**Industrial Relations Commission**
**New South Wales**

# "THE IRC IN NEWCASTLE"

## SPEECH GIVEN BY THE HONOURABLE JUSTICE INGMAR TAYLOR AT THE IRS NSW NEWCASTLE ANNUAL CONFERENCE 2024[1]

## 25 OCTOBER 2024 AT FORT SCRATCHLEY, NEWCASTLE

### Introduction

1 I would first like to acknowledge the Awabakal and Worimi Peoples, on whose lands the city of Newcastle exists. I pay my respects to their elders and to any First Nations people who are with us today.

2 I am delighted to join you on this occasion. From my earliest days I have had a fascination with Newcastle industrial relations. I recall meeting, as a young advocate, Ralph Warren, a local barrister, who told me he travelled to Sydney for hearings by seaplane; landing in Rose Bay. It left me with the impression that industrial relations Newcastle-style had a James Bond-like glamour.

3 It is an exciting time in the industrial relations space in NSW. The re-establishment of the Industrial Court and (for NSW public sector workers) the removal of the "wages cap" are profound changes that affect industrial relations across the State.

[1] This is an edited version of the speech as presented.

**The History of the Commission: 1901–2024**

4 The Industrial Relations Commission of NSW has a long and proud history. Combining its various iterations, it is in fact the longest-standing industrial tribunal in the world, established by the *Industrial Arbitration Act 1901* (NSW).

5 Over its 123 years, the Commission has set multiple conditions that became national standards, notably: the minimum wage, redundancy pay, permanent part-time employment, and the equal remuneration principle.

6 It has throughout that history taken a lead role in respect of industrial relations in this region.

7 In fact, the first substantive decision by the Court, reported on page 1 of volume 1 of the Arbitration Reports, was heard here in Newcastle. It was a dispute between the Newcastle Wharf Laborers' Union and the Newcastle and Hunter River Steamship Company. It commenced hearing on 19 May 1902.

8 There is a photo of that case reproduced in a history of the Newcastle Branch of the Industrial Relations Society titled "Co-operation out of Conflict". It shows the first President of the Arbitration Court, Judge Cohen robed, and on either side of him, in suits, the other two members of the bench, one nominated by trade unions and one nominated by employer organisations – a form of arbitration that the *Industrial Relations Act 1996* (NSW) still permits.[2] Before them at the Bar table sit bewigged counsel and solicitors.

9 On the Bar table there is a small amount of paper, but no law reports. There were of course no precedents.

10 In that first year Justice Cohen, who had no prior experience in industrial relations, laid the foundation for industrial law principles that are still relevant today.

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[2] *Industrial Relations Act 1996* (NSW), Ch 5, Pt 8.

11 The case was heard over 6 days in Newcastle. There had been a downturn in business and the company, desirous of cutting costs, decided to change the employment conditions, altering the method of employment from casual hourly engagement to a fixed wage, intending to offset costs equal to the profit shortfall.

12 The local union was opposed to the new reduced rates, so the company hired men from Sydney to do the work. The company argued that, as the union workers were casuals, as a matter of contract it had no obligation to employ them.

13 The Court found the company guilty of unlawful industrial action as its actions were in effect a lockout, imposed a penalty, and ordered it to re-employ certain union members.

14 Justice Cohen applied a principle still found in the Act today – he found that the company's conduct of reducing wages to offset entirely its loss of profit was not in accordance with "equity and good conscience".

15 The phrase "equity and good conscience" remains in the current Act at s 163(c). When it was selected by Parliament in 1901 it had an established legal meaning, namely to determine matters "such as plain men, ignorant of the rules of law … shall think just".[3]

16 While the Commission was neither then, nor, I trust, now, constituted by "plain men … ignorant of the rules of law", the approach of arbitrating disputes by determining what is industrially just, unburdened by technical legalities, remains at the foundation of the Commission's jurisdiction.

17 At its commencement in 1901, and for most of the subsequent 123 years, the Commission has been constituted by Justices – and when it was so constituted was called the Industrial Court. That however was not the case from 2016 until

[3] *Scott v Bye* (1824) 2 Bing 344; 130 ER 338 (Best CJ).

1 July this year when I, along with Justices David Chin, Vice President, and Jane Paingakulam, Deputy President, were sworn in.

18 The resurrection of the Industrial Court sees the return of the important Work Health and Safety jurisdiction. Nobody should die or be seriously injured because their workplace is unsafe. Since its re-establishment the Industrial Court has received 71 WHS prosecution applications, almost 1 per working day.

19 Each of the Presidential members and the rest of the Commission are currently occupied dealing with a large influx of public sector salary dispute cases.

20 We are also starting to hear federal underpayment claims. Most civil penalty proceedings under the *Fair Work Act 2009* (Cth), including underpayment claims, can heard by an "Eligible State or Territory Court", one of which, in s 12, is "the Industrial Court of New South Wales".

21 Having spoken to our equivalents, the South Australian Employment Tribunal and the Western Australian Industrial Relations Commission, I expect that we will soon have a substantial small claims jurisdiction. I am giving thought as to how that can be conducted efficiently.

**Sitting Locations**

22 Amongst various changes that are occurring to the NSW Commission, there are changes in respect of our premises.

23 Currently, the Presidential members are located in the Sydney CBD, specifically in a beautiful building named the Chief Secretary's Building. As the name suggests, the building was built for the Chief Secretary of the colony and took two decades to build. In fact, the first four levels of the building were finished

only two years prior to the construction of Fort Scratchley where we are located today.[4]

24 Our building has a magnificent history. It has remained a state government building for nearly 150 years and in this time has housed some of the State's various decision makers, including for about a third of that time the Industrial Relations Commission. As those of you who have been there know, it has been beautifully restored, with various historical artefacts recalling the industrial history of this State.

25 One of its most significant early occupants was Sir Henry Parkes, whose offices and adjoining Executive Council Chamber sit two floors below our court rooms and are preserved as they were when he used them in the late 19th century. It was the venue for several meetings that led to Federation.[5] Whilst the IRC's day to day role has some significance, affecting as it does almost 50% of the State budget, it is tough to compete with the importance of six different colonies unifying into the Australian Commonwealth.

26 The Commission will be using three of its previous court rooms in the Chief Secretary's building at least until July 2026.

27 The Commission continues to have the majority of its court rooms at Smith Street in Parramatta, where our Commissioners have their chambers.

28 Since 1 July, major cases, such as the State Wage Case and the PSA Salaries Cases, have been heard in the city location.

29 Now, we are very conscious that despite our Sydney locations we are the *New South Wales* Commission. Our matters arise all over this great State, from

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4 Fort Scratchley Historical Society, "Welcome to Fort Scratchley" https://fortscratchley.org.au/ accessed 25 October 2024.

5 Wikipedia, "Chief Secretary's Building" https://en.wikipedia.org/wiki/Chief_Secretary%27s_Building accessed 25 October 2024.

Albury to Ballina, from Broken Hill to Port Macquarie (and indeed further east, to Lord Howe Island).

30 If a matter would proceed with greater efficiency and productivity, our Judges and Commissioners will travel.

31 When you notify a dispute, or indeed any matter, indicate in the notification or at the first directions or conciliation the location of the parties and whether it is a matter suitable to be heard in Newcastle.

32 Where the Commission is notified of an urgent dispute involving parties outside Sydney, our AVL facilities can be used. Whilst I am definitely *not* encouraging parties to list urgent matters late on a Friday, I can say that if you need the Commission's help at short notice, we can accommodate you.

33 Our existing premises at Wharf Road will soon close. The Fair Work Commission, which also operates out of that location, is relocating to Level 2, 130 Parry Street, Newcastle.

34 The Industrial Relations Commission of NSW will from next year sit in the Newcastle Local Court building at 343 Hunter Street, Newcastle. I am giving thought as to how that can most efficiently be arranged.

35 Clearly there is a need to be able to adequately service industrial parties based in this region, and further north. To that end I will be writing to various interested parties including the Newcastle Branch of the Industrial Relations Commission, to arrange a meeting in Newcastle to better understand how the Commission can operate most effectively in this region going forward.

**Awards**

36 It is important that the Commission not only be accessible to parties, but also be efficient and effective in resolving industrial disputes.

37 The Commission's powers to resolve disputes are set out in the *Industrial Relations Act* of New South Wales. The author of the Act, Jeff Shaw QC, envisaged a system of dispute resolution based on conciliation and arbitration.

38 The amendments that reestablished the status of the Commission also repealed the section that empowered the Government to impose what became known as the "wages cap". Its removal has the effect of reinstating Jeff Shaw's broad and unfettered power to arbitrate where conciliation is unsuccessful. This in turn enhances the Commission's primary duty to "do everything that seems to be proper" to resolve a dispute by conciliation.[6]

39 Last Tuesday, former Deputy President Rod Harrison gave a seminar at our Sydney location on the "Hunter Model" of collaborative, interest-based industrial relations. This was of great interest to the Commission given the amendments to the *Industrial Relations Act* which inserted the new Chapter 2A, which provides for mutual gains bargaining, and anticipates that parties adopt a collaborative approach to bargaining and to work together to solve problems.

40 While our priority is to resolve disputes by conciliation, if disputes have to proceed to arbitration, the Act allows the Commission to "determine its own procedure" and to do so in a way that enables it to "act as quickly as is practicable" and "with a minimum of legal technicality".[7] Of course, the Commission also has to act in a way that upholds natural justice and procedural fairness. As stated by Justice Kitto of the High Court, "What the law requires in the discharge of a quasi-judicial function is judicial fairness."[8]

41 I want to talk about just a few of the tools that the Commission has at its disposal to ensure that arbitration is done quickly, fairly and inexpensively.

42 First, the Commission can make or vary an award. Now, the word "award", in everyday parlance, typically is understood to be a document that sets out the complete terms and conditions of employment that apply to workers in a sector

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6 *Industrial Relations Act 1996* (NSW), subs 134(1).
7 *Industrial Relations Act 1996* (NSW), subss 162(1), 162(2)(a), 162(2)(g).
8 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504.

or industry. The Act defines a "State award" to have a much broader meaning. A "State award" is any order of the Commission under the Act that sets conditions of employment, and the Act allows the Commission to make or vary an award to resolve an industrial dispute.[9]

43 Let's say, for example, that there is a dispute notified about whether nurses in a particular ward in the John Hunter hospital are being given appropriate breaks. The Commission's focus will be on resolving it by conciliation, including by issuing a recommendation, with a short statement of reasons to allow the parties to understand the reasons for the recommendation. That will usually be sufficient. But if the dispute has to be arbitrated, the Commission could deal with the dispute in a number of ways. It could vary the existing award, inserting a term that deals with breaks, either generally or at John Hunter. That is the usual approach. Alternatively, the Commission could make an order binding on John Hunter that requires going forward a particular method of work that resolves the particular dispute.[10] The Award must be in writing,[11] have a nominal term,[12] and not provide terms that provide unequal remuneration or conditions of employment for men and women,[13] but if there is already an award there is no requirement for the new Award to be comprehensive.[14]

44 Second, it is not the case that every arbitration needs to be a full conventional hearing, preceded by filing witness statements and submissions and involving cross-examination of witnesses. The Act provides that the Commission can determine its own procedure, is to act as quickly as is practicable, may require evidence or argument to be presented in writing, and can decide on the matters on which it will hear oral evidence or argument.[15]

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9 *Industrial Relations Act 1996* (NSW), ss 28A, 136(1)(b).

10 The Commission in the exercise of its arbitral function cannot determine past rights. That is a function for the Industrial Court. Note however *Industrial Relations Act 1996* (NSW), subs 176(3), which allows the Commission when constituted by a judicial member to, in effect, convert the proceedings into judicial proceedings in order to consider applications for back-pay or declarations.

11 *Industrial Relations Act 1996* (NSW), subs 13(1).

12 *Industrial Relations Act 1996* (NSW), s 16.

13 *Industrial Relations Act 1996* (NSW), s 23.

14 There is no need for a dispute resolution clause if there is an existing award that contains one: *Industrial Relations Act 1996* (NSW), subs 14(2).

15 *Industrial Relations Act 1996* (NSW), subs 162(2).

45 Further, it is open to the Commission to conduct consent arbitration proceedings in a manner that is agreed upon by the parties. The most suitable approach to arbitration will depend on the nature of the dispute. The "BlueScope Model" of arbitration, for example, was a method of consent arbitration where issues in dispute were sequentially resolved either by agreement or by an ex-tempore private binding determination by the Commission subsequently reflected in a new consent award.[16] The model was quick and effective. Such an approach is improved by publishing short reasons so that both the parties and other interested persons can understand, at least in summary form, what led to the outcome and to assist the later interpretation of the relevant clauses.

46 Consent arbitration methods of that type, which rely on providing the Commission with the power to determine matters without requiring a full hearing, expends fewer resources, is fast and reduces the potential for the relationship breakdown between parties that can occur during long, drawn out disputes.

47 There are two takeaways here about the Commission's approach to resolving disputes. The first is that the Commission will "do everything that seems to be proper to assist the parties" to achieve resolution by conciliation. The prospect of the matter otherwise being determined by arbitration provides parties with a significant encouragement to resolve the dispute in conciliation. The second is that if disputes do need to be arbitrated, the Commission has a broad capacity to shape the procedure of arbitration proceedings to suit the dispute before it, including by making an award or conducting proceedings in a manner agreed to by the parties.

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[16] The "BlueScope Model" originated from the proceedings in *Re Notification under section 130 by the Minister for Industrial Relations of a Dispute between BHP Billiton and the Australian Workers' Union NSW and others re proposed strike action* [2002] NSWIRComm 378. For a description of the nature of the Model, see *Operational Ambulance Officers (State) Award* [2008] NSWIRComm 168.

**John Stanton (1953–2024)**

48 John Stanton, who died on 1 September, occupies a very significant place in the Commission's history and played a very significant role in industrial relations here in Newcastle.

49 John was appointed a Commissioner in 2005, and in 2009 was dual appointed to the Fair Work Commission.

50 Along with Deputy President Rod Harrison, John helped create and then maintain a strong regional culture of cooperative industrial relations.

51 He continued in his role at the Commission until 22 October 2021, just four days short of 6,000 days as a Commissioner. Unsurprisingly, John was looked up to by members of the Commission. His knowledge and experience of industrial relations in the Hunter region were second to none.

52 Before his appointment as a Commissioner, John was a well-known figure in the Hunter region, working at the Metal Trades Industry Association, later known as the Australian Industry Group.

53 The history "Co-operation out of Conflict", which covers the first 20 years of the Newcastle Branch of the Industrial Relations Society of New South Wales, contains a note from John Stanton, in his then role as Chair of the Hunter Branch of the Industrial Relations Society. He recognises the successes of the Newcastle Branch from its commencement in 1978, stating, "it has, over [that] relatively short 20 year history, materially assisted in the development of co-operative and consultative relationships between unions and management based on mutual respect, trust and a preparedness to consider alternative viewpoints."

54 He also noted that the Branch had been instrumental in the establishment of Commission premises in Newcastle.

55 Organisations are only as good as their leaders, and it is clear that John played a large part in the success of the Branch and the Commission in Newcastle.

56 I had the privilege of appearing before Commissioner Stanton, as did many in this room. In his eulogy given at a memorial for John Stanton at Newcastle City Hall, Dr Rod Harrison recalled Peter McPherson telling him that

> John quickly developed a reputation of trusted impartiality that did not suffer grandstanders time wasters or bullshit artists from either side of the debate. He always said hello to the parties before formal proceedings with a friendly smile and always had the time for a chat.

57 He also conveyed the words of Ralph Warren who said:

> John was humble and respectful of his statutory obligation to the parties; he had the ability to deal equally with senior counsel and self-represented litigants and all those in between and to make them comfortable with each other despite their differences.

58 John had a wonderful career, was highly regarded, and the Commission is proud of the significant role he played in our history.