place. Thanks are also due to the staff of other court and departmental libraries for the cooperation and assistance they provide to the Librarian and to the Commission.

The past year has presented the Commission with some significant challenges in relation to the initiation of a number of reforms designed to ensure that the Commission was meeting 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. I offer my special thanks to the Vice-President, the Honourable Justice Walton, who spent the latter part of 2003 as Acting President during my absence through illness. I look forward to working cooperatively and collegially with all Members and major stakeholders as we continue the reform processes throughout 2004 and beyond.

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 functional 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 including 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 Service 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 and 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 Justice Leone Glynn, appointed 14 April 1980; retired 8 December 2003;

The Honourable Mr Justice Russell John Peterson, appointed 21 May 1992;

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, 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 Acting Justice James Patrick Curtis, appointed 15 September 2003.

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;

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 Reeve Neal, appointed 2 September 1996 (pre-retirement leave in 2003);

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 was appointed as Industrial Registrar and Principal Courts Administrator of the Industrial Relations Commission from 8 April 2003. Mr Grimson had held a temporary appointment to that position from 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

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" (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 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 country sittings.

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.

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 are done 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 disputation who can often attend the proceedings and then better understand decisions or recommendations made. In these times of increasing fiscal restraint it will be necessary during 2004 to review the current arrangements to identify areas where savings may be made but without detracting from the benefits gained by clients in regional areas outside Newcastle and Wollongong by having a regular Commission presence.

There were a total of 804 (808)* sitting days in a wide range of country courts and other country locations during 2003 with two regional Members based permanently in Newcastle (the regional Member for the Newcastle-Hunter Valley region, Deputy President Harrison, and Commissioner Redman). The Commission sat there for 314 (296)* sitting days during 2003. Deputy President Harrison and Commissioner Redman 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 159 (171)* sitting days in Wollongong during 2003.

The Commission convened in 38 other regional locations in 2003 including Albury, Armidale, Ballina, Bathurst, Bowral, Coffs Harbour, Dubbo, Gosford, Goulburn, Griffith, Tamworth, Wagga Wagga and Queanbeyan.

* Numbers in brackets are figures from 2002

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.

During 2003 in response to stakeholder feedback the Commission introduced a new listing mode for metropolitan unfair dismissal matters (that is, Sydney matters). This was introduced as a pilot program commencing from 1 July 2003 and involved the Registry assuming responsibility for the allocation and listing of these matters before Members within 21 days. The underlining strategy for the pilot was that the early listing of section 84 applications would aid in their timely resolution.

To support this initiative the Acting President of the Commission issued *Practice Direction No 11* which included a defined adjournment policy and case management practices designed to ensure that these matters were dealt with expeditiously with the minimum of costs incurred.

A significant amount of work was also undertaken by registry officers to ensure there was useful information on procedural matters available to parties with the aim of facilitating each step of the process.

Significant positive feedback was received from major stakeholders of the Commission and internal data analysis confirmed that the pilot was meeting its objectives. On that basis the pilot was confirmed to continue into 2004 with a view to investigating its extension to other areas of the State.

The tables following show matters filed and disposed of in the past five years (Table A); the method of disposal in 2003 (Table B); and the effect of the new listing pilot on median listing times (Table C).

TABLE A

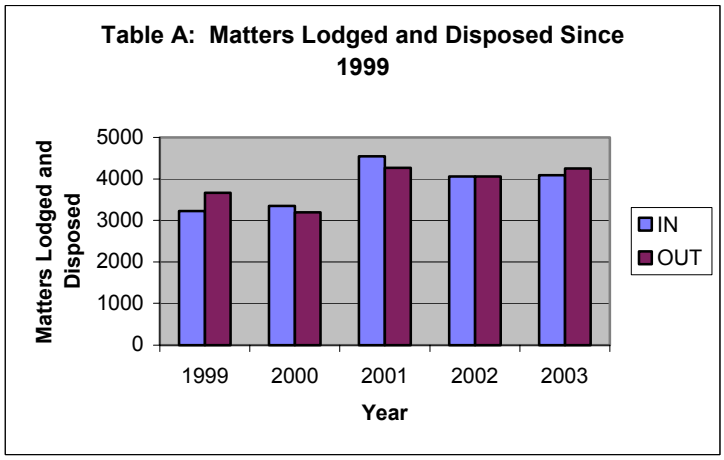


TABLE B

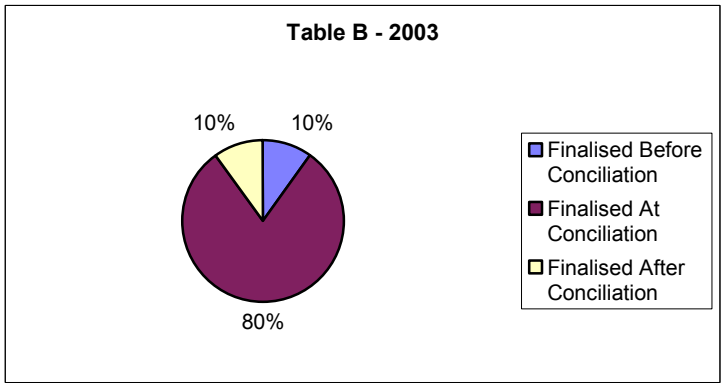
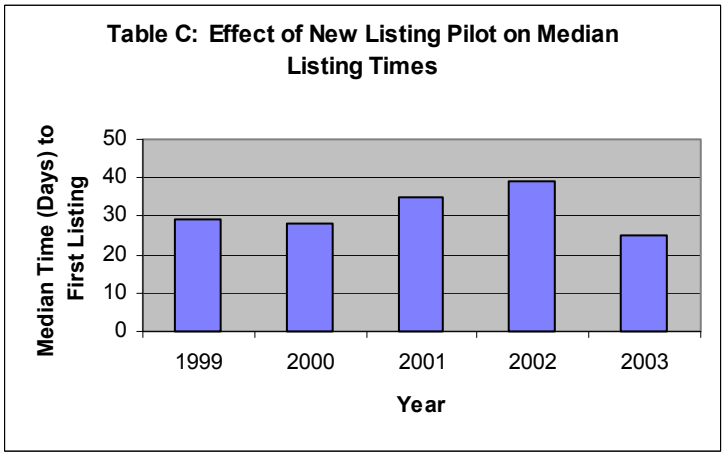


TABLE C



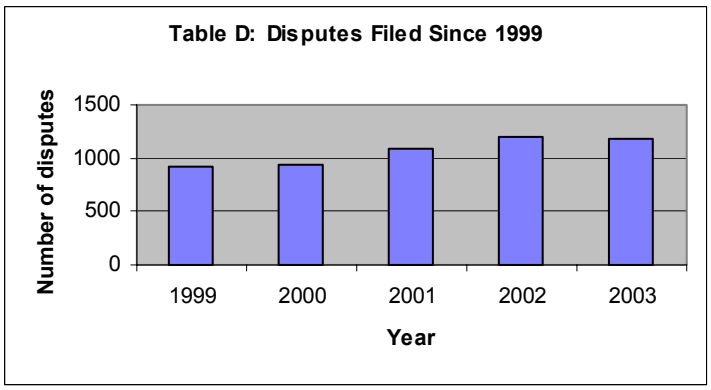
INDUSTRIAL DISPUTES

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.

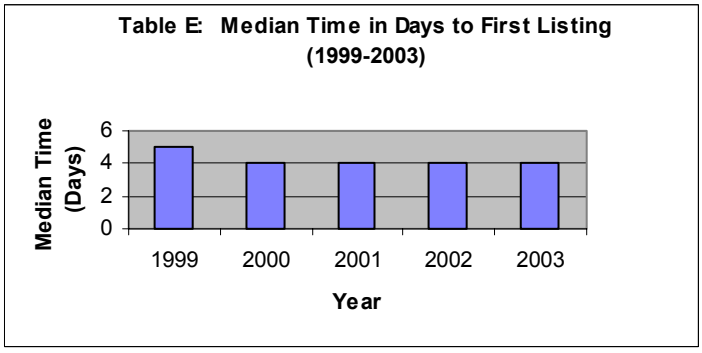
"Industrial dispute" is a broadly defined term linked, as it is, to the definition of "industrial matter" in s 6 of the *Industrial Relations Act* and this area of the Commission's jurisdiction remains high. The table below shows disputes filed in the previous five years:

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 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).

Table F provides details of filings in these areas in the last five years.

TABLE F

	1999	2000	2001	2002	2003
Application to make award	131	133	152	123	108
Application to vary award	374	377	426	334	338
Application enterprise agreement	321	361	369	307	348
Terminated enterprise agreement	44	103	152	172	179
Review of awards (Total) (Notices issued)	1094	408	591	0	233
Awards reviewed	180	173	447	1	97
Awards rescinded	268	203	515	0	15

State Wage Case 2003 [2003] NSWIRComm 174; (2003) 121 IR 446

On 6 May 2003 the Commission issued a summons to industrial parties to appear before it to show cause why, after considering the decision of the Australian Industrial Relations Commission in the *Safety Net Review - Wages, May 2003 Case*, the Commission should not adopt the decision pursuant to Pt 3 of Ch 2 of the *Industrial Relations Act* 1996. The matter was heard on 26 and 27 May 2003. The Commission delivered its decision on 27 May 2003 and published reasons for the decision on 6 June 2003.

Although there were some reservations on the part of employers about the implications for the New South Wales economy of the drought and the prospect of a weaker global economy, all

parties to the proceedings accepted that the Commission should adopt the increases awarded by the AIRC. The Commission had regard to the Australian Commission's detailed consideration of the economic and socio-economic material and adopted the Australian Commission's conclusions as to that material. The Commission decided to increase all award rates by between $15 and $17 per week. No party sought changes to the Commission's Wage Fixing Principles other than those necessary to reflect the National decision.

The Full Bench conducted the proceedings in Newcastle to reflect the significant contribution of the people and enterprises of Newcastle and the Hunter region to the State and National economy and to the development of industrial relations in New South Wales and Australia.

Award Review

The first major round of the triennial Award Review process commenced in the later part of 2003. 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.

As a result of that process the Commission issued *Practice Direction No 13* on 19 September 2003 to facilitate the Award Review Process.

This Practice Direction requires the parties to:

- file and serve on all other parties a list of any and all changes proposed at least one week prior to the callover date allocated; and
- to confer with all other parties on any proposed changes prior to the callover date so that all parties are in a position to advise the Commission at callover of the status of the award under review.

Significant administrative streamlining of the process was undertaken by the Registry and initial indications are that these steps have materially assisted both the parties and the Commission.

This process will continue into 2004 with the majority of awards having been reviewed by the end of that year.

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 had occasion to revisit these principles in *Poultry Industry Preparation (State) Award and other Awards* [2003] NSWIRComm 129; (2003) 125 IR 64 an appeal in which the substantive issue related to the extent to which variations could be made to an award during the award review process and, in particular, variations that could be made in order to "modernise" the award in accordance with s 19(2).

The Full Bench accepted the appellant's submission that there was no scope under the award review process for the Commission to engage in a "value-based assessment of what is appropriate" in the award. After referring to the decision of the Full Bench in *Principles for Review of Awards - State Decision 1998,* the Commission concluded "it is manifestly clear that changes which 'properly flow' as an exercise in the review process, are those consistent with the purpose of the review process; that is, having regard to the construction attributed to the term 'modernise' in the Award Review Decision, making it consistent with the current statutory framework". There was no scope in such proceedings to enter into value-based assessments that would normally be made under s 10 or s 17 of the Act. The appeal was allowed.

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

	1999	2000	2001	2002	2003
No.	313	552	956	894	631

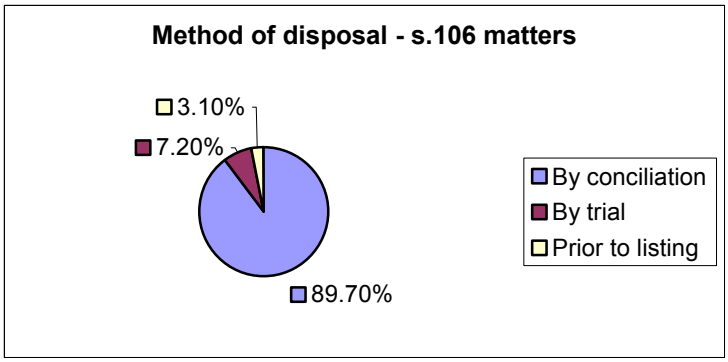
The consequence of this is that significant pressure has been placed on the resources of the Commission in seeking to ensure that these matters can be disposed of in a timely way.

A major initiative of the Commission during 2003 was the introduction of a special fixture running list whereby specific judicial resources were diverted to hear and determine matters that were ready for hearing. Whilst this initiative was successful in that the majority of matters targeted for disposal were finalised in a timely way, there were a number of issues raised by the profession that will need to be considered in line with any further such initiatives in 2004.

A focus for the Commission in 2004 will be ensuring that the case management strategies adopted by the Commission remain effective in terms of providing a timely forum for the resolution of these types of matters, particularly in light of the high settlement rate at the conciliation stage (see Table H).

An initiative that will be undertaken by the Commission in early 2004 will be to target additional resources towards conciliation. If successful and resources are available, this will be continued throughout the year.

TABLE H



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 for 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

	1999	2000	2001	2002	2003
No.	373	273	188	183	152

While the table above shows a decrease in prosecutions brought before the Commission, this remains a significant area of the Commission's workload given the complexity and seriousness of the matters that fall for determination.

On 24 October 2003 the Commission published *Practice Direction No 12* designed to facilitate the effective case management of prosecutions. This practice direction prescribes standard directions and timetables for such matters and, as far as practicable, is designed to ensure that they are dealt with in an orderly and expeditious manner. The practice direction will be reviewed in 2004 to ensure that it is meeting its objectives.

CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION

The *Child Protection (Prohibited Employment) Act* 1998 and associated legislation came into force in July 2000. Its provisions included 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.

Whilst 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.

In 2003 two important Full Bench decisions were handed down in respect of this legislation:

Commission for Children and Young People v "A" [2003] NSWIRComm 6; (2003) 56 NSWLR 486; (2003) 123 IR 395

The central issue in this appeal was the interaction between s 579 of the *Crimes Act* 1900 and the *Child Protection (Prohibited Employment) Act* 1998. The respondent on the appeal, "A", was a schoolteacher who had been convicted of an offence against s 71 of the *Crimes Act* 1900 (now s 66C of that statute) some 30 years ago, in that he did carnally know a girl under the age of 16 years. At the time of his conviction in 1971, the respondent entered a plea of guilty and was placed on a good behaviour bond of two years on condition that he place himself under the supervision of the Adult Probation Service. The respondent complied with the terms of the recognizance and had not since then transgressed. The relevant offence fell within the definition of a "serious sexual offence" contained within s 5(3) of the *Child Protection Act* and rendered "A" a "prohibited person" within the relevant definition - making it unlawful for "A" to continue in "child-related employment" (as defined).

At first instance, the trial judge had held that s 579 of the *Crimes Act* which, in essence, provided that where an offence had occurred more than 15 years ago the offender was entitled to have the conviction disregarded, in the words of s 579, "for all purposes whatsoever", meant that the prior offence was to be disregarded and that as such "A" was not a prohibited person as defined.

On appeal, the Full Bench considered that the trial judge had erred and that the background to, and the context in which the legislature enacted the *Child Protection (Prohibited Employment) Act*, provided the answer to the question as to the way the two pieces of legislation interacted. The Commission concluded that, having had regard to the "background, scope, purposes and intention of the legislation", the extraordinary nature of the legislation was such that it was intended to override any earlier legislation which might, prima facie, appear to be in conflict. The appeal was allowed and the matter was remitted to a judge for determination.

Commission for Children and Young People v "S" [2003] NSWIRComm 57 and Commission for Children and Young People v "S" [2003] NSWIRComm 205

This case also involved an application under the *Child Protection (Prohibited Employment) Act* by "S" who had been employed on a casual basis as a relief school bus driver, seeking that the Act not apply to a conviction of 25 November 2000 for the offence of having indecently assaulted a 41 year old woman, contrary to s 61L of the *Crimes Act* 1900. The commissioner, at first instance, had concluded that the *Child Protection Act* did not apply in the circumstances of an adult committing an indecent assault against another adult and thus found it was not necessary to determine the application by "S" to be declared exempt from the operation of the *Child Protection Act.*

On appeal, the Full Bench considered that the commissioner had erred in concluding that the legislature had intended to draw a distinction of that kind, emphasising that the purpose of the legislature is unquestionably to protect children from the possibility of sexual abuse by persons employed in child-related employment. The Full Bench concluded that while the risk to which s 9(4) relates is the risk posed to children, there is no basis for considering that risk should be limited in scope to risk arising from persons who have been convicted of a serious sex offence involving a child. The Full Bench was however satisfied on the evidence before it that the applicant did not pose a risk to the safety of children, within the meaning of s 9(4) of the *Child Protection Act*, and made orders accordingly.

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 2003 Full Benches finalised 124 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.

Crown Employees (NSW Fire Brigades Firefighting Staff Death and Disability) Award 2003 [2003] NSWIRComm 147

This matter concerned the making of an award following long-standing and complex proceedings concerning the unique employment circumstances of firefighters and the provision of special benefits in the event of death or total and permanent incapacity or partial and permanent incapacity. As was emphasised by the Full Bench in congratulating the parties on reaching ultimate agreement, the "complexities" involved in the proceedings " extended far beyond those normally encountered in proceedings of this nature". The Full Bench made the award to operate from 21 March 2003, and to remain in force for a period of three years.

Re State Working Hours Case 2003 [2003] NSWIRComm 86; (2003) 124 IR 253

On 23 July 2002, the Full Bench of the Australian Industrial Relations Commission delivered the *Working Hours Case July 2002* (2002) 114 IR 390. This decision dealt with a summons issued to industrial parties by the Commission of its own motion, to appear to show cause why, after considering the decision of the Australian Industrial Relations Commission (AIRC), the Full Bench should not take such action pursuant to Pt 3 of Ch 2 of the *Industrial Relations Act* 1996 as it may deem proper. The AIRC had determined to insert a clause into all awards that would:

> ... confer a right on an employee to refuse to work overtime in circumstances where the working of such overtime would result in the employee working unreasonable hours. It will permit the employees' ordinary hours to be taken into account in deciding whether overtime is unreasonable, but the right of refusal it confers will operate only in relation to overtime. The provision is only intended to be included in awards that specify ordinary time and provide for overtime. It will include a reference to the well established right of an employer to require an employee to work reasonable overtime.

The usual industrial parties appeared, as did the President of the Anti-Discrimination Board (ADB) pursuant to leave granted by the Commission pursuant to s 167(2) of the *Industrial Relations Act.* Following conferences between the parties, with the exception of the ADB, agreement was reached as to the form of the principle to be established.

Whilst the industrial parties were content to adopt the principle as established by the Full Bench of the AIRC with minor modifications, the ADB sought to amend the principle so that in place of referring to "employee's personal circumstances including any family responsibilities" as a matter identified as a consideration in determining what would constitute "unreasonable" hours, the clause should provide for "employee's personal circumstances including any family *and carer* responsibilities*"*.

The Full Bench determined to amend the provision in accordance with the submissions of the ADB and determined, pursuant to ss 50 and 52 of the *Industrial Relations Act*, that the clause would be inserted into awards upon application that specify ordinary hours of work and provide for the working of overtime.

Notification under s 130 by BHP Steel (AIS) Pty Ltd of a dispute with the Australian Workers' Union, New South Wales and others [2003] NSWIRComm 124; (2003) 125 IR 207

This matter concerned the notification by BHP Steel (AIS) Pty Ltd of an industrial dispute at its Port Kembla steelworks, relating to the operation of a particular clause of the BHP Steel Port Kembla Operations Enterprise Agreement 2000. The clause in dispute essentially provided an undertaking that in circumstances of industrial disputation, the parties to the agreement would comply with the relevant dispute procedures and that the parties would "hold discussions in relation to production or maintenance work that is necessary to enable genuinely urgent customer requirements to be met". The company had brought the proceedings following threatened industrial action by the unions party to the agreement. The substantive issue was whether the urgent dispatch arrangements were to operate with respect to one particular area of the company's operations, more generally throughout the company's plant.

The Commission observed that, as the urgent dispatch arrangements had come about by negotiation and agreement between the parties, it would "be careful to ensure that the sanctity of good faith bargains is adhered". It was held that considerable weight should be placed upon the construction of the enterprise agreement by reference to the words and expressions used in the agreement by the parties in resolving the question to be decided and that whilst the agreement should be considered in its entirety and not construed on an excessively literal or narrow basis, the relevant clauses had to be seen in their "context and having regard to their true purpose".

The Commission concluded that the urgent dispatch agreements were not limited in the manner contended by the respondent unions and ordered the parties to confer on appropriate orders in light of its decision.

Notification under s 130 by BHP Steel (AIS) Pty Ltd of a dispute with the Australian Workers' Union, New South Wales and others [2003] NSWIRComm 125; (2003) 125 IR 216

This matter again involved a dispute between the company and the relevant unions concerning enterprise agreements operating at the Port Kembla Steelworks, and in particular, clauses in the enterprise agreements that operated to guarantee supply and avoid the dumping of hot metal, during times of industrial disputation. The issues in these proceedings largely involved the operation of the company's rail supply network.

The Full Bench having noted that these arrangements came about by agreement, again emphasised that the "obligations which come about in such circumstances are not confined to merely legal considerations" and that the Commission will ensure parties give solemn adherence to the terms of industrial arrangements whether in the form of consent awards or enterprise agreements and will not countenance manoeuvring by parties designed to extricate themselves from good faith bargains. The Full Bench considered that one of the unions involved in the current dispute had not approached the matter in that way. The Full Bench directed that draft orders reflecting the decision be filed.

Real Estate Industry (Clerical and Administrative Employees) (State) Award [2003] NSWIRComm 149

The decision at first instance in these proceedings dealt with an application pursuant to the special case principle, creating a new award for clerical employees in the real estate industry entitled the *Real Estate Industry (Clerical and Administrative Employees) (State) Award*, and made consequential variations to the *Clerical and Administrative Employees (State) Award*. The Full Bench, having emphasised that in appeal proceedings the parties are bound by the conduct of the case presented at first instance, concluded that in large measure there was not an appropriate basis for the Full Bench to intervene as the decision at first instance was determined in light of the very specific evidence at first instance (noting that the proceedings at first

instance went forward as a special case under the Wage Fixing Principles). The Full Bench did, however, emphasise that in an application for variation of an award, current award conditions are presumed to be fair and reasonable and, as such, evidence would need to be led sufficient to overcome that presumption. The appeal was allowed in part.

Humphries v Cootamundra Ex-Services and Citizens Memorial Club Limited [2003] NSWIRComm 211; (2003) 128 IR 37

The Full Bench considered an appeal from a decision concerning the termination of the appellant's employment. Her termination occurred following the discovery of a large number of unusual beer refund transactions at the club. The appellant was charged by the police for 70 counts of obtaining money by deception. Following the dismissal of the charges by the Local Court, the appellant applied to the Commission for reinstatement.

The application was dismissed at first instance on the basis that it was found that the appellant was guilty of misconduct as she was the only person capable of being involved in all of the dubious refund transactions. The Full Bench found that this finding of fact was erroneous. The appeal was upheld and the decision at first instance quashed. The Full Bench considered that the dismissal of the appellant was harsh, unjust and unreasonable and made orders for reinstatement and part restitution of lost remuneration.

New South Wales Lotteries Corporations v Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales [2003] NSWIRComm 143

The appellant appealed against a refusal to include a proposed parental leave provision in a new award on the ground that the provisions provided for maternity leave only and not paternity leave. The respondent also contended the appeal should be upheld. The Full Bench emphasised the importance of precedent in the jurisprudence of the Commission and reiterated that single Members of the Commission are obliged to follow decisions of Full Benches. The issue on the appeal was in substance dealt with by the Full Bench decision in *Re Nursing Homes &c Nurses' State Award* (2001) 110 IR 433 where the Full Bench considered that a decision to refuse to make an award that contained paid maternity leave and not paid paternity leave provisions was in error. The Full Bench emphasised the observations of the Full Bench in *Re Nursing Homes &c Nurses' State Award* that paid maternity leave is an entitlement of a different character to

paid leave for employees who are parents and principal care givers of a child. The leave provisions of the consent award provide specific entitlements for leave for those employees who have child care responsibilities, that is unpaid parental and adoption leave for a period of up to 12 months. As these were available to both men and women, including women who are not pregnant, for the care of a child, there is no discrimination on the basis of gender, or unequal treatment by reference to gender. The appeal was upheld and the award, including maternity leave provisions, was made by consent.

Nursing Homes &c., Nurses' (State) Award [2003] NSWIRComm 311

The Full Bench in this matter dealt with an application by the New South Wales Nurses Association to vary the *Nursing Homes &c Nurses' (State) Award* in relation to salaries and related allowances. Although the award was varied on a formal basis the Full Bench considered it was in substance making an interim award. The Full Bench noted the agreement of the parties that the increases represented a fair and reasonable increase on an interim basis in the rates and allowances under the award and that work value changes of some significance had occurred. The Full Bench considered that the interim increase "would not embarrass the final result" of any final award in these proceedings and an interim increase was granted.

Industrial Registrar of New South Wales v The Uniting Church in Australia Property Trust (NSW) [2003] NSWIRComm 387; [2003] NSWIRComm 388

The proceedings were brought pursuant to the provisions of s 180 of the *Industrial Relations Act* 1996 by the Registrar seeking declarations that the respondent had been guilty of contempt of Court. There were five charges of alleged acts of contempt on various occasions in relation to two proceedings under s 106 of the *Industrial Relations Act* 1996. The substantive proceedings related to the employment of two applicants as senior employees at an aged care centre. It was common ground in the proceedings that the alleged contempt was to be treated as criminal contempt it being alleged there was improper pressure brought against the applicants in the substantive proceedings so as to interfere with the administration of justice.

The Full Bench unanimously dismissed one charge relating to the publication of a letter addressed to "Stakeholders" as its language did not involve injurious misrepresentations or abuse of the applicants such as to constitute public obloquy and derision. A majority of the Full

Bench found the respondent guilty of two charges. It was held that the conduct of the respondent had a tendency to interfere with the administration of justice with respect to the proceedings before the Court in the sense of requiring the applicants in the substantive proceedings to attend on the respondent to answer allegations made by the respondent in a Reply to the Summons for Relief and indicating in a letter that there may be detrimental consequences for the applicants, including dismissal, if they did not attend the specified meeting. A majority of the Full Bench dismissed the contempt charges relating to the actual dismissal of the applicants and the reason for the dismissal.

Australian Workers' Union v Pasminco Australia Ltd [2003] NSWIRComm 365

This was an application to appeal from a decision interpreting an award retrenchment provision. As a result of a conditional sales agreement for the mine, there was a proposed redundancy of all the employees at the completion of the sale process. The issue in the appeal was whether the circumstances of the sale of the mine were for economic reasons or as part of a Company reorganisation as defined in the relevant clause. Leave to appeal was granted to permit the determination of the correct approach to the interpretation. The Full Bench held that subsequent conduct in general is not relevant to the construction of a written instrument. It was held that the principles to be applied when interpreting industrial instruments was that set out in *Kingmill Australia Pty Ltd t/a Thrifty Car Rental v Federated Clerks Union of Australia, New South Wales Branch* (2001) 106 IR 217. The appeal was dismissed as it was held that the conclusion was reasonably open that the sale of the mine resulted from economic considerations.

Re Public Hospital Nurses (State) Award (No. 4) [2003] NSWIRComm 442

This decision concerned an application by the New South Wales Nurses' Association to vary the award by increasing rates of pay and introducing two new classes of allowance namely, a qualification allowance and a retention allowance. In *Re Public Hospital Nurse's (State) Award (No 2)* (2002) 118 IR 336, the Full Bench awarded an interim increase in salaries of six per cent on the basis that the Association had made out a special case. The principal issue in this case was whether further wage increases are justifiable on the ground of changes in the work value of nurses.

The Full Bench reiterated the test for an increase under the work value principle was whether the changes that had occurred amount to such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification significant net addition to the work requirements of each award classification in respect of which the increase is sought. The Full Bench found that there has been a significant net addition to the work requirements of registered nurses and enrolled nurses, including the ageing population and nurses performing functions previously performed by doctors such as to warrant a moderate increase in rates of pay. The Full Bench rejected the claim for a retention and qualification allowance. However, the parties were directed to confer on the form and content of a "Continuing Education Accelerated Advancement Entitlement" provision for registered and enrolled nurses.

Mitchforce Pty Ltd v Starkey (No.2) [2003] NSWIRComm 458

This matter concerned an application to reopen the decision of the Full Bench in *Mitchforce v Starkey* (2002) 117 IR 122, in which the Full Bench refused leave to the appellant to appeal from a decision in which a hotel lease was found to be an unfair contract within Pt 9 of Ch 2 of the *Industrial Relations Act* 1996. Having been refused leave to appeal by the Full Bench, the appellant applied to the Court of Appeal for prerogative remedies in the form of prohibition and certiorari: see *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212; (2003) 124 IR 79. Although the Full Bench held that there should be considerable reluctance to reopen proceedings of this kind, there were substantial bases for the reopening of the proceedings, including the clarification of the jurisdiction of the Commission in Court Session.

The Full Bench dealt with two jurisdictional propositions. First, whether the lease was a part of a broader arrangement entered into at the commencement of the relationship between the appellant and the respondents which fell within the reach of the Commission's jurisdiction under s 106 of the Act. Second, whether the lease was merely a part of an arrangement, for the purposes of s 105 of the Act, pursuant to which the rent due under the lease would be deferred so as to permit the respondents to trade out of their financial difficulties, which resulted in the arrangement falling within the reach of the Commission's jurisdiction under s 106 of the Act?

In respect to the first jurisdictional proposition, the Full Bench did not agree with the majority decision of the Court of Appeal that in order for a contract (as defined in s 105 of the Act) to fall

within the Commission's jurisdiction, there is a requirement that the relevant contract or arrangement have "an industrial colour or flavour" in addition to the requirement to demonstrate that the contract or arrangement led directly to the performance of work. However, the majority of the Full Bench was unable to find in accordance with the authorities on comity that the decision of the Court of Appeal was plainly wrong even upon their differing view of the law. In respect to the second jurisdictional proposition, the majority considered that once the relationship constituted by the "contract" has been created, an alteration in the economics of the relationship would not be capable of changing its underlying character. The majority nevertheless emphasised that there is no reason why an existing legal relationship that does not satisfy the relevant jurisdictional test could not have added to or superimposed upon it a further agreement, or arrangement, that changes the characterisation of the relationship between the parties such that it could be then seen to lead directly to and have as its purpose, the performance of work in any industry. It was found that there was no clear indication on the evidence that the rent deferral agreement was intended to lead to the performance of work in the tavern. In the absence of a clear basis for the finding of an "arrangement" for the purposes of s 105 of the Act arising from the agreement for rent deferral and in the absence of a case of that kind having been actively developed by the respondents (and the resulting absence of a relevant conclusion by the trial judge) there was an insufficient basis upon which to reach an affirmative conclusion on the second jurisdictional proposition. The appeal was upheld and the orders made at first instance were set aside.

Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award, Re [2003] NSWIRComm 479; (2003) 129 IR 135

The New South Wales Teachers' Federation applied for a new award seeking an increase in salaries and other related matters. The Full Bench was satisfied that there had been a significant change in teaching work and that there were features warranting the finding that a special case had been made out. An interim increase in salary rates was awarded.

Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004 and other awards [2003] NSWIRComm 476; (2003) 129 IR 361

This application by the New South Wales Independent Education Union sought new awards involving increases in salaries and allowances for principals, teachers and advisors in the

Catholic school sector in New South Wales. Both parties agreed that a significant increase in salaries was justified on work value grounds and that the proceedings constituted a special case for the determination of an appropriate increase. Having regard for the substantial degree of agreement as to the work value changes of principals, teachers and advisors under the proposed awards, the Full Bench considered that it was appropriate to grant the interim increase in salaries and allowances sought.

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, Courts 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 matters, 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 five locations - 50 Phillip Street, Sydney (Principal Registry); 815-825 George Street, Sydney (Flight Centre); Hospital Road Court Complex, Sydney; Newcastle and 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 Industrial Relations Commission of New South Wales, 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 approved employment conditions for employees.

The team is also responsible for the preparation of enterprise agreement comparison reports for the Industrial Registrar to provide to the Commission, assisting the Commission in determining if the proposed agreement meets the statutory conditions for approval.

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).

Applications / Renewals for Certificates of Conscientious Objections				
1999	***2000***	***2001***	***2002***	***2003***
203	217	203	214	199

Special Wage Matters - Year End Current Files					
	1999	***2000***	***2001***	***2002***	***2003***
Special Wage Permits	-	-	-	823	765
* SWS - P	-	-	-	101	212
** SWP - MC	-	-	-	244	224
TOTAL	**1010**	**1035**	**1150**	**1168**	**1201**

Special Wage Matters - Matters Lodged				
1999	***2000***	***2001***	***2002***	***2003***
1077	1141	1063	1268	1281

*	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, the Assistant Deputy Industrial Registrar and the Information Manager. 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.

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 30 April to 2 May 2003. Presentations covered a range of topics. The first day covered a variety of topics with presentations by Professor Keith Ewing (*Developments in the United Kingdom*); The Hon Justice John Fawkes, Family Court of Australia (*Unrepresented Litigants*); Stephen Cartwright, Managing Director, Chandler McLeod Group (*Labor Hire Companies*); and Professor Mark Bray (*The Relationship between National Competition Policy and Labor Regulation*). An informative and thought provoking paper was also presented by Commissioner Peter Connor (*The State of Unfair Dismissal Jurisdiction: Industrial Access*). The Conference Dinner Address was by Mr Antonio Gelonesi, Chief Executive Officer of the Horizons Golf Club.

On the second day of the conference sessions were given by the Hon David Hall, President of the Queensland Industrial Relations Commission, who spoke on the industrial tribunal of that State; Ms Joellen Riley, Lecturer, University of Sydney, who gave a paper on *Protecting Employee Entitlements;* and Associate Professor Jim Psaros, University of Newcastle who gave a presentation concerning *Corporate Collapse in Australia: the Role of and Implications for Accounting*.

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. 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 (Lawlink) and the Australian Legal Information Institute website (AustLII). The introduction and maintenance of the system has been possible with the co-operation of Members of the Commission and their staff and with the assistance of the Executive and Strategic Services Division of the Attorney General's Department.

Practice Direction No 9

Practice Direction No 9 was published in the Industrial Gazette of 25 October 2002. Its purpose was to facilitate the processing of matters by providing for, encouraging and requiring that documentation filed in certain classes of matters by a party be accompanied by a copy of the documentation in computer-readable format, to provide for and encourage the use of technology in matters before the Commission and also to provide an appropriate foundation for the increased use of technology in proceedings before the Commission. Parties before the Commission must now, subject to certain specified exceptions, file a copy of any document lodged in a computer-readable format at the time of filing of the document in hard copy form.

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 2003 the full Users' Group met on the 13 August 2003. The unfair contract sub-group met on 29 April 2003 and 20 October 2003 and the unfair dismissal sub-group met on 29 April 2003 and 3 November 2003.

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

COMMITTEES

A list of the committees in operation within the Commission are contained at Appendix 3.

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 2003.

COMMISSION PREMISES

I have earlier reported on the significant benefits in terms of the co-location of Presidential and Commissioner Members in terms of efficiency and co-ordination. It is pleasing to be able to report that refurbishment of the Chief Secretary's Building (adjacent to the principal premises at 50 Phillip Street, Sydney) is under way with a view to relocation of Members and staff currently located at Railway Square to a united complex.

As would be appreciated, the detail associated with ensuring that the refurbishment meets the needs of the Commission and its users 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.

Indications are that the refurbishment and relocation should be completed towards the end of 2004 or the beginning of 2005.

AMENDMENTS TO LEGISLATION ETC

The legislative amendments enacted during 2003, or which came into force that year, affecting the operation and functions of the Commission are reported at Appendix 4.

Amendments to Regulations affecting the Commission are reported at Appendix 5.

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 8A* (for details of *Practice Directions No 11, 12* and *13* see pages 11, 18 and 15 respectively).

Practice Direction No 8A came into effect on 27 June 2003 and replaced *Practice Direction No 8.* The purpose of this practice direction is to enable prompt and timely notice to be provided to the Commission of the commencement of a major industrial case and thereby to ensure, as far as practicable, the effective use of the Commission's resources in respect of such cases.

The practice direction was re-issued to emphasise the importance of prompt and timely notice being provided to the Commission of the likelihood of the commencement of a major industrial case and to reinforce that failure to give such notice may affect the priority the Commission is able to afford to the matter.

CONCLUSION

Overall, 2003 has been a year in which the Commission, its Members and staff, faced a number of challenges in terms of resource constraints and changing practices and remained responsive to the needs of the community which it has served for over 100 years.

The year ahead will present further and different challenges but I am confident that the Members of the Commission will approach the major issues of resource constraints, reform and rationalisation of procedures in a spirit that will see the Commission remain 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

Hilton Hotels of Australia Limited v Pasovska [2003] NSWIRComm 17; (2003) 122 IR 428

This matter concerned an appeal and across-appeal from a decision of the Chief Industrial Magistrate, in which his Worship had found in favour of the respondent in an application for the recovery of long service leave and annual leave payments. During the course of her employment the respondent suffered a number of work related injuries. These injuries led to proceedings before the Compensation Court in which the respondent was held permanently unfit for duties. It was common ground on the appeal that no action, formal or otherwise, was taken to terminate the respondent's employment, following the decision of the Compensation Court.

The substantial issue on appeal was whether the proceedings in the Compensation Court had resulted in the contract of employment between the parties coming to an end by operation of the doctrine of frustration. The Full Bench, having emphasised that the respondent was employed under an award and that "such employment (except where casual in nature) may usually be described as employment of indefinite duration", did not consider that the circumstances of the respondent's employment (including its history, the nature of the employment, the nature of the award coverage and the circumstances in which payment of accrued entitlements were made) provided any basis for the operation of the doctrine of frustration. The Full Bench concluded that the finding of total incapacity of the individual did not frustrate the contract, but gave rise to a right in the appellant to terminate the respondent's employment in accordance with the award.

Re Aged Services Association of NSW (Industrial) [2003] NSWIRComm 68

This matter concerned an application by the Aged Services Association of NSW (Industrial) for an order cancelling its registration as an industrial organisation under the *Industrial Relations Act* 1996. The evidence in the proceedings showed that an organisation had been registered under the *Workplace Relations Act* 1996 which now serviced the needs of members of the Association which had assumed the financial and other obligations of the Association. The application was granted.

Labour Co-operative Limited v WorkCover Authority of New South Wales (Insp Robins) [2003] NSWIRComm 51; (2003) 121 IR 78

This appeal was brought against the conviction and the sentence imposed on the appellant, a non-profit-making body, operating a labour hire business in Newcastle, for breach of s 15 of the *Occupational Health and Safety Act* 1983. The prosecution arose following an investigation into an injury suffered by a worker the appellant had sent to a worksite in Newcastle. The substantial issue on appeal was whether the appellant was properly held to be the employer of the relevant worker.

The Full Bench concluded that the trial judge was correct in concluding that the appellant was the employer of the injured worker and in relation to the operation of the statutory defence provided in s 53 of the Act. The Full Bench also held that there was no error of principle in the determination of penalty, such as would warrant intervention on appeal. The appeal was dismissed.

Weisser v Spur Group Pty Limited [2003] NSWIRComm 79; (2003) 121 IR 89

This appeal related to a decision to order costs against an employee in proceedings alleging unfair dismissal under s 84 of the *Industrial Relations Act* 1996, in reliance upon s 181(2)(c) of that Act; that is, on the basis that the appellant had unreasonably refused to settle the claim. The relevant offer to settle had, on the findings of the Deputy President, been in excess of the maximum amount that could have been ordered under s 89(5) and therefore met the test of an unreasonable refusal to settle the claim. On appeal, the Full Bench concluded that that finding involved error. Further, the Full Bench considered that the offer of settlement had been an "all inclusive" offer, seeking release from rights of recovery associated with various forms of leave and other matters, rather than merely being a release from the unfair dismissal claim. These were matters to which regard should have been paid. Having emphasised that a decision to award costs was largely discretionary and when made with regard to relevant factual circumstances, would be unlikely to be subject to appellate review, the Full Bench granted leave to appeal as the discretion in the present case had been exercised having regard to erroneous considerations. The appeal was upheld and the costs orders made at first instance set aside.

Patton v Fletcher Construction Australia Limited (No 2) [2003] NSWIRComm 94; (2003) 123 IR 350

This was the second Full Bench judgment in respect of this appeal. In the first judgment, the Full Bench upheld an appeal brought by the prosecutor from a decision of the Chief Industrial Magistrate, in which his Worship had dismissed charges brought against the defendant. This judgment dealt with the determination of penalty. Having emphasised that the primary determinant of penalty was the objective seriousness of the offence, the Full Bench concluded that these were "serious offences", having regard to the fact that the risks to safety were obvious and capable of simple remedy; those risks and the accident arising there from were such that, by their nature, they inevitably had the potential to cause serious injury; and the need for general deterrence as the matters concerned a risk which arose in an inherently dangerous industry.

State Transit Authority of New South Wales v Guillarte [2003] NSWIRComm 128; (2003) 123 IR 237

The Full Bench refused leave to appeal against a decision of the Chief Industrial Magistrate, in which his Worship had convicted the appellant of an offence under s 15 of the *Occupational Health and Safety Act* 1983. The Full Bench considered the conclusion of the Chief Industrial Magistrate was correct when he found that the appellant had not provided a safe system of work because the system adopted by it permitted variation between the practices which represented a risk to the safety of employees and those which did not, observing that "at its highest", the appellant's system of work was *ad hoc* and ultimately did not meet its obligations under the Act. The Court relied on the judgment in *WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Limited* [2002] NSWIRComm 316 to the effect that in order to meet the obligations imposed by the Act, the "system of work must be 'coherent and systematic' so that all employees who are performing work on any given site can properly understand what is being required of them".

Couriers Please Pty Ltd v Transport Workers' Union of Australia, New South Wales Branch [2003] NSWIRComm 93

This matter concerned an appeal against a finding that the appellant was a "principal contractor" as defined in s 310 of the *Industrial Relations Act* 1996 and was therefore amenable to the

Commission's jurisdiction under s 332 of the Act. Prior to the matter being heard, the Commission was advised that the "industrial issues between the parties were now resolved" and that, in the circumstances, "there was no utility in the appeal". The Full Bench ordered, in accordance with the agreement reached between the parties, that leave to appeal should be refused and the appeal dismissed.

Allied Express Transport Pty Limited v Emerton [2003] NSWIRComm 133; (2003) 125 IR 204

The Full Bench refused the appellant leave to appeal from a decision of the Chief Industrial Magistrate, in which his Worship had found in favour of two applicants who had alleged an underpayment of wages under the Transport Industry - Courier and Taxi Truck Contract Determination. The appellant contended leave to appeal was warranted as his Worship had erred in the construction of the relevant contract determination, and that his Worship had erred in fact. The Full Bench referred to the decision in *Transport Workers' Union of Australia, NSW Branch v Allied Express Transport Pty Ltd* [1996] NSWIRComm 203 and otherwise refused leave to appeal, emphasising "the legislature has chosen to impose a barrier to an automatic right of appeal in the interests of ensuring the finality of judgments given at first instance": *Antonakopoulos v State Bank of New South Wales* (1999) 91 IR 385 at 392 - 393.

Sydney Legacy Appeals Fund v Simpson [2003] NSWIRComm 91; (2003) 125 IR 200

This was an appeal by the appellant against a refusal to allow the appellant to lead evidence due to a failure to comply with directions as to the filing and service of witness statements that had been made by the Commissioner. The appellant had filed the relevant witness statements approximately two days after the date fixed and fifteen days prior to the date set for the hearing of the matter.

The Full Bench observed that, although having been filed late, the relevant witness statements "were filed well in advance of any date which was fixed for the hearing of the matter and, on any view, at a time which gave the respondents to these proceedings ample opportunity to file statements in reply". Although the Full Bench referred with approval to the decision in *Spanish Club Limited v Bounouar* (1998) 94 IR 173, and the observation that a party will run the risk of a sanction imposed by the presiding member if it fails to comply with directions designed to facilitate the efficient and effective determination of matters before the Commission, the Full Bench emphasised that case-management was not an "end in itself" and that in failing to have regard either to the explanation for the default or the lack of any prejudice suffered by the respondent, there had been appellable error in the exercise of discretion. The appeal was upheld and the matter remitted to another Member of the Commission.

Inspector Moore v Blacktown City Council [2003] NSWIRComm 47; (2003) 124 IR 59 and Inspector Moore v Blacktown City Council [2003] NSWIRComm 362; (2003) 128 IR 361

These judgments concerned an appeal by the prosecutor from a decision of the Chief Industrial Magistrate, in which his Worship had found the charge brought against the defendant had been established, but that the defendant had made out a defence under s 53(a) of the *Occupational Health and Safety Act* 1983. The Full Bench found this conclusion was erroneous, having regard to the interaction between the need to supervise an employee and the provision of adequate training and instruction where an employee is to perform work unsupervised. The appeal was upheld.

In the second judgment the Full Bench dealt with the appeal insofar as it related to the issue of penalty. The Full Bench concluded that there was a serious breach of the Act as it involved a simple

task with clearly identified hazards and the risk was entirely foreseeable. Consideration was also given to the defendant's record, improvement by the defendant to its occupational health and safety system and the principle of double jeopardy.

Brent v Bastian [2003] NSWIRComm 65; (2003) 124 IR 223

The Full Bench in this matter dealt with a decision in which the trial judge had concluded that the contract of employment between the parties was an unfair contract, had varied the contract, and made monetary orders that were considered just in the circumstances of the case. The Full Bench concluded that his Honour had erred in principle in his application of the principle of mitigation and considered in detail that principle; referring in particular to *Westfield Holdings v Adams* (2002) 114 IR 241. The Full Bench also gave consideration to the interaction of the principles as set out in *Westfield* and s 106(6) of the Act as inserted by the *Industrial Relations Amendment (Unfair Contracts) Act* 2002.

Eagle Boys Dial-A-Pizza Australia Pty Ltd v Clifford [2003] NSWIRComm 101; (2003) 125 IR 35

This matter concerned an appeal against a decision in which the trial judge had found that the franchise agreement between the parties for the operation of a fast food business was an unfair contract, varying the contract and providing monetary compensation considered just in the circumstances of the case. The appellant had challenged the findings of unfairness by the trial judge and the consequential orders that were made upon that finding of unfairness. The Full Bench refused leave in relation to the first aspect of the appeal, and heard the parties as to the nature of the orders that had been made. In this respect, the Full Bench concluded that the trial judge had erred in declaring the entire contract void *ab initio,* emphasising that consequential orders made upon such a finding should be directed towards remedying the unfairness found. Having regard to the limited basis upon which the trial judge had found the contract to have been unfair, in avoiding the contracts in their entirety the trial judge had made orders "disproportionate to the finding of unfairness" and as such had fallen into appellable error. The appeal was upheld in part.

Public Service Association of NSW and Health and Research Employees' Association of NSW v Broken Hill Town Employees' Union [2003] NSWIRComm 100; (2003) 125 IR 54

This matter concerned appeals by the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (PSA) and the Health and Research Employees' Association of New South Wales (HREA) against a decision of the Deputy Industrial Registrar, in which he had rejected objections to the Broken Hill Town Employees' Union being registered as an industrial organisation under the Act and otherwise approving the respondent's registration.

The gravamen of the Deputy Registrar's decision was that the special circumstances and industrial history of the respondent and of the Broken Hill region more generally, resulted in the situation where the "conveniently belong" test under s 218(1)(m) of the Act had not been met by the PSA and HREA in respect of the objections lodged by them. This was the first "conveniently belong" objection dealt with under the 1996 Act. The Full Bench dismissed the appeal, subject to the respondent's rules being varied in some respects.

Dowling v Bournelis & Bedrock Constructions (NSW) Pty Ltd [2003] NSWIRComm 88; (2003) 124 IR 447

This matter concerned an appeal against a decision of the Chief Industrial Magistrate in which his Worship had dismissed informations and summonses alleging a contravention of s 15 of the *Occupational Health and Safety Act* 1983 and a breach of s 50 of the statute by one of the corporate defendant's directors. The summonses were dismissed at first instance as the CIM found a defence under s 53 of the Act had been established. The Full Bench considered that his Worship had erred in concluding the statutory defence had been established, noting that there had been no specific finding in relation to whether the offence alleged had otherwise been established. The Full Bench emphasised that it was not permissible to consider a defence under s 53 in the absence of a finding that an offence under a provision of the Act had been proven; further, that unless the offence was identified then it was not possible to determine whether or not it was reasonably practicable to comply with the provision of the Act and it is likewise not possible to determine whether the commission of the offence was due to causes over which the defendant had no control and against the happening of which it was impracticable for the person to make provision. The Full Bench also had regard to the nature of appeals under s 197A of the *Industrial Relations Act*. Having regard to all the circumstances of the matter, it was determined that it would be appropriate to exercise the Court's discretion not to disturb the orders made at first instance. The appeal was dismissed.

New South Wales Teachers Federation v Managing Director NSW TAFE Commission [2003] NSWIRComm 90; (2003) 123 IR 384

This matter involved an appeal from a decision on an application for a declaratory order, relating to whether full time employees of TAFE were entitled to have prior temporary or non-permanent employment taken into account when assessing length of service for the purposes of the extended leave provisions in the *Technical and Further Education Commission Act* 1990 and the *Public Sector Management Act* 1988. The Full Bench held that the totality of the history of extended leave and long service leave as it applies in particular to the public service shows that the legislature has invariably approached entitlement on the basis of a requirement of continuous service and not on the basis of an aggregation of non continuous periods of service and that this had been the situation since 1884. The appeal was dismissed.

Poultry Industry Preparation (State) Award and Other Awards, Re [2003] NSWIRComm 129; (2003) 125 IR 64

This decision is considered at page 16 of this Report.

Hurrell and Queensland Cotton Corporation Limited [2003] NSWIRComm 139; (2003) 125 IR 145

This matter concerned an appeal from a decision of a Commissioner, refusing an application to extend the time within which to bring unfair dismissal proceedings. The substantive reason put as warranting an extension of time was that the applicants were unaware of the time frame within which to bring proceedings. The Commissioner considered that this was an insufficient reason for extending time and dismissed the application. On appeal, the Full Bench emphasised that to arbitrarily adopt an approach that "ignorance of the law is no excuse" when dealing with an application for an extension of time may lead to a failure to consider potentially relevant issues, such as the reasons and circumstances as to the ignorance of the relevant time limitation, personal circumstances affecting or potentially affecting an applicant's knowledge or access to professional advice and the actual circumstances giving rise to late lodgement, including any attempts to lodge

an application. The Full Bench reiterated that when dealing with an extension of time for the filing of an application alleging unfair dismissal "the ultimate exercise of discretion is governed by the requirements of justice in a particular case". The appeal was allowed and remitted for rehearing.

WorkCover Authority of New South Wales (Inspector Keenan) v Lucon (Australia) Pty Limited (No 2) [2003] NSWIRComm 40; (2003) 124 IR 459

These proceedings had their genesis in a reference to a Full Bench of the Commission, relating to the validity of summonses issued under the *Occupational Health and Safety Act* 1983. The reference was determined by the Full Bench: see *WorkCover Authority of New South Wales (Inspector Kennan) v Lucon (Australia) Pty Limited* (2002) 112 IR 332, and costs were ordered against the defendants. This matter concerned an application to be heard as to those costs orders. The Full Bench did not accept the defendant's submissions that the matters raised and the questions posed arising from the notices of motion raised novel questions or matters of significant importance that had not already been decisively determined such as to warrant consideration by a Full Bench and that they therefore should not be liable for the relevant costs. The Full Bench granted leave to reopen insofar as the issue of costs was concerned, and otherwise dismissed the application.

National Hire Pty Limited v Howard [2003] NSWIRComm 144; (2003) 126 IR 240

This matter concerned an appeal from a conviction under s 18 of the *Occupational Health and Safety Act* 1983. The appellant had sought leave to reargue the judgment of the Full Bench in *WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Limited* (2001) 105 IR 81. In reaffirming that judgment, the Full Bench emphasised that the judgment rested on a carefully considered and well established principle, the subject of an earlier long standing judgment of the chief judge of this Court and the subject of a long standing decision of the Chief Industrial Magistrate. Leave to appeal was refused and the appeal dismissed.

Construction, Forestry, Mining and Energy Union (New South Wales Branch) v Delta Electricity [2003] NSWIRComm 135

The central issue in this appeal was the interaction between a clause in an award providing for the payment of a shift allowance for "dayworkers" when relieving shift workers engaged under a 12 hour shift arrangement, and a local enterprise agreement that had been reached between the parties pursuant to a clause of the award, for the provision of shift work arrangements. The practical issue was whether the workers who had been transferred to perform the shift work were to be paid a shift-work allowance for the entire 12 hours of the shift or only for 8 hours per shift. At first instance, the commissioner had received and relied upon evidence from the respondent in relation to what had been intended in the negotiation of the relevant enterprise agreement. The Full Bench on appeal emphasised that reliance on the subjective intention of the parties in the interpretation of the industrial instruments involves error in principle thus requiring appellate intervention and emphasised the normal approach to interpretation which requires the particular words or phrases under consideration to be considered in context. The appeal was allowed and the decision at first instance set aside.

Graham v Walker [2003] NSWIRComm 180

In this appeal, the Full Bench reaffirmed that the appellate mechanism available under the *Industrial Relations Act* 1996 requires the grant of leave from the Full Bench and that such leave would not lightly be granted. The matter concerned an appeal from a decision of the Chief Industrial Magistrate in an application for the recovery of money in which his Worship had made

orders in favour of the respondent on the appeal. The Full Bench further emphasised that a denial of procedural fairness in and of itself would not "invariably" lead to a decision being set aside. In all the circumstances, there was no issue of principle that warranted the grant of leave to appeal in the public interest. Leave to appeal was refused and the appeal dismissed.

Mohammed Shakiq v Boral Australia Gypsum Limited [2003] NSWIRComm 182

This matter concerned an application for leave to appeal and appeal against a decision of a Commissioner, dismissing an application for relief from an alleged unfair dismissal. Having stressed that mere assertions of jurisdictional error would not be sufficient to warrant the grant of leave to appeal, the Full Bench emphasised the need for specificity in dealing with an application alleging unfair dismissal. Whilst the Commissioner concluded that the misconduct found might have been deserving of summary dismissal, the Full Bench observed that this would not necessarily mean that the termination was not harsh, unreasonable or unjust as the application of the statutory test involves more than the conduct of an applicant and not merely findings as to whether an employer had lawfully exercised any right to terminate an employee. In the circumstances of the matter, the Full Bench considered no error had been demonstrated and that leave to appeal should be refused. The appeal was dismissed.

Ahmed Khan T/as Golden Horn Halal Meat Butchery v Prasad [2003] NSWIRComm 183

The Full Bench in this judgment emphasised that an appeal which seeks largely to challenge findings of fact and the exercise of discretion at first instance would have a substantial hurdle in obtaining leave to appeal. The proceedings before the Full Bench concerned an appeal against a series of decisions by the Chief Industrial Magistrate seeking the recovery of unpaid wages, allowances and superannuation. The Full Bench refused leave to appeal and dismissed the appeal.

Healey v HPA [2003] NSWIRComm 195; (2003) 125 IR 227

The original application was made pursuant to s 84 of the *Industrial Relations Act* 1996. The issue on appeal was the principles which were applicable to the exercise of discretion in an application to extend time. The Full Bench held that it is essential in such cases to consider the various reasons advanced for the delay; also the fact that the delay occurred by a mistake or error of advice from a person acting in a representative capacity may be a relevant consideration. The Full Bench also referred to the fulfilment of the duty imposed on Members of the Commission in proceedings involving unrepresented litigants, which may require the provision of some minimum levels of assistance. The appeal was upheld and the application to extend time was granted.

Lahoud v Lahoud [2003] NSWIRComm 179; (2003) 127 IR 243

This matter involved several proceedings including two summonses for relief under s 106 of the *Industrial Relations Act* 1996. The issue before the Full Bench was whether the second summons for relief should be struck out on jurisdictional and estoppel grounds on a preliminary basis. The judge at first instance found that there was no jurisdiction to grant the relief sought and ordered a permanent stay of the proceedings. The Full Bench considered that the question of jurisdiction was decided prematurely. There was no sufficient basis to conclude that there was no jurisdiction, particularly as no evidence had been filed in the proceedings.

It was held that the relevant question in considering the applicability of *Anshun* estoppel was whether the claim in question could have been raised in the earlier cause of action and secondly, whether the claim raised matters so clearly part of the subject matter of the earlier proceedings that

it was unreasonable not to have raised that claim in those proceedings. The Full Bench considered that, in the present case, the later proceedings were a new cause of action as the issues raised did not arise until after the first proceedings were dismissed. In any event, there were special circumstances that precluded the application of the *Anshun* principle as the later cause of action involved supervening factors not in issue in the original litigation. Leave to appeal was granted and the orders made at first instance were quashed, with the matter remitted for hearing.

Pride v Mark Hansen Real Estate Pty Limited [2003] NSWIRComm 209

This was an appeal against a decision to strike out an application on the ground that it was defective as it had not been signed or completed in accordance with the requirements of the relevant section of the *Industrial Relations Act* 1996 or the relevant provision of the Industrial Relations Commission (General) Regulation 2001. The Full Bench found that the decision at first instance did not consider clause 43 of the Industrial Relations (General) Regulation 2001 and *Wadhera v Habib* [2002] NSWIRComm 1050, in which the Full Bench held that clause 43 was a provision available to the Chief Industrial Magistrate to cure the difficulty or irregularity identified. The appeal was allowed and proceedings were remitted to the CIM.

IGA Distribution Pty Limited and Moses (No 3) [2003] NSWIRComm 230; (2003), 130 IR 145

In *IGA Distribution Pty Ltd and Moses (No 2)* (2002) 114 IR 307, the Full Bench had upheld an appeal against a decision ordering reinstatement consequent upon a finding that the respondent's dismissal was harsh, unreasonable and/or unjust. This decision dealt with the issue of costs. In examining offers of settlement for the determination of costs, the respondent had sought nothing less than reinstatement. In its offers, the appellant offered compensation but refused reinstatement. When ordered by the Commission to reinstate the respondent, the appellant paid the respondent's wages but refused to allow him to work, relying upon a medical examination declaring him unfit for work. The Full Bench found that the appellant did not have adequate regard to its obligations as a party to proceedings under s 84 to attempt reasonably to make an offer to settle the proceedings. Costs were awarded against the appellant.

D & R Commercial Pty Ltd v Flood (No 2) [2003] NSWIRComm 237; (2003) 130 IR 21

In *D & R Commercial Pty Ltd and Flood* (2002) 113 IR 344, the Full Bench had allowed an appeal in part against a decision in proceedings under s 84 of the *Industrial Relations Act* 1996. This decision concerned the costs of the proceedings. While the Full Bench was satisfied that there was a failure to agree to a settlement of the claim within the meaning of s 181(2)(c) of the Act, thereby enlivening the powers in s 181(1), as both parties were to an extent successful on the appeal and the appellant had a "real measure of success" on the appeal, the Full Bench declined to exercise its discretion to make an order for costs.

Crowe v UCS Developments Pty Ltd [2003] NSWIRComm 234

This matter concerned the reference to the Full Bench of the Commission in Court Session of questions which related to whether the limitation period in s 108B of the *Industrial Relations Act* 1996 applies in respect of an application to join a respondent to proceedings. As the joinder of the additional respondents was based upon their alleged participation in the circumstances which gave rise to the initial application for an order under s 106 constituted by the original summons, the Full Bench held that the application to amend the summons was in substance an amendment to an application for an order made under s 106(1) prior to s 108B coming into effect. The amendment sought and, if granted, the resulting amended summons was therefore not precluded by s 108B.

Briscoe v Newcastle Knights Limited [2003] NSWIRComm 287

The appellant appealed against a finding that cl 6(1)(b) of the Industrial Relations (General) Regulation 2001 precluded the appellant from pursuing his application for relief under s 84 of the *Industrial Relations Act* 1996 because he was an employee, in terms of that provision, "engaged under a contract of employment for a specific task". Both parties sought consent orders that the application for leave to appeal be allowed, the appeal be allowed and the matter be remitted to be determined according to law. The Full Bench commended the parties for having reached a compromise in the matter and granted the consent orders remitting the matter for hearing on the merits.

Austeck Pty Ltd v Atsalos [2003] NSWIRComm 290

The matter concerned an appeal from an interlocutory finding that the respondent's "maximum annual remuneration" was below the monetary amount prescribed by s 83(1) of the *Industrial Relations Act* 1996. The question in the appeal concerned the phrase "annual remuneration" in s 83(1)(b) of the Act and whether that phrase was to be determined according to the actual amount paid to the employee in the 12 months preceding termination of employment or whether it was to be according to what the applicant was entitled to under the employment contract at the time of the termination of employment. The Full Bench held that the proper approach to be taken to the interpretation of the phrase "annual remuneration" was that the expression included the amount the person is entitled to be paid. The appeal was upheld.

WorkCover Authority of New South Wales (Inspector Buggy) v Weathertex Pty Limited [2003] NSWIRComm 273; (2003) 127 IR 60

This was an appeal against the inadequacy of the sentence imposed on the respondent who had pleaded guilty to a charge under s 16(1) of the *Occupational Health and Safety Act* 1983 following a fatality at the respondent's log yard. The Full Bench found that the sentence was inadequate as the trial judge gave too much weight overall to the general and non-proactive measures taken by the respondent, rather than focusing more closely upon all of the obligations under the Act which mandated more extensive and specific action by the respondent; did not give any weight to general deterrence; attached no significance to the fatality arising from the accident; and did not give sufficient weight to the fact that compliance with the Act requires enforcement and promulgation of procedures and practices. The appeal was upheld and a new penalty imposed.

Parkinson v Mayne Group Ltd (t/as Mayne Express) [2003] NSWIRComm 132; (2003) 125 IR 414

In this matter, the Full Bench granted leave to appeal to allow the determination of the proper approach to the application of s 162 of the *Industrial Relations Act* 1996 and unfair dismissal proceedings involving unrepresented litigants. The Full Bench held that the determination to exclude evidence filed late requires at least a consideration of the explanation for the delay. In any event the decision in *The Spanish Club Limited v Bounouar* (1999) 94 IR 173 did not impose an inflexible rule. Rather, the exercise of discretion under s 162 of the Act in relation to the receipt of evidence filed late must be subject to the overall dictates of justice. The Full Bench also emphasised that a Member of the Commission hearing an unfair dismissal application involving an unrepresented litigant is bound to ensure that that person receives a fair hearing of that application. This includes a duty to provide such information and advice as necessary to ensure that end; for example, the provision of information to the unrepresented party as to their rights in order that they may determine how to conduct their case.

Theodorakopoulos and Central Sydney Area Health Service [2003] NSWIRComm 295

The issue in this matter was whether there had been a denial of procedural fairness to the appellant. During the course of proceedings at first instance, a ruling was made to the effect that an application to extend time to bring an application under s 84 of the *Industrial Relations Act* 1996 would be dealt with as a threshold matter before a jurisdictional issue which had also arisen at the commencement of the proceedings, namely, whether the appellant could bring an application under the section having regard to her purported resignation from employment. In the decision at first instance, a finding was made that the appellant had intended to resign from her employment. The Full Bench found that this aspect of the decision travelled into an area which had been precluded by the earlier ruling and that this was a denial of procedural fairness as the appellant was entitled to proceed upon the basis of the Commissioner's ruling and should not have been precluded from bringing her case otherwise.

Youssef v Western Sydney Area Health Service [2003] NSWIRComm 284

This matter concerned a refusal at first instance to intervene in the dismissal of the appellant. The Full Bench granted leave to appeal holding that there was a miscarriage of justice as there were errors of fact made in the decision at first instance and that these errors raised considerable questions in respect to subsequent findings of credit in respect to the appellant and criticism of her conduct in the circumstances. Further, the error was demonstrative of the failure at first instance to sufficiently have regard to mitigating factors in favour of the appellant, in particular the exemplary service of the appellant for some period and the inappropriate and insensitive conduct of the respondent after the assault upon the appellant at work. The appeal was upheld and reinstatement was ordered.

Wykoff Investments Pty Ltd T/as Putt Putt West Ryde v SDA, New South Wales [2003] NSWIRComm 315

This matter involved consideration of the construction of an award, the Theatrical Employees Recreation and Leisure Industry (State) Award 2000, the coverage of which (because of the provisions of the relevant award) depended upon consideration of the terms of the industries and callings of the applicable industrial committee, namely, the Theatrical Employees (State) Industrial Committee, which are set out at (2000) 319 NSWIG 406, 425.

Leave to appeal was refused. However, the Full Bench considered that the relevant exclusion provisions required urgent attention.

Cavacuiti & Anor v Toyota Motor Corporation Australia Limited [2003] NSWIRComm 301

This was an application for leave to appeal and appeal from a judgment in which a contract was found to be unfair but it was not such as to warrant any orders avoiding or varying the parties' arrangement. Leave to appeal was refused as the Full Bench was satisfied that appellable error had not been demonstrated.

United Globalcom.Inc v McRann [2003] NSWIRComm 318; (2003) 124 IR 275

This was an appeal against an interlocutory judgment of a Member of the Commission in Court Session in an application under the unfair contracts provisions of the *Industrial Relations Act* 1996, dismissing the appellant's motion seeking to dismiss the proceedings. The Full Bench refused leave to appeal as it did not consider that, at the relevant level of decision-making applicable to the basis

upon which the trial judge was dealing with the matter, and in light of the settled principles as stated in *Nagle (T/as W D and J L Nagle & Sons) v Tilburg* (1993) 51 IR 8, it could be said that the conclusions at first instance were not open.

King v State Bank of New South Wales (No 3) [2003] NSWIRComm 308; (2003) 126 IR 443

The substantive appeal in the proceedings was dealt with in *King v State Bank of New South Wales (No 2)* [2002] NSWIRComm 353. The issue in this matter was whether leave to appeal should be granted so as to consider whether an order for interest from the date of termination made by the judge at first instance should be set aside. The Full Bench emphasised the discretionary nature of the power to award interest and having regard to the principles applicable to an appeal against a discretionary judgment, found that the respondent had not demonstrated any appellable error. Leave to appeal on the matter of interest was refused and final orders in the proceedings were made.

Manassa v WorkCover Authority [2003] NSWIRComm 348

This case involved an appeal pursuant to s 197 of the *Industrial Relations Act* 1996 on the severity of the sentence imposed by the trial judge. The Full Bench found that the sentences imposed were manifestly excessive and in light of the lengthy history of the proceedings, proceeded to deal with the appropriate penalty rather than remitting the matter to the Local Court. In determining the appropriate penalties, the Full Bench had regard to both general and specific deterrence; the defendant's good industrial record demonstrated by the fact that after ten years in a hazardous industry, he had no prior convictions nor had come under adverse attention. Reference was also made to the care and contrition for the injured worker on the day of the accident; the defendant's modest financial means and assets and his considerable financial obligations.

Gibson v Western Sydney Area Health Service [2003] NSWIRComm 465; (2003) 130 IR 95

This was an application for leave to appeal and appeal against a judgment which ordered the dismissal of the proceedings brought by the appellant pursuant to s 106 of the *Industrial Relations Act* 1996. The issue was whether the application of s 106 of the *Industrial Relations Act* 1996 was inconsistent with the operation of the provisions of Pt 4 of Ch 8 of the *Health Services Act* 1997, which provides a system of review for certain decisions made by a public health organisation regarding the employment of a visiting practitioner. It was held by the majority of the Full Bench that there is a significant difference between the subject matter of the provisions of the two statutes and that no "direct conflict" existed. The majority considered that the appeal procedure created within Pt 4 of Ch 8 of the *Health Services Act* is limited in its application whereas s 106 of the Act is more comprehensive in its operation extending to pre-contractual and post-contractual matters as well as conduct which occurs during the subsistence of the contract of employment which has a relevant connection with that contract. The majority emphasised the principle that implied repeal of legislation can only be effected in circumstances where there can be said to be clear and unmistakable intention to this end and held that judgment appealed from should be overturned.

Bell and Berg v Macquarie Bank Ltd and Another [2003] NSWIRComm 363

In this matter, the Full Bench refused leave to appeal from a judgment dismissing claims brought under s 106 of the *Industrial Relations Act* 1996. Although the Full Bench considered that the trial judge erred in finding that the introduction of s 109A of the Act had the effect of excluding from any consideration under s 106 of the Act whether or not there was procedural fairness, it was reasonably open for the trial judge to find there was no requisite unfairness in the circumstances of the case.

Daly Smith Corporation v Cain [2003] NSWIRComm 310

This was an application for leave to appeal and appeal against a decision in unfair dismissal proceedings. The issue in this appeal was whether the appellant had dismissed the respondent. After considering the evidence, the Full Bench concluded that the Commissioner's finding that the respondent had been dismissed was, on balance, open on the evidence. The decision at first instance included adverse findings against the appellant's witnesses. The Full Bench commented that perjury is a very serious allegation and if it is to be used in relation to a witness he or she is entitled to a rigorous and detailed justification in the reasons citing cogent grounds for that conclusion.

Crewdson v New South Wales Department of Community Services and Anor [2003] NSWIRComm 417

This was an application for leave to appeal and appeal against an interlocutory decision in unfair dismissal proceedings, in particular the refusal of the trial judge to grant summary relief. The Full Bench emphasised the principle that interlocutory appeals of a procedural nature are generally deprecated and discouraged. It was also noted that it is, as a general rule, open to a party to challenge an interlocutory order in appeal proceedings brought following final judgment, provided that the interlocutory order affected the final result. Leave to appeal was refused and the appeal was dismissed.

Health Employees Pharmacists (State) Award and other Awards [2003] NSWIRComm 453

This matter involved applications pursued both as a series of special cases warranting the Commission's intervention to establish "fair and reasonable" rates of pay pursuant to s 10 of the *Industrial Relations Act* 1996 and as instances in which work value changes warranted the Commission's intervention, in accordance with Principle 6, Work Value Changes, of the Commission's wage fixing principles. The application sought to vary a number of awards with regard to a number of occupational classifications in the pharmacy and dental stream as well as the Perfusionist classification. The Full Bench considered that the fact that there was a labour shortage, and the magnitude of that shortage in some areas (such as pharmacy), was sufficient to make out a special case in this matter. This was because the shortage was connected to changes in work value, in particular changes in the way work was now performed, such that it had resulted in changes in the nature of the work (that is, the requisite skills and responsibilities) and in the value of that work and secondly, the matter was one of considerable public interest as it was concerned with significant shortages in a number of occupational streams in the public health sector.

Burgess and Ors v Mount Thorley Operations Pty Ltd [2003] NSWIRComm 432

This was an application for leave to appeal and appeal from a judgment dismissing the appellants' summonses for relief pursuant to s 106 of the *Industrial Relations Act* 1996 for want of jurisdiction. It was common ground that the appellants' employment was governed, at least in part, by an award and a certified agreement of the Australian Industrial Relations Commission.

The primary position of the appellants was that the award (particularly an award provision creating a system of seniority) and the enterprise agreement with its provision for job security, formed a part of the appellants' contracts of employment and other arrangements. The Full Bench found that the letters of appointment did not expressly incorporate any award provision into the appellants' contracts of employment. The terms of the enterprise agreement were also not expressly or impliedly incorporated into the appellants' contracts of employment nor did they form an

arrangement or collateral arrangement to the contracts as the appellants were not a party to the agreement and had no standing to seek orders pursuant to s 108 of the statute.

The judge at first instance held that any orders that might be made under s 106 if unfairness were found, would give rise to constitutional inconsistency pursuant to s 109 of the Commonwealth Constitution. The Full Bench did not consider that any direct inconsistency necessarily arose between a provision of the award to the effect that the termination of employment by an employer shall not be harsh, unjust or unreasonable and an order that the contracts of employment between the appellants and the respondent were unfair, harsh and unconscionable and contrary to the public interest. It was nevertheless emphasised that in examining the question of inconsistency between two closely related, indeed often overlapping, fields such as unfair dismissal and unfair employment contracts it is necessary to look closely at the particular circumstances of the case and in this matter, the orders would be inconsistent with the terms of the award. The matter was stood over for the parties to provide further submissions as to whether the contracts were rendered unfair by the respondent's conduct and the consequent orders appropriate if unfairness was found.

Inspector Ching v Bros Bins Systems Pty Ltd [2003] NSWIRComm 386; (2003) 130 IR 62

In these proceedings, the Full Bench determined a prosecution appeal pursuant to s 197A of the *Industrial Relations Act* 1996 from a dismissal of a charge under s 17(1)(b) of the *Occupational Health and Safety Act* 1983 in which it had been found that there was no case to answer. The question to be determined on appeal is whether, for the purpose of s 17(1)(b) of the Act, the respondent's hook lift truck was "plant which has been provided for the use or operation of persons at work" in the context of it having been provided to Tibby Rose Auto by the respondent for the purpose of undergoing repair. The trial judge found that the truck nor its equipment was plant for the purposes of s 17(1)(b).

The Full Bench noted that the *Occupational Health and Safety Act* 1983 is an elaborate safety code the objectives of which are to secure the health, safety and welfare of persons at work and to protect persons at a place of work (other than persons at work) against risks to health or safety arising out of the activities of persons at work. It was held that the approach taken in *Inspector Page v Woolworths Ltd and Growth Equity Services Pty Ltd* (unreported, CT 93/1044 and 1047, 9 September 1994) to the question of what is "plant" for the purpose of s 17(1)(b) was correct. The appeal was upheld and remitted for hearing.

Bourot v NSW Department of Public Works and Services [2003] NSWIRComm 431

This was an appeal from an interlocutory judgment dismissing an application by the appellant for a judgement on admissions. The appeal raised various complaints, including an alleged failure to correct a factual error in the first instance judgment, a refusal to give the appellant summary judgment on the basis of certain admissions said to have been made by the Department; the costs order made against the appellant, in relation to her failed application for summary judgment and the trial judge's refusal to step aside on the ground of reasonable apprehension of bias. The Full Bench identified a typographical error in the first instance judgment. Leave to appeal was granted and the judgment was corrected by the replacement of the particular word. Leave to appeal was otherwise refused.

SEDA PTY Limited v Inspector James (WorkCover Authority of New South Wales) [2003] NSWIRComm 368; (2003) 130 IR 47

This appeal was brought against the severity of sentence imposed for offences under s 15(1) of the *Occupational Health and Safety Act* 1983. The charges alleged failures to provide and maintain the respective pieces of plant or machinery that were safe and without risks to health and failures to conduct any adequate machine guarding risk assessment on all plant and machinery in the premises. The Full Bench relied on statements in *Fisher v Samaras Industries Pty Limited* (1996) 82 IR 384 that the penalty imposed for a breach must compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace but must not be oppressively high. The Full Bench also referred to other cases involving crush or amputation injuries and to errors in the trial judge's approach to the issue of the time the appellant took to comply with improvement notices issued by the respondent and assessment of the financial means of the appellant. The appeal was upheld and new fines imposed for the two offences.

Re Elura Mine (Consent) Award 2001 [2003] NSWIRComm 469; (2003) 130 IR 200

This matter concerned an application for leave to appeal from a decision rescinding the award and dismissing an application by the union to vary the award. The Full Bench held that it would be inconsistent with the object of the *Industrial Relations Act*, set out in s 3(a) (to provide a framework for the conduct of industrial relations that is fair and just) and the principles of procedural fairness, to accept an application, made in the proper form by a party who has standing, and to then refuse that application without it being considered or determined. The Full Bench granted leave to appeal, upheld the appeal, quashed the orders at first instance and remitted the matter for hearing and determination.

Australian Workers Union, New South Wales v BHP Steel (AIS) Pty Limited [2003] NSWIRComm 461

This matter involved an application for arbitral proceedings in respect of a drug and alcohol policy adopted by the respondent. The applicant sought to amend certain parts of the policy, including the form of testing and testing processes contained in the policy. The Full Bench followed the approach in *Pasminco Broken Hill Pty Ltd v Construction, Forestry, Mining and Energy Union (NSW Branch)* (1997) 92 IR 179 and made recommendations to the parties pursuant to s 136(1)(a) of the Act with the aim of maximising the prospects of the parties reaching a consensual position as to the operation of the drug and alcohol policy at this workplace. The recommendations included amending the policy to provide independent employee assistance for those who are addicted to alcohol or drugs and ensuring that the respondent could not use the policy to victimise, harass or intimidate employees.

Australian Workers Union, New South Wales v BHP Steel Pty Ltd [2003] NSWIRComm 456

The genesis of this dispute was an application by the union opposing the outsourcing of functions at the respondent's Port Kembla site. Following lengthy conciliation and arbitration, the issue for determination in this case was whether new employees engaged by one of the contractors to perform or substantially perform the work carried out by existing Kembla Site Services employees should be paid in accordance with The Cleaning and Building Services Contractors' (State) Award or at the higher rate of pay sought by the union. The Full Bench held that the appropriate course was for the new employees engaged by the contractor in question to be paid the rate of pay, at least in the interim, under the cleaning industry award as to do otherwise would be to import into the

outsourced arrangements rates of pay which were wholly inapplicable because of their special and unique origins.

Crown Employees (New South Wales Fisheries Salaries and Conditions of Employment) Award [2003] NSWIRComm 405; (2003) 129 IR 369

This matter concerned an application for a new award by the Public Service Association and Professional Officers' Association Union of New South Wales. The proposed award's sole objective was to require NSW Fisheries to implement new staffing levels for full-time Fisheries Officers. The Full Bench found that due to the effect of s 22 of the *Public Sector Employment Management Act* 2002 which provides that the appointment or failure to appoint a person to a vacant position in the Public Service is not an industrial matter for the purposes of the *Industrial Relations Act* 1996 and there was thus no jurisdiction to make the award.

Electrical Contractors Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch and Anor [2003] NSWIRComm 404

This matter concerned an appeal from two decisions in which the appellant was refused leave to appear in proceedings for approval of an enterprise agreement and the approval of an enterprise agreement that contained clauses requiring supplementary labour companies, subcontractors or group training companies to have enterprise agreements with the unions. As to the first issue, the Full Bench found that the appellant had a right to appear at first instance as s 34(2)(b) of the *Industrial Relations Act* 1996 reflecting the intention of the legislature to encourage collective organisation in industrial relations by providing that such organisations are to be heard in relation to the approval of enterprise agreements affecting the interests of members. As to the second issue, the Full Bench found that clauses relating to additional labour resources being obtained so as to meet short term peak work requirements, the rates of pay upon which an employer will endeavour to subcontract work when such a need arises, and a provision that relates to providing advice when hiring apprentices or trainees are industrial matters as defined in the statute, and therefore fell within the scope of what may be included in an enterprise agreement. The Full Bench stressed that the decision in this matter was limited to the jurisdictional and related arguments raised by the parties, without consideration of the merits of the provisions.

APPENDIX 3

COMMITTEES

Library Committee

The Hon. Justice Wright, President
The Hon. Justice Walton, Vice President
The Hon. Justice Glynn (Chair)
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 4

LEGISLATIVE AMENDMENTS

Justices Legislation Repeal and Amendment Act 2001

The *Justices Legislation Repeal and Amendment Act* 2001 commenced on 7 July 2003 and is part of a set of cognate statutes including the *Criminal Procedure Amendment (Justices and Local Courts) Act* 2001 and the *Crimes (Local Courts Appeal and Review) Act* 2001, repealing and replacing the provisions of the *Justices Act* 1902. The statute amended the *Industrial Relations Act* so as to update the provisions relating to the commencement of proceedings for an offence before the Commission in Court Session (or an appeal from such proceedings) and to otherwise amend references to the *Justices Act* so as to reflect the operation of the *Criminal Procedure Act* 1986 in proceedings before the Commission in Court Session.

Industrial Relations Amendment (Industrial Agents) Act 2002

This Act which commenced on 1 February 2003, was considered in the 2002 Annual Report.

Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002

This Act which commenced on 1 January 2003, was considered in the 2002 Annual Report.

Rail Safety Act 2002

This Act which commenced on 8 February 2003, was considered in the 2002 Annual Report.

Coal Mine Health and Safety Act 2002

This Act which commenced on 13 June 2003, was considered in the 2002 Annual Report.

Industrial Relations Amendment (Adoption Leave) Act 2003

This Act commenced on 23 October 2003 and extended the definition of adoption leave under s 55(4) of the *Industrial Relations Act* so that it would include children under the age of 18 years. Previously the definition only included children under five years of age.

Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003

The *Industrial Relations Amendment (Public Vehicles and Carriers) Act* 2003 commenced on 6 November 2003. It amended Chapter 6 of the *Industrial Relations Act* to extend the application of the provisions applying to public vehicles and carriers and to continue to exclude Part IV of the *Trade Practices Act* 1974 (Cth) and the Competition Code of New South Wales from applying to that Chapter.

Local Government Amendment (Employment Protection) Act 2003

This Act commenced on 5 September 2003. It amended the *Local Government Act* 1993 to provide employment protection for certain staff members transferred from the employment of one council to another council due to the constitution, amalgamation or alteration of council areas. New provisions included provisions to protect the entitlements of non-senior employees who are affected by council amalgamations, the prohibition of forced redundancy of affected staff members during the period where a council amalgamation is proposed and the preservation of employee entitlements in the event of a transfer.

APPENDIX 5

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

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 know 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 6

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

Matters filed during period 1 January 2003 to 31 December 2003 and matters completed and continuing as at 31 December 2003 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 1.1.2003 – 31.12.2003	Completed 1.1.2003 – 31.12.2003	Continuing as at 31.12.03 (including previous years)
APPEALS			
Appeal - from Industrial Registrar	1	3	0
Appeal - from an Award matter	3	9	1
Appeal - from a Child Protection matter	1	1	1
Appeal - from a dispute matter	12	7	6
Appeal - from an Enterprise Agreement matter	1	1	0
Appeal - from an unfair dismissal matter	30	38	12
AWARDS			
Application create new Award	108	108	45
Application vary an Award	338	329	77
Application vary – nominal term	2	1	1
Application – State Wage Case	1	1	0
Rescission of Award	7	6	1
Review of Award	233	91	143
Application for exemption (s.18)	14	11	7
DISPUTES			
s130 of the Act	1131	1146	648
s130, s380 of the Act	7	10	4
s332 contract determination	34	38	23
s332, s380 of the Act	6	5	4
Other	2	6	3
ENTERPRISE AGREEMENTS			
Approval (Employees and Union)	41	32	14
Approval (Employees)	31	32	5
Principles for approval of Enterprise Agreements	1	1	0
Approval (Union)	275	261	37
UNFAIR DISMISSALS			
Application (by individual only)	1848	1992	547
Application (representative)	1724	1707	718
Application (organisation representative)	479	497	233
Application (organisation – multiple)	39	54	14
OTHER			
Contract Agreements	7	6	2
Contract Determinations	21	15	18
Contract of Carriage (claim for compensation)	10	2	12
Application under Child Protection (Prohibited Employment) Act	6	7	2
Application for Demarcation Order	1	3	1
Application under *Employment Protection Act* 1992	1	1	1
Registration pursuant to Clothing Trades Awards	75	77	2
Application extend duration of Industrial Committee	17	22	3
Application for reinstatement injured employee (by individual)	20	10	15
Application for reinstatement injured employee (by organisation)	9	7	8
Application for Review of Order under s181D *Police Service Act*	7	10	5
Application for Rescission of Order under s173 *Police Service Act*	1	0	1
Application for Relief from Victimisation s213 of the Act	25	21	11
Miscellaneous (not categorised)	4	6	3
SUB-TOTAL	**6573**	**6574**	**2628**

APPENDIX 7

MATTERS FILED IN INDUSTRIAL RELATIONS COMMISSION (IN COURT SESSION)

Matters filed during period 1 January 2003 to 31 December 2003 and matters completed and continuing as at 31 December 2003 which were filed under the *Industrial Relations Act* 1996.

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

Nature of Application	Filed 1.1.2003 – 31.12.2003	Completed 1.1.2003 – 31.12.2003	Continuing as at 31.12.03 (including previous years)
APPEALS			
Appeal from Local Court (Industrial Magistrate)	23	21	22
Appeal – superannuation	16	13	13
Appeal – OHS prosecution	20	8	20
Appeal – against decision of VETAB	1	0	1
Appeal – s106 matter	24	23	37
Appeal – other	9	4	8
CONTRAVENTION			
Contravention of Dispute Order s139 of the Act	2	2	1
HARSH CONTRACTS			
Application under s106 of the Act	631	733	1055
PROSECUTIONS			
Offences under *Industrial Relations Act* or *Regulations* (s.397)	1	2	1
Prosecution – s8(1) *OHS Act* 2000	47	2	45
Prosecution – s8(2) *OHS Act* 2000	17	1	16
Prosecution – s9 *OHS Act* 2000	4	0	4
Prosecution – s10(1) *OHS Act* 2000	4	0	4
Prosecution – s10(2) *OHS Act* 2000	4	0	4
Prosecution – s13 *OHS Act* 2000	1	0	1
Prosecution – s26(1) *OHS Act* 2000	6	0	6
Prosecution – s15(1) *OHS Act* 1983	36	98	136
Prosecution – s16 *OHS Act* 1983	3	5	5
Prosecution – s16(1) *OHS Act* 1983	15	44	61
Prosecution – s16(2) *OHS Act* 1983	1	2	5
Prosecution – s17(1) *OHS Act* 1983	2	6	5
Prosecution – s17(1) (1)(a)*OHS Act* 1983	0	5	12
Prosecution – s18(1) *OHS Act* 1983	3	6	6
Prosecution – s18(2)(a) *OHS Act* 1983	1	2	1
Prosecution – s19(a) *OHS Act* 1983	0	5	7
Prosecution – s27(1) *OHS Act* 1983	3	2	3
Prosecution – s50(1) *OHS Act* 1983	4	15	61
OTHER			
Declaratory jurisdiction (s154, s248)	8	7	13
Cancellation of registration industrial organisation	1	1	1
Civil Penalty for breach of industrial instrument	26	12	14
Monetary claim s357 of the Act	4	1	3
Monetary claim s365 of the Act	7	6	20
Monetary claim under *Long Service Leave Act* 1955	1	1	0
Miscellaneous (not otherwise categorised)	4	4	7
SUB-TOTAL	**930**	**1031**	**1597**
TOTAL (IRC & CICS MATTERS)	**7503**	**7605**	**4225**

NB: Statistics for the 2003 Annual Report have been collated from a different case management system to that of previous years and, therefore, comparison with previous years should be treated with caution. A number of new sub-categories were created for the year 2003 to ensure that the Commission was able to extract data on specific areas and this may give an impression that data reveals only disposals for 2003. Matters disposed from previous years may, in some cases, be reflected under a more general category.