The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2001

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I have the honour to furnish to the Minister for presentation to Parliament the sixth Annual Report of the Industrial Relations Commission of New South Wales made pursuant to section 161 of the Industrial Relations Act 1996 for the year ended 31 December 2001.

PRESIDENT

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INTRODUCTION

The Sixth 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, 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 11 Commissioners.

During the year the Honourable Mr Justice Gregory Ian Maidment retired. His Honour's service commenced as a Member of the Industrial Commission in August 1988 and continued during almost 13 years until retirement in July 2001. His Honour's service included the difficult transitional periods when new legislation was introduced in 1992 and 1996. The vacancy created by his Honour's retirement was filled by the appointment of Wayne Roger Haylen QC as a Deputy President and judicial member in July 2001.

I note with appreciation the work of the Industrial Registrar and Principal Court Administrator, Mr T E McGrath, and the staff of the Registry who have greatly assisted the Members of the Commission in meeting the demands made in 2001. The dedication of the Industrial Registrar, the Deputy Industrial Registrar and the staff of the Registry is greatly appreciated by the Commission. The significant burden carried by them is not assisted by the difficult conditions under which they are at times required to work. It is hoped that further alleviation of this situation will occur in the near future.

I commend the work of my Principal Associate, Ms Dorothy Martin, and Associate, Ms Philippa Ryan (whose role was assumed during the year by Ms Lisa Gava), all of whom have assumed the major responsibility of 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 appreciation to the Research Associates to the President, Tom Chisholm and Sharlene Naismith, 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 and the library staff. The services that 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 co-operation and assistance they provide to the librarian and to the Commission.

The work of the Commission has increased significantly over recent years resulting in Members of the Commission dealing with extended lists. The increase in the applications filed in the Commission is revealed by a comparison of applications made in the years 1990 and 2001. The following table compares those years:

MATTERS FILED

	1990	**2001**
TOTAL	1,495	8644
Dispute notifications	438	1081
Unfair Dismissals	2 *(s.95)	4532
Award/EA applications	506	1559
Unfair Contract applications	165	955
OHS prosecutions	13	179
Appeals	83	119

* *plus an estimated 50 - 100 cases involving reinstatement issues but notified as disputes.*

The dramatic increase in applications filed in the Commission in 1996 and 1997 generally levelled off in 2000. However, the above comparison of the number of applications received in 1990 and 2001 reveals the historical increase in the workload of the Commission. The increase in the current year, 2001, was again very dramatic, increasing by 36 percent over the number of matters filed in 2000. The total number of matters filed of 8644 was unparalleled. It represented an 18 per cent increase on the number of matters filed in 1997, the previous year in which the number filed was a "record". As will be noted, the largest increases are in the categories of unfair contract application under s 106, unfair dismissal applications under s 84 and applications as to awards and agreements. There was a commensurate increase in appeals lodged. The only area of decrease was the area of prosecutions under the *Occupational Health and Safety Act.*

The following table displays a comparison of the number of applications filed from January to December 2001 as compared to the year 2000:

NEW MATTERS FILED

Calendar Years 2000 and 2001

FILED	Jan - Dec 2000	Jan - Dec 2001	Percentage change	
Awards/Agreements	998	1559	↑	56 %
Unfair dismissals	3,342	4532	↑	36 %
Disputes	925	1081	↑	17 %
OH&S prosecutions	271	179	↓	34 %
Unfair contracts	551	955	↑	73 %
Appeals	91	119	↑	31 %
All others	178	219	↑	23 %
TOTALS	**6,356**	**8644**	↑	**36 %**

ABOUT THE COMMISSION

The Industrial Relations Commission of New South Wales is the industrial tribunal for the State of New South Wales. The Industrial Relations Commission is also 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. A 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 will thus celebrate its Centenary in 2002 and arrangements to mark the Centenary are well advanced.

The work of the Commission includes:

- establishing and maintaining a system of enforceable awards which provide for fair minimum wages and conditions of employment;
- approving enterprise agreements entered into between employers and their employees or one or more trade unions;
- 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;
- handling unfair dismissal claims, by conciliation and, if necessary, by arbitration to determine if a termination is harsh, unreasonable or unjust;

- dealing with matters including the registration, recognition and regulation of industrial organisations;
- dealing with major industrial proceedings, such as State Wage Cases.

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 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.

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 Carmel Glynn, appointed 14 April 1980;

The Honourable Mr Justice Gregory Ian Maidment, appointed 1 August 1988; retired 3 July 2001;

The Honourable Mr Justice Barrie Clive Hungerford, appointed 13 July 1989;

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.

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;

Commissioner Ian Walter Cambridge, appointed 20 November 1996;

Commissioner Elizabeth Anne Rosemary Bishop, appointed 9 April 1997;

Commissioner Janice Margaret McLeay, appointed 2 February 1998.

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 Management Act* 1988, to the Director General of the Attorney General's Department.

Mr Timothy Edward McGrath was appointed as Industrial Registrar and Principal Court Administrator of the Industrial Relations Commission of New South Wales on 27 October 1999.

Dual Appointees

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.

The Honourable Frederick Vernon Watson QC

It is with great regret that I advise that the Honourable Frederick Vernon Watson QC passed away on 27 November 2001. The Honourable Vernon Watson was a greatly esteemed judge of the Industrial Commission of New South Wales from 1973 to 1989. A very well attended Ceremonial sitting of the Commission was held on Thursday 13 December 2001 in memory of and in tribute to him.

Those who spoke on this occasion were the President, the Honourable J W Shaw QC, on behalf of the New South Wales Bar Association, Mr R J Baragry, on behalf of the solicitors of New South Wales and the Law Society of New South Wales, Mr G Brack, on behalf of the employers of New South Wales and The Honourable J M Riordan AO, on behalf of the Labor Council of New South Wales and the unions of New South Wales.

ACTIVITY OF THE COMMISSION

Figures relating to the period 1 January to 31 December 2000 appear in brackets after the 2001 figures.

Members Sitting Alone

Matters filed and concluded

For the period 1 January to 31 December 2001, 8,644 (6,356) matters were filed in the Industrial Relations Commission of New South Wales, 8,271

(5,406) matters were concluded and 5,690 (5,384) matters were continuing as at 31 December 2001 (see *Annexures A & B).*

For the period from 1 January to 31 December 2001, there were 598 (510) applications for the making variation or rescission of an award, 590 (111) award reviews, 371 (377) applications for the approval of an enterprise agreement, and 1,081 (925) notifications of an industrial dispute *(Annexure A).*

During the year, 1,259 (932) matters were filed in the Commission in Court Session, 706 (534) were concluded and, as at 31 December 2001, 1,959 (1,437) were continuing. There were 955 (551) applications filed to declare contracts void or varied pursuant to section 106 of the Act (*Annexure B).*

Applications pursuant to section 84 of the *Industrial Relations Act* 1996

A large and continuing volume of work lies in the area of unfair dismissal applications under section 84 of the *Industrial Relations Act* 1996. These matters are allocated to Deputy Presidents and Commissioners on a daily basis.

A total of 4,532 (3,342) applications under section 84 were filed during 2001, with 4,410 (2,984) being concluded and 2,103 (1,996) matters were continuing at the end of 2001 *(Annexure A).* While the figure for 2000 represented a reduction from the particularly high number of applications received in 1997 and 1998, there has been a general trend over the last few years of a steady increase in the number of unfair dismissal matters filed in the Commission. However, in the present year the filings reached the highest level ever representing an increase of 36 percent over the year 2000 and an 18 percent increase over the highest previous year in 1997. This increase has had a substantial impact on the workload of the Commission with a particular burden falling upon Commissioners.

Appeals to the Commission

For the period 1 January to 31 December 2001, 44 (25) appeals were lodged in the Commission (other than in Court Session). Of these, 30 (18) were appeals against a decision of a Commissioner; 14 (6) were against a decision of a Presidential Member. During 2001, 25 (33) appeals were concluded and, as at 31 December 2001, 31 (18) appeals remained active (*Annexure A).*

A total of 75 (66) appeals were lodged in the Commission in Court Session for the period 1 January to 31 December 2001. These include 46 (37) appeals lodged against a decision of a Judicial Member of the Commission sitting alone; 21 (18) appeals lodged against a decision of the Chief Industrial Magistrate or other Magistrates; and 8 (11) appeals lodged against a decision of the State Authorities Superannuation Board. During 2001, 56 (47) appeals were concluded and, as at 31 December 2001, 71 (70) appeals remained active (*Annexure B).* The significant and continuing level of Full Bench activity in 2002 is reflected in the consideration of important Full Bench decisions later in this report.

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 general policy of the Commission in relation to unfair dismissal applications (section 84) and rural and regional industries has been to sit in the country centre at or near where the events have occurred. This does require 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.

There were a total of 756 (759) sitting days in a wide range of Country Courts and other country locations during 2001 with one regional Member based permanently in Newcastle (Deputy President Harrison) at the commencement of the year. The number of Members permanently based at Newcastle increased to two in August 2001, as a result of the President's approval of Commissioner Redman transferring, at the Commissioner's request, his usual place of sitting from Sydney to Newcastle. The Commission sat there for 268 (285) days during 2001. Deputy President Harrison and Commissioner Redman deal with a wide range of industrial matters mostly of a regional nature in Newcastle and the Hunter district.

The regional Member for the Illawarra - South Coast Region, the Honourable Justice Walton, Vice-President, deals with most Port Kembla steel matters and other Members also sit regularly in Wollongong and environs. There were a total of 180 (150) sitting days in Wollongong during 2001.

Occupational Health and Safety

A total of 179 (271) prosecutions were filed with the Commission in Court Session pursuant to the *Occupational Health & Safety Act* 1983, for the period from 1 January to 31 December 2001. A total of 112 (129) prosecutions were commenced in relation to an offence under section 15 of that Act alleging a failure to ensure the health, safety and welfare of employees at work; 39 (34) prosecutions under section 16 alleging a failure to ensure the safety of non-employees; and 11 (85) prosecutions were commenced against the directors or managers of corporations under section 50 of the Act. (*Annexure B*)

The significant penalties under this legislation are directed to the vindication of safety in the work place and no doubt have the effect of discouraging dangerous practices and encouraging a more thoughtful and professional

approach to occupational safety.

STATE WAGE CASE

State Wage Case 2001 [2001] NSWIRComm 119; (2001) 104 IR 438

The Commission instituted proceedings on its own motion to consider the Australian Industrial Relations Commission's decision in *Safety Net Review - Wages, May 2001* (2001) 104 IR 314. The Commission delivered its decision on 31 May 2001.

The Commission decided to adopt the approach of the Australian Industrial Relations Commission and to increase all award rates by between $13 and $17 per week. It was held that the evidence demonstrated that although there had been a downturn in the New South Wales economy which was greater than that of the Australian economy, the decline was attributable to transitional factors and that this situation would be corrected by mid-2002. The Full Bench therefore saw no reason to depart from the conclusion reached in the *State Wage Case 2000* (2000) 97 IR 93 that "the New South Wales economy in the long term is expected to continue to function at about the average of the Australian economy and that the New South Wales economy should continue to demonstrate a relatively consistent position by comparison to the Australian economy." It was held that the "divergent approaches of the legislative schemes do not manifest themselves in the decision of the AIRC to such an extent as would warrant any departure from that decision." The adoption of the adjustment was held not to be inconsistent with the objects of the Act and there was no serious opposition to the adoption of such a course by any party to the proceedings. The Commission considered there was a need to make safety net adjustments in order to protect lower paid employees under State awards.

The Commission also considered that efforts to ameliorate the difficulties occasioned to low paid workers by the non-adjustment of awards in accordance with previous State Wage Case decisions had not been fully effective. In the circumstances it was considered appropriate to "continue to fashion the provisions of Principle 8 so as to rectify lagging awards in the New South Wales system which by their nature (in not being merely minimum rates awards) require special attention for the low paid." The wage fixing principles were also varied in order to take into account the *Anti-Discrimination Amendment (Carers' Responsibilities) Act* 2000 and to incorporate the principle arising from *Re Equal Remuneration Principle* (2000) 97 IR 177.

OTHER SIGNIFICANT FULL BENCH DECISIONS

A number of significant decisions of Full Benches of the Commission in 2001 are briefly referred to in this section.

Ozwide Real Estate Pty Ltd v Department of Industrial Relations (Inspector Gibson) [2001] NSWIRComm 1; (2001) 103 IR 177

In this appeal the Full Bench considered whether the provisions of Subdivision 6A Division 2 Part 4 of the *Justices Act* 1902, governing the service of briefs of evidence upon a defendant, required the respondent prosecutor to serve a brief of evidence upon the appellant as defendant to a charge pursuant to s 4(3) of the *Annual Holidays Act* 1944. The Full Bench held that the prosecutor was not required to serve a brief of evidence as the provisions applied only to "prescribed summary offences" being "prosecuted by a prosecuting authority" as provided by the terms of s 66A of the *Justices Act*, and the Department of Industrial Relations or an inspector of that Department was not a "prosecuting authority" in terms of the definition in s 66A(1).

The Full Bench also held that, as an inspector duly appointed under the

Industrial Relations Act, the respondent's power to bring prosecutions arose from s 12 of the *Annual Holidays Act*. As he was not a "prosecuting authority" the provisions requiring the service of briefs of evidence upon defendants did not apply to the proceedings. Leave to appeal was refused and the appeal was dismissed.

Transport Industry - Waste Collection and Recycling (State) Award (No 2) [2001] NSWIRComm 5

The Full Bench heard an appeal arising from proceedings in which the appellants' roles were limited to that of interveners. On appeal the two main issues for the Full Bench's determination were, first, whether registered organisations were able to be parties to an award, for the purposes of principle 2(e) of the wage fixing principles, in circumstances where they or their members were not capable of employing employees pursuant to the subject award due to the way the award coverage in the industry was structured; and second, whether the Commissioner at first instance had erred in limiting the appellants' roles in terms of the material they could place before him. The Full Bench dismissed the appeal, finding that references in s 11(2) of the *Industrial Relations Act* to "an employer" and to "an industrial organisation of employers", when read in conjunction with the qualification in s 11(4) as to "sufficient interest", do not apply when the relevant employers could not employ employees bound by the subject or proposed award. It was also held that the history of the wage fixing principles demonstrated that references to "the parties" in principle 2(e) were clearly intended to be limited to persons or bodies who were to be bound by the award. As interveners, the appellants' roles were limited and did extend to be able to lead evidence or cross-examine as of right.

Re Pastoral Industry (State) Award [2001] NSWIRComm 27; (2001) 104 IR 168

This matter concerned an application referred to the Full Bench of the Commission as a Special Case under the wage fixing principles, to vary the Pastoral Industry (State) Award. The application sought to vary the award to maintain conformity with a federal counterpart award. The federal counterpart award had been "simplified" in accordance with s 89A of the *Workplace Relations Act* 1996 (Cth). The State award contained many provisions which had been deleted from the Federal award during the process. The Full Bench undertook an extensive analysis of the award making schemes in each jurisdiction and found that the schemes diverged and were based upon different policy considerations. It was considered that the award simplification process was an example of a policy extant in the federal legislative scheme directed towards "the exclusion of industrial tribunals from dealing with a range of industrial matters" by limiting the content of awards to the "allowable matters" stipulated in s 89A of the *Workplace Relations Act*. There was no similar policy discernable in the State legislative scheme where award making and variation was based upon setting "fair and reasonable conditions of employment for employees" as required by s 10 of the Act. Whilst the definitions of an industrial matter were in similar terms in the two legislative schemes, there was no provision in the nature of s 89A limiting the award making power of the State Commission.

The Full Bench held that the established principles governing counterpart awards and the considerations upon which they were based, had been affected by the diverging legislative schemes. In accordance with long established principle, whilst decisions of the federal Commission were to be given due weight, they cannot be followed where they conflict with the requirements of the State statute. The Full Bench therefore considered that there was no basis for importing changes made to the federal award as a consequence of the award simplification process unless those alterations conformed with the

requirements of award making under the New South Wales Act. The Full Bench also held that where "an award contains current conditions of employment", there was an inference that those conditions were in conformity with the obligations imposed upon the Commission by s 10 of the Act and its predecessors. It was held that "some positive demonstration of why such a condition sought to be removed no longer provides fair or reasonable conditions of employment must be provided on the evidence, before the Commission will act to remove them". There was not sufficient basis, on the evidence in the proceedings, to vary the award as sought in the application. The application was dismissed.

Gotico Industries Pty Ltd v Benbow [2001] NSWIRComm 30

The appellant appealed against the severity of the penalty imposed upon it for failure to notify a workplace accident in accordance with s 27 of the *Occupational Health and Safety Act* 1983. In declining leave to appeal the Full Bench emphasised the significance of s 27 of the *Occupational Health and Safety Act*. That provision is intended to enable the WorkCover Authority of New South Wales to carry out investigations for the purposes of identifying and remedying risks to safety in the workplace. Manifest public interest considerations are involved in the requirements of the provision being carried out which, in this case, were all the more significant as the appellant's failure to notify resulted in the foreclosure of the possibility of any prosecution for breach of s 15 of the *Occupational Health and Safety Act* 1983.

Riley v Australian Grader Hire Pty Ltd [2001] NSWIRComm 31; (2001) 103 IR 143

In this matter the Full Bench considered a prosecution appeal from a decision giving the respondent the benefit of s 10 of the *Crimes (Sentencing Procedure) Act* 1999. The respondent had not sought the application of the section and the

appellant had not been provided with an opportunity to make submissions on its application. The Full Bench held that the Magistrate erred in failing to advise the appellant of the intention to dispose of the proceedings pursuant to s 10 of the *Crimes (Sentencing Procedure) Act* or providing an opportunity to make submissions as to its application. As to the use of s 10, the Full Bench held that the Magistrate failed to exercise the discretion in a manner consistent with *WorkCover Authority (NSW) (Inspector Hopkins) v Profab Industries Pty Ltd* (2000) 100 IR 64. It was held that it was not reasonably open for the Magistrate to have concluded that the objective features of the offence could lead to no penalty being imposed. Further, it was considered reasonably clear that the Magistrate had regard to the "lack of common sense of the injured worker" and "concluded that [her] conduct effectively removed or minimised the liability of the respondent." This was "wrong in principle" as s 15 of the *Occupational Health and Safety Act* 1983 "requires employers to be diligent and proactive to ensure the safety of employees". Further, "those obligations are not diminished because of the error or negligence of an employee." The appeal was upheld, the decision at first instance was set aside and the respondent was re-sentenced by the Full Bench.

Shop, Distributive and Allied Employees' Association, New South Wales v Librus Pty Ltd, t/as Dymocks Parramatta [2001] NSWIRComm 46; (2001) 103 IR 390

The Full Bench here examined the statutory and regulatory regime pertaining to the exclusion of employees from the provisions of Part 6 of Chapter 2 of the *Industrial Relations Act*, pursuant to s 83(2) of the Act and regulation 5B(1)(d) of the *Industrial Relations (General) Regulation* 1996. The issue before the Full Bench was whether the Commission had jurisdiction to determine an application for unfair dismissal where an employee has been employed, for the purposes of an award of the Commission, as a casual employee for a period of less than 6 months. The Full Bench held that such an employee was not

exempted from the conciliation process provided under the statute as s 87(1) provides that a s 84 application may only be dismissed after conciliation attempts have proven unsuccessful. Jurisdiction to arbitrate the application, however, will depend on whether the casual employee has been engaged for a "short period". As to this aspect, the Full Bench held that the regulation excluding casual employees "engaged for a short period unless the employee is saved by having had regular and systematic periods of employment during a period of at least six months" did not mean that "engagement on a casual basis for a period of less that six months is necessarily engagement for a short period." The Full Bench held that the question of whether any particular employment comes within that statutory definition was a mixed question of fact and law to be determined in all of the circumstances. The appeal was upheld.

WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Ltd [2001] NSWIRComm 50; (2001) 105 IR 81

The Full Bench heard a prosecution appeal pursuant to s 197A of the *Industrial Relations Act* from an acquittal of the defendant of a charge alleging a breach of s 18(2) of the *Occupational Health and Safety Act* 1983. The respondent was a supplier of plant and equipment (a wood-chipping machine) and was alleged to have failed to ensure that its plant and equipment was safe and without risks to health when properly used.

The Full Bench examined the construction of the section in order to determine the nature of the duty of the supplier provided by s 18(2)(a). The Full Bench considered that on its proper construction the section "is not intended to provide protection to a supplier of plant which is unsafe or poses a risk to health by allowing ... a defence that unsafe plant was not used according to the supplier's operating manual or a defence that the unsafe plant was not 'diligently' maintained (in circumstances where the supplier knew the machine

was to be used for an inappropriate purpose)." In so determining the Full Bench held that the word "ensure" as it is used in s 18(2)(a) should be given the same meaning as it has in s 15 of the *Occupational Health and Safety Act* 1983. As to the qualification of "when properly used" the Full Bench concluded that this phrase is intended to limit liability to cases where the plant is safe but becomes unsafe by reason of misuse. Where a defendant has provided instruction or advice on how to use the plant but the plant itself is unsafe, the defendant cannot avoid guilt by claiming the plant was not properly used. It is thus not correct to approach the determination of a defendant's guilt, as the trial judge had done, by taking a "holistic approach" and having regard to the "totality of the machine, the environment and circumstances in which it was used, the persons who might be expected to operate the machine, the training of operators, the conduct of the supplier and the obligations imposed on the employer of operators of the machine." The appeal was upheld by majority and the acquittal of the respondent was quashed.

Llandilo Staircases Pty Ltd v WorkCover Authority of New South Wales (Inspector Parsons) [2001] NSWIRComm 64; (2001) 104 IR 204

In this appeal the Full Bench considered whether an offence under s 155(1) of the *Workers Compensation Act* 1987, which requires an employer to obtain and maintain a policy of insurance for workers' compensation purposes, is one of absolute liability thereby making the defence of reasonable and honest mistake irrelevant. The Full Bench held that the offence was one of absolute liability as the terms of the provision did not require the existence of mens rea. The objectives of the section would be defeated if the defence of honest and reasonable mistake was open, given that an "obviously important part of the legislative scheme is insurance" and that the legislation is "social legislation concerned with the regulation of industrial conditions in terms of workplace safety." The Full Bench also considered that the statute is directed at "the

identified mischief" of the employment of workers where the employer does not have the compulsory policy of insurance for workers' compensation liability and exposure to damages at common law, a mischief which has "been met by requiring a policy of insurance to be obtained and maintained in force at all relevant times". The appeal was dismissed.

Crown in Right of the State of New South Wales (Department of Education and Training) v Keenan [2001] NSWIRComm 106; (2001) 105 IR 181

In this appeal against severity of sentence, the Full Bench considered the principles for determining penalties for multiple offences against the *Occupational Health and Safety Act* 1983. The Full Bench held that the Court should determine an appropriate penalty for each offence and then apply the principle of totality. Where the multiple offences contain common elements, the sentencing judge must ensure that the defendant is not punished more than once for the common elements of the offences. Reference was made to the importance of the High Court judgments in *Pearce v The Queen* (1998) 194 CLR 610 and of *Mill v The Queen* (1988) 166 CLR 59. The Full Bench held that the subject offences had substantial common elements and the trial judge had not properly applied the correct principles. Given the substantial common elements of the offences, the total fine was re-assessed and reduced by the Full Bench. The appeal was upheld.

Burge v NSW BHP Steel Pty Ltd [2001] NSWIRComm 117; (2001) 105 IR 81

The Full Bench heard an appeal from a decision in which the appellant's application for unfair dismissal pursuant to Pt 6 of Ch 2 of the *Industrial Relations Act* 1996 was dismissed. The Full Bench considered that the Commissioner's conclusion that the respondent's decision to dismiss the

appellant was "in all the circumstances, a reasonable decision consistent with contemporary standards in industry generally and should not attract the Commission's discretion to intervene," was incorrect as the respondent had failed to discharge the onus of proof in alleging serious and wilful misconduct. The Full Bench held that the Commissioner erred in accepting the respondent's blanket application of its "no fighting" policy as the respondent had failed to take into account the circumstances of the employee or the history of his employment. Reference was made to the possibility that dismissals which occur by reason of the application of workplace policy may still be unfair where an employer fails to consider all the circumstances of the incident and examine its causes. It was also held that the Commissioner erred in considering the appellant's conduct immediately prior to the fight as an alternative justification of the appellant's dismissal as this conduct could not in itself justify summary dismissal. The conduct had in any event, been condoned by the respondent and it had waived any right to dismiss the appellant on those grounds. The Full Bench granted leave to appeal, upheld the appeal and made consequential orders for compensation and reinstatement.

Kingmill Australia Pty Ltd t/a Thrifty Car Rental v Federated Clerks' Union of Australia, New South Wales Branch [2001] NSWIRComm 141; (2001) 106 IR 217

This appeal concerned the question of whether persons employed by the appellant as "Reservation Consultants" and "Retail Sales Officers" were covered by the Clerical and Administrative Employees (State) Award which applies to "all persons employed in any clerical capacity whatsoever". The Full Bench referred to the principles to be applied in interpreting awards as considered in *Bryce v Apperley* (1998) 92 IR 448, which require an approach according to the actual words used and their plain, ordinary English meaning. The application of aids to the construction of awards such as the "major and

substantial" or "principal purpose" tests should be approached with caution, as the automatic adoption of such approaches may have the potential for awards to be interpreted inconsistently with their plain words and, therefore, unnecessarily restrictively. It was observed that there was no dispute that the employees were engaged in what may be described as clerical or administrative duties. The trial judge had not erred in concluding that the employees were employed "in [a] clerical capacity" and were therefore covered by the Award. The appeal was dismissed.

Campbells Cash and Carry Pty Ltd and National Union of Workers, New South Wales Branch (No.2) [2001] NSWIRComm 163; (2001) 53 NSWLR 393

In this appeal the Full Bench dealt with the Commission's jurisdiction pursuant to s 6(2) of the *Industrial Relations Act* 1996 to order the insertion into an award, of a clause requiring the authorised remittance by the appellant employer of membership fees to the respondent union. The appellant contended that the use of the word "example" in s 6(2) did not effectively provide that the authorised remittance of union dues was an industrial matter as the word "examples" could not be read, as the trial judge determined, as meaning "includes". The Full Bench rejected this construction for various reasons. For example, the decision in *Re Alcan Australia Limited and Others, ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, which held that deduction of union dues was not an industrial matter was decided in relation to a federal statute and the New South Wales Parliament is entitled to enact provisions which reverse the effect of that decision. Second, the "inclusion of the authorised remittance of union membership fees is addressed in unambiguous terms in the Act" and "the only properly available construction of that section is to conclude that the authorised remittance by employers of membership fees of industrial organisations is an industrial matter." Third, by adopting a purposive

approach to construction it is to be concluded "that the authorised remittance by employers of membership fees of industrial organisations of employees is an industrial matter" and the construction put forward by the appellant would "render nugatory the provisions of s 6(2)(i) thereof." Fourth, that Parliament "may be presumed to have legislated with knowledge of decisions of the High Court, and other courts and tribunals; and, relevantly in this instance, of the 1994 decision in *Alcan*". The appeal was dismissed.

Manpac Industries Pty Ltd (formerly t/as Pacific Concrete & Quarries Pty Ltd) v WorkCover Authority of New South Wales (Inspector Glass) [2001] NSWIRComm 190; (2001) 106 IR 435

This appeal raised questions relating to the circumstances in which the Court may amend the name of the defendant in a summons alleging offences against the *Occupational Health and Safety Act* 1983. The company name and Australian Company Number (ACN) on the original summonses were those of a company which was created after the date of the alleged offences, and which had taken the former name of the appellant when it had changed its name. The Full Bench found that the true defendant was the appellant referred to in the summonses. It held that it was the appellant which the prosecutor intended to charge and the only error was the incorrect use of the new company's Australian Company Number. The amendment of the summonses by the trial judge to correct the misnomer or misdescription in the name of the true defendant was within the scope of either s 6(1) of the *Supreme Court (Summary Jurisdiction) Act* 1967 or s 170(1) of the *Industrial Relations Act* 1996. The Full Bench held that the guilty plea initially entered by the appellant was therefore properly made, and the refusal to allow the withdrawal of the plea was open to the trial judge.

The Full Bench held, however, that the penalty of $160,000 imposed at first instance was manifestly excessive. The trial judge failed to give full weight to

the fact that the alleged contraventions, charged as a single offence pursuant to s 49A of the *Occupational Health and Safety Act* 1983, arose out of the same factual circumstances and therefore had "double counted" the culpability. There was also a failure to properly take into account the appellant's limited financial means. The Full Bench vacated the penalty imposed at first instance and imposed in lieu a penalty of $90,000.

Integral Energy Australia v Allen [2001] NSWIRComm 193; (2001) 107 IR 456

In this appeal the Full Bench considered the jurisdiction of the Commission in Court Session to make orders for the provision of notice of termination pursuant to s 106 of the *Industrial Relations Act* 1996 where the employer is a State owned corporation constituted by the *Energy Services Act* 1995. The relevant portion of the *Energy Services Act* provided that the appellant's board "may remove a person from office as chief executive officer, at any time for any or no reason and without notice." The respondent was terminated without notice pursuant to these provisions and commenced s 106 proceedings. The appellant sought a declaration that the Commission had no jurisdiction to hear and determine any of the respondent's claims "with respect to the time at which the applicant was removed from office, the reasons for which that was done and the notice that he might be entitled to receive".

The Full Bench found that the respondent was employed solely in the office of chief executive, and that the removal of a chief executive pursuant to the *Energy Services Act* brought the contract applying to the holder of that office to an end. It was held that in the absence of express words the provisions of the *Energy Services Act* (which were earlier in time) were not repealed, altered or derogated from by the (later in time) provisions of s 106 unless an intention to that effect was evinced by necessary implication. There was an absence of power under s 106 of the *Industrial Relations Act* to make orders requiring the

appellant to provide notice of termination to the respondent in circumstances where he had been removed from office pursuant to the relevant provisions of the *Energy Services Act*. The Full Bench upheld the appeal and made the declaration sought by the appellant holding, however, that it was not necessary to determine whether the Court may have jurisdiction to vary the contract to provide for payment in lieu of notice

Bourke Air Charter v Easton [2001] NSWIRComm 229; (2001) 109 IR 443

The Full Bench considered on appeal the effects of the trial judge's intervention in the hearing of an application under s 106 of the *Industrial Relations Act* 1996. The application at first instance sought a declaration of an unfair contract and the subsequent payment of monies at the "rate prevailing in the industry" with no specific request for the payment of overtime. During the hearing, the trial judge asked a number of questions relating to overtime worked by the respondent. The appellant maintained that this represented excessive judicial intervention resulting in an order for payment of overtime in circumstances where there was no such request in the pleadings. The Full Bench held that although the intervention of the trial judge did not affect the proceedings overall it did lead to a situation where the conclusion reached and the orders made in respect of overtime could not stand, there being no claim by the respondent for overtime nor any amendment sought to the pleadings when the matter was raised by the trial judge. The appeal was upheld with respect to the overtime issue and orders substituted for those made by the trial judge.

WorkCover Authority of New South Wales (Inspector Dawson) v Plastachem Pty Ltd [2001] NSWIRComm 244

In these proceedings the Full Bench considered the circumstances in which a defendant may be awarded costs and indemnity costs, when charges brought

under the *Occupational Health and Safety Act* 1983 have been withdrawn or dismissed. The Full Bench held that where a defendant has secured the dismissal of a criminal charge, it would not generally be just and reasonable to deprive the defendant of an order for costs. However, costs will not be awarded to a defendant on an indemnity basis unless there is some special or exceptional feature of the case that would make such an award just and reasonable. The Full Bench discussed the distinction between the withdrawal and dismissal of charges, and identified the circumstances in which a prosecutor would be granted leave to withdraw charges. The Full Bench upheld the appeal, finding that no proper basis had been made out for an order of costs on an indemnity basis.

Transport Workers' Union of Australia, New South Wales Branch and Chubb Security Services Ltd [2001] NSWIRComm 248

In this appeal the Full Bench considered the extent of the Commission's power to make dispute orders pursuant to s 137(1) of the *Industrial Relations Act* 1996. At first instance orders were made to the effect that the appellant refrain from imposing bans, limitations or restrictions upon the performance of work and that the appellant take "all necessary steps to ensure the continuation of work by their members" employed by the respondent. The Full Bench held that the order requiring the appellant to ensure the continuation of work could not be justified as "an order of the kind specified in the grant of power provided by paragraph (a)" and further, "the order, when construed, could not be said to be an order to or in aid of order one, particularly having regard to the fact that order one was an order to refrain from taking industrial action." Accordingly the Full Bench found there was no power to make the order and that it should therefore be set aside. The Full Bench also determined that the order did not contain the clarity required given that it is "essential that orders made under s137 be in clear terms and in terms readily understood and capable of being obeyed by those against whom they are

made."

Genner Constructions Pty Limited v WorkCover Authority of New South Wales (Inspector Guillarte) [2001] NSWIRComm 267; (2001) 110 IR 57

The Full Bench considered the question of what constitutes adequate training in the context of s 15(1) of the *Occupational Health and Safety Act* 1983 and held that adequate training requires the provision of such information and instruction as is necessary to fully equip employees to safely perform work which they are expected to undertake, including the provision of training as to all contingencies arising out of or relating to the performance of such work. The Full Bench held that an employer must therefore educate the employee to deal with the full range of circumstances which may arise in the performance of work, including eventualities which are more unusual in character. Where an employee is left in control of a worksite and given the authority to alter work arrangements if required, it is less likely that informal, "on-the-job" training will, of itself, be sufficient. The Full Bench dismissed the appeal, finding that the charges were established beyond reasonable doubt, the defence under section 53 of the Act had not been made out, and that the penalty as assessed by the trial judge was within the available range.

Re Social and Community Services Employees (State) Award [2001] NSWIRComm 274

The Full Bench heard an application for a new award to replace the Social and Community Services Employees (State) Award made as a first award in 1991. The Full Bench found that the applicant union had established a Special Case within the *State Wage Case* principles and determined it was appropriate to make a new award incorporating agreed matters and other changes in salaries and conditions. In particular, the Full Bench was satisfied on the evidence

that the existing classification structure was limited and did not afford "sufficient scope for recognition of changes in breadth of the skills base of employees within this industry in the past decade nor does it afford sufficient scope for increases in the range and diversity of services provided within the industry and hence, the range and diversity of work now required to be performed by employees." The Full Bench found that the making of the new award required certain matters to be dealt with on a short term basis and others in the longer term. As to the long term, the parties were directed to confer as to the creation of an enterprise-focussed award classification structure, translation arrangements and related matters. In the interim, the Full Bench fixed a new and extended classification structure of six grades based upon the existing provisions but providing greater recognition of tertiary and other training based qualifications, "the contemporary standing of social and community welfare work as a career" and "the greater range and diversity of work now being asked of employees in this industry." The new structure also contained higher rates of pay with incremental advancement within each grade, and a further pay increase of three per cent after 12 months. The Full Bench considered that the award and the extent to which the Union's claims were granted were to be seen "as resulting uniquely from the particular circumstances of the special case found and thus represents a balancing of all of the considerations referred to relevant to the finding of the special case, as well as the particular history of the present award and the history of award making in the industry."

Re Hotel &c Employees (State) Award [2001] NSWIRComm 284

In this appeal the Full Bench referred to the distinction between the Commission's powers of award making and variation pursuant to ss 10 and 17 of the *Industrial Relations Act* 1996 and those of the review process under s 19. The appellants contended that the variations made to the award at first instance travelled beyond what was permissible in the context of s 19 review

proceedings. The variations at first instance, contained in a consent award between the respondents to the appeal, involved substantial increases in wages, allowances, extension to the coverage of the award, the introduction of new conditions for annual leave loading, paid stop work meetings and jury service.

The Full Bench held that the variations proposed were "not contemplated or permitted by the terms of s 19 of the Act" and were "only capable of being processed under the relevant provisions of the Act and in accordance with *State Wage Case Principles*". The Full Bench held that the trial judge had only made the proposed consent award as the parties had failed to disclose "that the document did much more than simply reflect existing rates of pay and conditions with changes legitimately arising under s 19 of the Act." In upholding the appeal, the Full Bench expressed concern as to the conduct of the proceedings as no steps were taken by the parties to correct the mistaken view at first instance. Such an "absence of candour" was considered contrary to the "obligation on parties appearing before the Commission" to identify what was being sought in proceedings and to inform the Commission of all relevant matters.

CGEA Transport Ltd t/as Southtrans v Transport Workers' Union of Australia [2001] NSWIRComm 287; (2001) 110 IR 211

The Full Bench in dismissing this appeal considered the requirements of procedural fairness in the hearing of an unfair dismissal application. The appellant argued that in finding there was a strong suspicion that a complaint against the respondent had been recorded later in an expanded form to provide justification for the appellant's position, the Commissioner had denied procedural fairness to the appellant because the issue had not been sufficiently raised during the hearing. The Full Bench held that procedural fairness requires parties to know the case which they are required to answer so that they have the opportunity to respond to it, however, in this case the issue was

peripheral to the Commissioner's decision and the finding that the dismissal was harsh, unreasonable or unjust was properly open on the evidence notwithstanding the questioned findings. The appeal was dismissed.

Western Sydney Area Health Service v Gibson [2001] NSWIRComm 290

The Full Bench considered an appeal from an interlocutory judgment in which the appellant's application for a declaration under s154 of the *Industrial Relations Act* and dismissal of the proceedings pursuant to rule 82(1)(g) of the *Industrial Relations Commission Rules* 1996 was held to be out of time by reason of the operation of rules 82(2)(c) and 79(1). The substantive question raised by the appellant's application was whether the Commission in Court Session had jurisdiction or power to grant the relief under s106 sought by the respondent. The appellant claimed that the Commission did not have jurisdiction because the respondent's employment was governed by the *Health Services Act* 1997. The judge at first instance held that it was unnecessary to deal with the substantive question and instead dealt with whether the notice of motion could act as an appropriate vehicle for the question to be determined. "In other words, his Honour embarked upon a procedural exercise and thereby did not determine the real question raised by the respondent."

The Full Bench held that this approach was erroneous and the effect was to "deny to the appellant a consideration of the jurisdictional issue raised by it because of the operation of the rules and apparently without examination of whether it was appropriate to hear that jurisdictional issue as a preliminary matter." The Full Bench further considered that "attention to the strictures which may exist in granting relief under s 154 in the determination of jurisdiction would be to unnecessarily fetter the ordinary jurisdiction of the Court in exercising its incidental power under s 106 to determine whether there is or is not jurisdiction to grant the relief sought." The determination of

jurisdiction is an essential duty of the Court to be performed in the appropriate circumstances in accordance with the principles stated in *Virtue v New South Wales Department of Education and Training* (1999) 92 IR 428 at 447. It was also held that the extension of time question was of limited significance as the issues to be determined by the trial judge were, first, whether the interlocutory application should be considered as falling within principle (3) or principle (4) of the principles in *Virtue* (considered in context of the principles as a whole) and second, the related consideration of whether it was appropriate, as a matter of discretion, to consider the grant of declaratory relief. The appeal was upheld and the matter was remitted to the trial judge for hearing and determination in accordance with the reasons of the Full Bench.

Westfield Holdings v Adams [2001] NSWIRComm 293

The respondent was a senior executive who received benefits upon the termination of his employment with the appellant after three years' service. The trial judge found, pursuant to s 106 of the *Industrial Relations Act* 1996, that the contract of employment and certain collateral arrangements were unfair and awarded the respondent significantly larger total benefits encompassing notice and redundancy, performance bonus, share options and interest. On appeal, the Full Bench held that the law relating to unfair contracts in New South Wales had developed into a substantial and important area of jurisprudence, the present case being one of an increasing number of unfair contract cases in recent years involving claims by senior corporate executives and other highly paid employees. The Full Bench undertook an extensive review and analysis of the authorities relating to the making of monetary orders under s 106(5). The Court considered the concept of restitution and the effect of the decision in *Brown v Rezitis* (1970) 127 CLR 157, the relevance of principles for assessment of damages at common law and under the *Trade Practices Act* 1974 (Cth), the doctrine of mitigation and the effect of the distinction between notice and severance payments, the role of

industrial standards and the appropriateness of considering whether the overall amount to be awarded is excessive after having determined an amount for each particular element. The Court concluded by re-stating the principles to be applied in the making of money orders under s 106(5).

It was held that the trial judge erred in awarding the respondent full entitlement of share options rather than awarding options in the same proportion as his completed service had to the qualifying period for the options. Further, it was held that the trial judge erred in failing to take into account as to the monies awarded in lieu of notice, monies earned by the respondent after his termination. The appeal was upheld to that extent and consequential orders made.

Pacific Healthcare (Australia) Pty Ltd v AHI Healthcare Systems Pty Limited [2001] NSWIRComm 297

This appeal involved a challenge to the orders made at first instance in proceedings pursuant to s 106 of the *Industrial Relations Act* 1996, in which the trial judge varied the respondent's contract of employment and provided consequential monetary orders, in an amount equivalent to two years notice or termination. In refusing leave to appeal, the Full Bench emphasised that the matters against which the appeal were brought were within the trial judge's discretion. The Court stressed that the proper application of principle permitted interference with a trial judge's exercise of discretion only in the limited circumstances set out in the High Court decision of *House v The King* (1936) 55 CLR 499. The Full Bench held that no proper basis had been demonstrated for the granting of leave to appeal.

Nursing Homes, &c Nurses' (State) Award [2001] NSWIRComm 298; (2001) 110 IR 433

The Full Bench considered an application by the Catholic Commission for Employment Relations for a new award to be made and current awards to be varied to replace the standard personal/carer's leave provision approved in the *State Personal/Carer's Leave Case 1998* (1998) 84 IR 416. The proposed award allowed employees to access their sick leave entitlements for absences to provide care or support for "a family member or other person who needs the employee's care or support" due to illness. The President of the Anti-Discrimination Board opposed the award, submitting that, as a result of the definition of "family member" in the award, the award was discriminatory on the basis of marital status, homosexuality and race, contrary to the *Anti-Discrimination Act* 1977. The Full Bench rejected this submission, finding that a person who required the employee's care or support and was not a "family member" was clearly an "other person" and therefore came within the scope of the provisions. The operation of the provisions did not depend on the nature of the particular caring relationship, but only on there being persons who were ill and required the employee's care or support. The Full Bench granted the application, taking into account that the award provisions were an improvement on both the standard clause and the "Catholic clause" in the *1998 Personal/Carer's Leave Case*, were not contrary to the principles of the *Anti-Discrimination Act*, and reflected the agreement of the industrial parties.

Health and Community Employees Psychologists (State) Award, Re [2001] NSWIRComm 302; (2001) 109 IR 458

The Full Bench considered under the Special Case principle an application to make a new award for psychologists employed in the New South Wales public health system. This was the first occasion on which the Commission had undertaken an arbitrated review of the salaries paid to public sector

psychologists. The present classification structure had remained largely unaltered for 34 years, despite the recent development of area health services which has affected the nature and responsibilities of psychologists in the total health setting as involving a multi-disciplinary approach and performed as a community-wide function. The Full Bench found that the applicant had made out a special case in accordance with the Special Case principle in the *State Wage Case 2001*. It was found that the qualifications and academic rigour expected of psychologists today were far greater than existed when the classification scale was first established, and that the evidence established a career industry where the qualifications, knowledge and responsibilities increased markedly as the individual psychologist gained experience in performing the various functions at the respective levels. The present classification scale was unsatisfactory and did not provide a fair and reasonable career path. The Full Bench changed the classification structure to create a new classification of Senior Psychologist and to insert two additional salary levels for the classification of Senior Clinical Psychologist, and also increased the annual salary rates.

Origin Energy Limited v Smith [2001] NSWIRComm 308; (2001) 111 IR 476

This was an appeal against a decision of a single judge in which the respondent, while still in the appellant's employment, brought an application under s 106 of the *Industrial Relations Act* 1996, claiming that his contract of employment was unfair due to the appellant's conduct refusing to give the respondent redundancy pay, and instead giving him 14 months notice of termination. The Full Bench upheld the trial judge's decision, finding that in terms of the appellant's termination policy, the respondent had been made redundant but had not been given any compensation in accordance with that policy. The appellant's reasoning for refusing redundancy seemed to arise from a belief that the respondent was soon to retire and should not get a

"windfall gain". The Full Bench held that the 14 months notice received by the respondent was not, in the circumstances of this case, a reason to reduce the 18 months redundancy pay awarded to the respondent by the trial judge. The Full Bench found that it was clear that the respondent applied for redundancy prior to his termination and his working out the entire notice period was inevitable in light of the approach adopted by the appellant. The Full Bench also observed, in respect of s 106 applications generally, that although "conduct of a party which renders a contract or arrangement unfair or otherwise actionable under s 106 of the *Industrial Relations Act* may well provide jurisdiction for relief under that provision, the primary focus of the exercise of the Court's jurisdiction should be, where relevant and available, the contract or arrangement and its respective terms or omitted terms as to the effect thereon of the impugned conduct. This approach will usually lead to orders (where orders are made) more certainly well-founded jurisdictionally and will be less likely to result in appeals which, whilst superficially thought to be available, upon examination on appeal are soon shown to lack substance." The appeal was dismissed.

Legge v Coffey Engineering Pty Ltd (No 2) [2001] NSWIRComm 319; (2001) 110 IR 447

The prosecutor appealed pursuant to s 197A of the *Industrial Relations Act* 1996 from a decision of a local court magistrate dismissing an information brought against the respondent alleging a breach of s 15(1) of the *Occupational Health and Safety Act* 1983. The Full Bench observed that if leave were required to bring an appeal under s 197A, it should be granted as the appeal raises important issues including the nature of an offence under s 15(1). In granting leave the Full Bench observed that the "better view would seem to be that leave to appeal is required...". The issues in the appeal related to the duties of the respondent labour hire company to its employees. At first instance the information was dismissed because the magistrate considered

there was little or no expectation on the respondent's part that its employee would be working on the particular machine that gave rise to his injury, even though it was admitted that the job could entail the use of the machine. In upholding the appeal, the Full Bench confirmed that an offence under s 15(1) is one of absolute liability and the requirement that there be a causal nexus between the risk to safety and the employer's conduct did not obviate or diminish the nature of that liability which is "satisfied by the nature of the section in its terms being to 'ensure' safety", not by the need "for a causal relationship between the conduct of the employer and the consequent risk to safety." In the case of a labour hire company, liability cannot be avoided "merely because the client to whom an employee is hired out is also under a duty to ensure that persons working at their workplace are not exposed to risks to their health and safety or because of some implied obligation to inform the labour hire company of the work to be performed." "The employer is to take positive steps to ensure that the premises to which its employees are sent do not present risks to health and safety." The Full Bench also rejected the respondent's claimed defence under s 53 of the *Occupational Health and Safety Act* 1983, observing that although a labour hire company "may abdicate supervision of its employee in the performance of the work it cannot abdicate its responsibility under s 15(1) of the *Occupational Health and Safety Act* to ensure that employee's health, safety and welfare at the premises of the client." In this case, the risks were reasonably foreseeable and it was practicable for the respondent to take precautions against those risks. The appeal was upheld and the respondent was convicted.

Inspector Steven Jones v State of New South Wales (Department of Public Works and Services) [2001] NSWIRComm 321; (2001) 111 IR 391

This matter involved a reference to the Full Bench of questions of law as to Crown immunity from prosecution under the *Occupational Health and Safety*

Act 1983. Two questions were referred; first, whether the Crown in right of the State of New South Wales (Department of Public Works and Services) were liable to criminal prosecution under the Act, and second, whether or not the Crown is an "employer" within the meaning of s 16(1) of the *Occupational Health and Safety Act*. Having heard submissions of the parties and on behalf of the Attorney General as amicus curiae, the Full Bench declined to answer the questions as there was no utility in doing so. The Full Bench said:

> "Even when the questions are considered against the submissions filed by the defendant, we are satisfied that no jurisdictional impediment exists to the Court proceeding to hear and determine the charges brought by the prosecutor. In reaching this conclusion we have very much in mind the submissions made today [on behalf of the Attorney General] as amicus to this effect:
>
> > 'If it were considered that these questions might arise before the Commission on a regular basis in the future, there might be a good reason for determining them at this time. But, as already noted, these questions cannot arise under the new legislation and so can only be an issue in a closed class of cases remaining under the old legislation. Given the existence of an opinion by the Solicitor General on these questions, it might be thought that it is unlikely that they will arise even in that closed class of cases involving a government agency or instrumentality as the defendant.' "

Re Operational Ambulance Officers (State) Award [2001] NSWIRComm 331

These proceedings involved an application pursuant to s 17(3)(c) of the *Industrial Relations Act* 1996 for variation of the Operational Ambulance Officers (State) Award. The application was heard as a Special Case pursuant

to Principle 10 of the State Wage Case Principles. The application sought an increase in annual leave entitlements for ambulance officers engaged in shift work on the basis of occupational health and safety concerns relating primarily to the risk of acute stress or other associated psychological injury. It was contended that additional leave would assist in alleviating the trauma experienced by ambulance officers during the course of their employment and would prevent future adverse consequences arising from such trauma. The decision also dealt with a cross application on behalf of the Health Administration Corporation to reduce some other unrelated conditions of employment. The Full Bench reviewed the operation of the special case principle and the authorities as to the application of the principle and held that for an application for variation as a special case to be made out, the applicant must, on the ordinary standard of proof, demonstrate that the variation is necessary to ensure that the award continues to provide fair and reasonable conditions of employment as required by s 10 of the Act, and that the application for variation had some special attributes to enliven the principle. The Full Bench also reviewed the authorities on the appropriateness of including provisions pertaining to occupational health and safety within awards, and held that when determining what amounts to fair and reasonable conditions of employment, it is appropriate for the Commission to have regard to considerations of the health and safety of employees. Such an approach was consistent with authority and reflects the ongoing concern to eradicate, where possible, threats to the health and safety of employees in the workplace. The existence of legislation and common law obligations upon employers in the area of occupational health and safety "should not operate to limit the Commission's jurisdiction to make awards which also address health and safety concerns" however, the inclusion of such considerations does not mean the award is seeking to "replicate or diminish the much broader obligations of an employer under the *Occupational Health and Safety Act*". The Full Bench considered that where an applicant has "made out a case for the making or variation of an award based on occupational health and safety

considerations" the case will generally have "sufficient attributes to bring the matter under the special case principle".

On the basis of the expert evidence in the proceedings, the Full bench held that ambulance officers performed work in an environment where they were "consistently exposed to the risk of psychological illness and injury by the nature of their work exposing them to emergency situations". It was decided to make a "moderate adjustment" to the leave conditions with a recommendation that annual leave be taken in two equal amounts at six monthly intervals. As to the cross claim, the Full Bench held that where conditions of employment were challenged, there was a presumption that such conditions were fair and reasonable and in this matter, the evidence as to the cross claim had not rebutted that presumption.

Newcastle City Council and Bevan [2001] NSWIRComm 338

The Full Bench was requested to determine an appeal and cross-appeal and deliver its decision even though the parties had advised the Commission that they had compromised their differences in relation to the employment of the respondent. The Full Bench declined to proceed with the appeals, finding that as the parties had come to an agreement, the issues raised in the appeals were "moot and any decision by the Commission would be 'academic' in that it would have no practical effect on the relations or relationship between the parties...". The Full Bench held that although the respondent in the appeal had demonstrated that a previous Full Bench decision was arguably incorrect and should, in appropriate proceedings, be reconsidered, the current appeals "no longer provide a suitable vehicle for that to occur," given the agreement. The Full Bench further considered that the determination of the appeals would not be of general guidance as "decisions in unfair dismissal matters turn on their own facts and circumstances." The appeals were thereby dismissed.

Taudevin v Egis Consulting Australia Pty Limited and the Commonwealth of Australia [2001] NSWIRComm 340

This matter involved the reference to the Full Bench of the Commission in Court Session pursuant to s 193 of the *Industrial Relations Act* 1996 of two questions of law. First, whether the Commonwealth was immune from the an exercise of the power by the Commission in Court Session under s 106 of the Act, on the basis that the Parliament of New South Wales was not constitutionally capable of affecting the Commonwealth in the manner permitted by s 106. Second, whether the Commonwealth was immune from an exercise of power under s 106 on the basis that the Parliament of New South Wales was not constitutionally capable of conferring power to grant the relief sought by the applicant against the Commonwealth as it vested the exercise of a non-judicial power upon a court exercising federal jurisdiction, contrary to Chapter III of the Constitution.

The Full Bench answered both questions in the negative. As to Crown immunities, the Full Bench held that the issue was whether, in light of *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410, "the application of s 106 impairs or interferes with the executive capacities of the Commonwealth or whether it merely regulates the exercise of those capacities." The Full Bench held that the Commonwealth was not immune from the substance of s 106 as it could not be said that the section empowers "the impairing, modification or attempted modification of executive power. At its highest, it involves regulation of activities such as employment which the Commonwealth might choose to enter into."

As to the second question, the Full Bench held that in exercising jurisdiction over a matter in which the Commonwealth was a party, the Commission in Court Session was exercising federal jurisdiction and judicial power. As to whether the exercise of such judicial power is constitutionally impermissible, the relevant question arising from the submissions of the Commonwealth was

whether State courts are subject to the *Boilermakers'* principle and must abide by the requirements of Chapter III of the *Constitution* when exercising federal jurisdiction. In this respect, the Full Bench held that *Boilermakers'* principle "does not provide that the judicial power of the Commonwealth may not be exercised by State courts which also exercise non-judicial power." Rather, the only relevant prohibition is that "it is not permissible under the framework of federal and State courts established under, or contemplated by, the *Constitution* since 1901, to vest in a federal or State court power which is incompatible with the role of the court as the repository of the exercise of federal judicial power."

PARLIAMENTARY REMUNERATION TRIBUNAL

The Honourable Justice M J Walton, the Vice-President of the Commission has constituted the Parliamentary Remuneration Tribunal since the amendment to the *Parliamentary Remuneration Tribunal Act* 1989 took effect in 1999 to provide that the Tribunal was to be constituted by a judicial Member of the Commission. However because of his Honour's heavy workload and panel responsibilities it was not feasible for his Honour to continue when his term of office expired on 30 September 2001. The President of the Commission, in accordance with the powers conferred by the statute, appointed the Honourable Justice R P Boland to constitute the Parliamentary Remuneration Tribunal from 2 October 2001.

LEGISLATIVE AMENDMENTS

The legislative amendments enacted during 2001 affecting the operations and functions of the Commission include:

Industrial Relations Amendment (Leave for Victims of Crime) Act 2001

This amendment commenced upon assent on 19 June 2001 and inserted a new Part 4B into Chapter 2 of the *Industrial Relations Act* 1996. The amendments provide that all employees, including part time and casual employees, are entitled to unpaid victim's leave in connection with court proceedings relating to the commission of a violent crime affecting the employee, the employee's child, grand-child or a child for whom the employee is a guardian, provided the child was under 18 years of age at the time of the violent crime. Leave is provided by the statute to attend court proceedings and to travel to court proceedings where the victim resides more than 100 kilometres away.

Corporations (Consequential Amendments) Act 2001

This Act commenced simultaneously with the *Corporations Act* 2001 (Cth) on 15 July 2001 and amended s 217 of the *Industrial Relations Act* 1996 to replace references to organisations incorporated under the *Corporations Law* with references to organisations incorporated under the *Corporations Act* 2001 (Cth). Section 379 of the *Industrial Relations Act* was the subject of similar amendment.

Statute Law (Miscellaneous Provisions) Act 2001

The *Statute Law (Miscellaneous Provisions) Act* 2001 commenced on 17 July 2001 and amended the definition of penalty unit in the Dictionary of the *Industrial Relations Act* 1996 by replacing the reference to s 56 of the *Interpretation Act* 1987 by reference to s 17 of the *Crimes (Sentencing Procedure) Act* 1999. The amendment was necessary after s 56 of the *Interpretation Act* was repealed by the *Crimes Legislation*

Amendment (Sentencing) Act 1999.

Industrial Relations Amendment (Casual Employees Parental Leave) Act 2002

This Act commenced on 17 July 2001 and reduced the length of service required for a casual employee's eligibility for parental leave provided by s 57(3)(a) of the *Industrial Relations Act* 1996 from 24 months to 12 months. Consequential amendments were also made to Schedule 4 of the *Industrial Relations Act* 1996.

Occupational Health and Safety Act 2000

The *Occupational Health and Safety Act* 2000 commenced on 1 September 2001 and repealed the *Occupational Health and Safety Act* 1983 and made minor amendments to the *Industrial Relations Act* 1996.

The new Act restructures the provisions of the 1983 Act and is written in simple language. The objects of the legislation have been rewritten and expanded and include the objectives of risk management (s 3(e)), consultation between employers and employees (s 3(d)) and the promotion of community awareness of occupational health and safety issues (s 3(f)). The Act creates new duties in the area of consultation, with a mandatory duty imposed upon employers to consult with employees about workplace safety issues. Part 2 of Division 2 sets out the nature of consultation, when it is required and how it is to be undertaken.

The new Act also introduces non-monetary penalties for breaches of the Act (Part 7 Division 2) that may be made in addition to a monetary penalty (s 112(2)). The Court may make orders for offenders to remedy or restore any matter caused by the offence, to pay the costs of the

WorkCover investigation into the offence, to publicise or notify other persons of the offence and its consequences or to undertake a project for the improvement of workplace health and safety. Failure to comply with such orders without reasonable excuse constitutes an offence under s 117 of the statute.

The Act also provides for "on the spot" fines to be issued by WorkCover inspectors (s 108 Part 7 Division 1). The level of fines are set out in the *Occupational Health and Safety Regulation* 2001 and when paid, bar further legal proceedings for the offence.

Amendments to the *Industrial Relations Act* 1996 were made by Schedule 2.6 of the *Occupational Health and Safety Act* 2000. Sections 70, 197A and 396 of the *Industrial Relations Act* 1996 were updated to refer to the new Act rather than the 1983 Act, and an addition was made to s 210 to provide that an employer or industrial organisation must not victimise an employee or prospective employee because the person makes a complaint regarding a workplace matter where the person considered it unsafe or a risk to health, or who exercises functions with respect to workplace consultation conferred under Division 2 of Part 2 of the *Occupational Health and Safety Act* 2000.

Industrial Relations Amendment (Public Vehicles and Carriers) Act 2001

This Act commenced on 14 December 2001 and inserted a new section 310A into the *Industrial Relations Act* to make provision with respect to the operation of Part VI of the *Trade Practices Act* 1974 (Cth) and the *Competition Code of New South Wales*, which referred to a number of prohibited restrictive trade practices. The amendment provides for a number of exceptions to those provisions to facilitate the exercise of the jurisdiction by the Commission provided by Part 2 of Chapter 6 of the

Industrial Relations Act 1996, or by the Contract of Carriage Tribunal, pertaining to contracts of bailment and contracts of carriage.

Industrial Relations (Ethical Clothing Trades) Act 2001

This Act related specifically to outworkers in the clothing trades. It constituted the Ethical Clothing Trades Council and made provision with respect to a mandatory code of practice to operate within the industry. The Act also provided consequential amendments to the *Industrial Relations Act* 1996. Part 2 of the Act established the Ethical Clothing Trades Council of New South Wales. The Council is constituted by seven part time members including one Chair person, selected by the Minister from a range of interested industrial organisations and the Labor Council of New South Wales. The Council's purpose is, broadly stated, the giving of advice and recommendations to the Minister, promoting the adoption of the various codes and other self regulatory mechanisms and to educate and inform the clothing industry in relation to outworkers. After 12 months from the commencement of the Act, the Council is to report to the Minister on its efforts to improve compliance in the industry, and to recommend whether a mandatory code would improve compliance.

Part 3 of the Act provides that once the Council has made its report and recommendations, the Minister may make a mandatory code of practice for the purpose of ensuring that outworkers receive their lawful entitlements. The Act makes it an offence for an employer or another person engaged in the clothing industry, or sector of the clothing industry described in the mandatory code, to fail to adopt, without reasonable excuse, any standard or practice set out in the code with a maximum penalty for infringement being 100 penalty units. Where there is an inconsistency between the code and an award, the award is

to prevail to the extent of any inconsistency.

Part 3 also provides that certain provisions of the *Industrial Relations Act* including, Part 7 of Chapter 5 (Entry and inspection by officers of industrial organisations), Part 4 of Chapter 7 (Inspectors and their powers), Part 5 of Chapter 7 (Evidentiary provisions), Part 6 of Chapter 7 (Criminal and other legal proceedings) and any other provision prescribed by the regulations, apply (as amended by s 17 of the Act) for the purposes of Part 3.

Section 17 provides authorisations for the purposes of s 51 of the *Trade Practices Act* 1974 (Cth), with the effect that certain conduct and contracts will not be considered to infringe restrictive trade practices provisions of the *Trade Practices Act* pursuant to s 51 of that statute.

Schedule 2 of the Act includes a number of amendments to the *Industrial Relations Act.* In particular, a new s 127B provides that an outworker may make a claim for unpaid remuneration, while ss 127C to 127G provide the procedural provisions for such claims. Section 127E applies the provisions of Part 2 of Chapter 7 (Recovery of Remuneration and other amounts) to the recovery of an amount payable from an "apparent employer" who fails to make a payment for which that employer is liable under s 127C. The "apparent employer" is the person the outworker believes is his or her employer (s 127B).

Apprenticeship and Traineeship Act 2001

This Act repealed and replaced the *Industrial and Commercial Training Act 1989*, introducing a new scheme to regulate traineeships and apprenticeships in New South Wales. The objects of the statute are the regulation and establishment, operation, transfer, variation, suspension and cancellation of apprenticeships and traineeships, to provide for the recognition of other trade qualifications, to provide for the resolution of

disputes and the conduct of disciplinary proceedings in relation to apprenticeships and traineeships, to provide for rights of appeal against determinations under the Act and to establish administrative procedures in connection with the administration and enforcement of the Act.

The administration of the Act is vested in the office of the Commissioner for Vocational Training. Disputes between the parties to an apprenticeship arrangement are to be made the subject of complaint to the Commissioner who must attempt to bring the parties to a mutually acceptable settlement. Failing settlement, the dispute is to be referred to the Vocational Training Tribunal of New South Wales, constituted by Division 2 of Part 6 of the Act. The Tribunal must again attempt to settle the dispute, failing which it must determine the dispute by cautioning or reprimanding the person against whom the complaint has been made, or by ordering the person against whom the complaint has been made to make such redress (otherwise than by way of damages for breach of contract) as the Tribunal considers appropriate, or by varying, suspending or cancelling the apprenticeship or traineeship to which the complaint relates, or by dismissing the complaint. Appeals against the decisions of the Tribunal are taken to the Vocational Training Appeal Panel, constituted by Division 3 of Part 6 of the Act. A number of the other determinations of the Commissioner under the Act are also subject to appeal to the Appeal Panel. Such an appeal is to be dealt with by way of a new hearing, and fresh evidence or fresh information may be given on the appeal.

From the Appeal Panel, an appeal is available to the Industrial Relations Commission by leave of the Commission. In appeal proceedings before the Commission, the Commission may exercise any function that could have been exercised by the Appeal Panel in making the determination the subject of the appeal and is not bound to act

formally. The Act also provides for consequential amendments to the *Industrial Relations Act* to remove references to the *Industrial and Commercial Training Act 1989.*

Workers Compensation Legislation Further Amendment Act 2001

This Act provided for the expansion of the jurisdiction of the Chief Industrial Magistrate and other Industrial Magistrates, to hear and determine applications to the Local Court under the *Building and Construction Industry Long Service Payments Act* 1986, *Essential Services Act* 1988, the *Occupational Health and Safety Act* 2000, the *Shops and Industries Act* 1962, the *Workers Compensation Act* 1987 and the *Workplace Injury Management and Workers Compensation Act* 1998. The Act also validated any decision or purported decision of an Industrial Magistrate made pursuant to any of those Acts. A new section 383A was also into the *Industrial Relations Act,* providing that orders of an Industrial Magistrate or the Chief Industrial Magistrate under certain provisions of the *Occupational Health Safety Act* 2000 and the *Workers Compensation Act* 1987, requiring the payment of monies may be recovered as if they were judgments of the Local Court.

AMENDMENT TO REGULATIONS AFFECTING THE COMMISSION

Industrial Relations (General) Regulation 2001

Pursuant to Part 3 of the *Subordinate Legislation Act* 1989, the *Industrial Relations (General) Regulation* 1996 was repealed and replaced by the *Industrial Relations (General) Regulation* 2001 on 1 September 2001. The 2001 Regulations will expire on 1 September

2006.

AMENDMENT TO THE COMMISSION'S RULES

Pursuant to section 186 of the 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.

Industrial Relations Commission Rules (Amendment No 4) 2000

This amendment was made by the Rule Committee of the Commission on 23 October 2000 and replaced three unfair dismissal application forms with one form to take effect from 1 February 2001. Any application made after that date must be in or to the effect of the new Form 7A.

PRACTICE DIRECTIONS

There were no new Practice Directions issued in 2001.

INDUSTRY PANELS

Under the power of the President to direct the business of the Commission pursuant to sections 159 and 160 of the Act, 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 required since 1998. 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.

Two of the panels specifically deal with applications from regional areas. The panel dealing with applications from the Illawarra-South Coast region is chaired by the Honourable Justice Walton, Vice-President. The panel dealing with applications from the Hunter region is chaired by the Honourable Deputy President Harrison. A trial of new panel arrangements concerning country and regional areas commenced in late 2001. The results of the trial will be dealt with in the next Annual Report.

ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 2 May to 4 May 2001. Presentations covered a range of topics. The first day focussed significantly on consideration of changes in employment practices and issues relevant to occupational health and safety and the judicial system. A presentation was given by Professors Philip Bohle and Michael Quinlan (School of Industrial Relations and Organisational Behaviour, University of New South Wales) on *Occupational Health and Safety*. Mr Stephen Long, Journalist, Australian Financial Review, spoke on *The Media, Courts and Tribunals*; and Dr Ludmila Stern, Senior Lecturer, School of Modern Language Studies, University of New South Wales, presented a session on the issue of dealing with non English speaking witnesses.

Papers given on the second day also provided perspectives on issues relevant to the Commission's functions. Mr W S Coleman (Chief Commissioner, Western Australian Industrial Relations Commission) gave a presentation concerning *Trends in the Western Australian Industrial Relations Commission*; Ms Sally Moyle, Director of Sex Discrimination, Human Rights and Equal Opportunities Commission, on *Developments in Human Rights*; Ms Juliette Bourke, of Work & Life Strategies, gave a presentation on issues relating to

Flexible Workplace Practices & Women in the Workforce and *Carers' Responsibilities and Anti-Discrimination*; and Professor Des Cahill, RMIT and Ms Dinh Cong Tran, Assistant Registrar, Family Court of Australia presented a session on *Vietnamese Culture.*

The conference was well attended and provided 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 and to all those who contributed as participants. 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 web site (Lawlink) and the Australian Legal Information Institute site (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. Invaluable training and ongoing support was also provided by staff of the Judicial Commission of New South Wales.

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.

This important area of jurisdiction will require monitoring to ensure that the Commission's procedures are appropriate for the nature of the jurisdiction exercised. The applications received in 2001 often required the urgent hearing of applications or applications for a stay of the prohibition imposed by the legislation.

USERS' GROUP

The Industrial Relations Commission Users' Group was established in late 1998 to provide a forum for the major industrial parties and others who regularly appear before the Commission to provide feedback to the Commission and allow input into the Commission's practice and procedure. The first meeting was held in November 1998 and meetings were held during 1999 and 2000. The Users' Group did not meet as such in 2001 largely because of pressure of business associated with the demands of the s 19 review. Nevertheless the President, Vice-President, the Industrial Registrar and the Deputy Industrial Registrar met with groups of "stakeholders" to deal with matters of concern and interest. A number of meetings were held with representatives of trade unions, employer organisations and Government to deal with the s 19 reviews, the review process and related matters. Meetings were also held with representatives of the legal profession, legal aid centres and the Anti-Discrimination Board. Meeting of the Users' Group will resume in 2002.

COMMISSION PREMISES

I have earlier reported that little discernible progress had been made with respect to the co-location of Judges and Commissioners in the premises at 50 Phillip Street. This remains an important goal of the Commission and would greatly enhance the efficiency and co-ordination of its activities. However, during the year with the assistance of the Director General, senior officers of the Attorney General's Department and the Industrial Registrar some further positive developments have occurred in this area. I am hopeful of being able to report in the next Annual Report of tangible progress having occurred.

AWARD REVIEW PROCESS

Under section 19 of the *Industrial Relations Act* 1996 the Commission was required to review each award before September 2001 and subsequently at least once in every three years. The purpose of the review is to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards. A committee was constituted to consider procedures appropriate for conducting the review of awards pursuant to section 19 of the Act. The Committee's analysis of the information compiled by the Industrial Registrar showed a number of awards with no recorded activity for over 5 years, obsolete awards, awards relating to completed construction projects, related awards, splinter awards and awards that required consolidation and general updating. It was accepted that an important purpose of the section 19 award review process was to reduce the number of awards, particularly the number applying to the one employment area, by the appropriate consolidation of parent, splinter and single issue awards.

An Award Review Panel was established under the leadership of the Vice President, the Honourable Justice Walton, to progress the award review process. Initially, all matters for review were listed before the Registrar's call-over to ensure that all reasonable steps were taken in progressing the review process before matters were referred to members of the Award Review Panel for the formal review. Matters were then listed and programmed by the Members to whom the files were allocated. The use of the Industrial Registry's database played a vital role in the analysis of data and the overall monitoring of the award review process. It was imperative that accurate and timely data was produced to ensure that the progress of the review was on track and meeting the legislative requirement of reviewing all awards by September 2001.

The Award Review Panel was successful in completing all the award review matters allocated to it before September 2001. In addition, all other award

review matters within the Commission were completed within this period. It must be recognised that this outcome is a major achievement by the Commission. The success of the award review process was due to the significant contribution made by the Vice-President, the members of the Award Review Panel, their staff and the efforts of the Industrial Registrar, the Industrial Registry and Registry staff associated with the award review project. In addition, this result has been achieved by not only a considerable effort but by the co-operative will and efficient teamwork of all associated with this project.

The result is the amalgamation of many splinter awards into their parent awards, the declaring of a large number of awards obsolete and the general modernisation of awards. Of the total of 1747 awards that were reviewed: 747 awards were declared obsolete and rescinded; 220 splinter, single-issue or other related awards were rescinded after being consolidated, creating 116 new awards; 109 awards were determined as complying with the provisions of section 19 of the Act; 47 awards were varied to comply with the section 19 provisions of the Act; and 353 new awards were made rescinding and replacing prior awards to comply with the requirements of section 19 of the Act. The number of current awards is 777 compared to 1763 prior to the review.

ANNEXURES

Annexure A refers to matters filed, concluded and continuing under the Industrial Relations Act 1996 in the Industrial Relations Commission (other than in Court Session).

Annexure B refers to matters filed, concluded and continuing under the Industrial Relations Act 1996 in the Commission in Court Session.

ANNEXURE A

Matters filed during period 1 January 2001 to 31 December 2001 and matters completed and continuing as at 31 December 2001 which were filed under the Industrial Relations Act 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

(other than in Court Session)

(1940 or 1991 Acts) and 1996 Act ABBREVIATIONS	USAGE	FILED 1.1.2001 - 31.12.2001	COMPLETED 1.1.2001 - 31.12.2001	CONTINUING AS AT 31.12.2001 (inc prev. years)
AW	Application re new award/ variation/rescission of award	598	611	283
CA	Application for approval of a Contract Agreement	5	5	2
CC	Application re Industrial Committees	0	0	1
CD	Application re Contract Determination	10	19	11
CPA	Applic re Child Protection (Prohibited Employment) Act 1998	23	18	14
CTA cl 27A, 31, 33	Application cl 27A, 31, 33 of Clothing Trades Award	46	46	4
EA	Applications re Enterprise Agreement (s.35), (s.43), (s.44)	371	417	84
EPA	Report under s.11 of the Employment Protection Act	0	0	1
IC	Application to establish Industrial Committee	3	1	7
PSA s173,174, 181	Application for review s 173, 174, 181 of Police Service Act	12	11	16
S18	Application for exemption from whole or any part of award	1	0	1
S19	Notice of award review	590	731	412
S33	Commission to set principles for approval of EAs	0	0	0
S50	Adoption of National decision	0	0	0
S51	Commission to make State decision	1	1	0
S52	Variation of awards/orders on adoption of National decisions	0	0	0
S79	Commission to make State decision - Pt 3 re part-time work	0	0	0
(S246) S84	Application re unfair dismissal	4,532	4,410	2,103
S93	Application for reinstatement of injured employee	17	14	11
S126	Application for Stand down orders	3	3	0
S130 & S332	Notification of industrial dispute to Commission	1,080	1,196	695
S132	Commission may convene compulsory conf re s.130 dispute	0	2	0
S143	Application for payment of Strike pay/remuneration	8	6	2
S146	Ministerial Inquiry pursuant to s146(1)(d) of IR Act 1996	0	1	0
S167	Notification of dispute by Minister for Ind Relations	1	0	1
S175	Interpretation pursuant to section 175 of IR Act 1996	0	0	0
S193	Reference of a matter by Member to Full Bench	0	0	0
S203	Referral of matter by Federal President to State Commission	0	0	0
S204	Referral of matter by State President to Fed. Commission	0	0	0
S205	Joint proceedings State/Federal Commissions	0	0	0
S213	Application for relief from victimisation pursuant to s. 213	11	11	7
S217	Application for registration of industrial organisation	0	0	0
S236	Reinstatement of injured employee	0	0	0
S252	Application for enquiry re irregularity in election	1	0	1
(S220) S294, 295	Demarcation orders	5	6	7
S311	Contract determinations/contracts of carriage	1	1	0
S314	Reinstatement of contract of carriage	8	12	4
(S697) S346, 348	Comp conference re claims – contract of carriage	11	9	15
(S698)	Compulsory conf re alleged breach of contracts of carriage.	0	0	0
C	Referred from Australian IRC under WR Act 1997 (Cth)	3	9	18
IRCAP1	Appeal against decision of Commissioner	30	17	26
IRCAP2	Appeal against Presidential Member	14	8	5
IRCAP3	Other Commission Appeals	0	0	0
VTBAP	Other Commission Appeals	0	0	0
Sub Total		**7,385**	**7,565**	**3,731**

ANNEXURE B

Matters filed during period 1 January 2001 to 31 December 2001 and matters completed and continuing as at 31 December 2001 which were filed under the Industrial Relations Act 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES IN COURT SESSION

(1940 or 1991 Acts) and 1996 Act ABBREVIATIONS	USAGE	FILED 1.1.2001 - 31.12.2001	COMPLETED 1.1.2001 - 31.12.2001	CONTINUING AS AT 31.12.2001 (inc prev. years)
AHA	Application recovery of moneys *Annual Holidays Act* 1944	1	1	4
DGA S9	Prosecution under s.9(1)(a) Dangerous Goods Act 1975.	0	0	0
FSIA	Appeal pursuant to Factories Shops and Industries Act 1962	0	0	0
LSLA	Application under section of 12 Long Service Leave Act 1955	1	2	1
OHS S15	Prosecution: s.15 Occupational Health & Safety Act 1983	112	104	239
OHS S16	Prosecution: s.16 Occupational Health & Safety Act 1983	39	41	98
OHS S17	Prosecution: s.17 Occupational Health & Safety Act 1983	9	21	33
OHS S18	Prosecution: s.18 Occupational Health & Safety Act 1983	3	2	9
OHS S19	Prosecution: s.19 Occupational Health & Safety Act 1983	1	3	11
OHS S27	Prosecution: s.27 Occupational Health & Safety Act 1983	1	0	3
OHS S31R	Prosecution: s.31R Occupational Health & Safety Act 1983	1	1	1
OHS S49	Prosecution s.49 Occupational Health & Safety Act 1983	2	0	2
OHS S50	Prosecution: s.50 Occupational Health & Safety Act 1983	11	7	127
WCA S27(1)	Prosecution: s.27(1) Workers Compensation Act 1987	0	0	0
S99	Prosecution s.99 Industrial Relations Act 1996	3	0	3
(S275) S106	Application to Commission to declare contracts void/ varied	955	444	1,285
S129	Prosecution under s129(1)	0	2	0
S137 & S139	Application re contravention of a dispute order	6	3	4
S154	Declaratory jurisdiction	11	8	17
S180	Proceedings for Contempt of Commission	0	0	0
S195	Application under s195 of the Industrial Relations Act 1996	0	0	0
S196	Reference pursuant to s196 IR Act 1996 to the Full Bench	0	0	1
S197	Application to State a Case	0	0	0
(S198)	Reference under s194 of 1991 Act	0	0	0
S225 & S227	Application for cancellation of regstrtn of indstrl organisatn	0	0	2
S247	Orders re rules of State organisation	1	0	1
S248	Application for declarations and orders under s248 of IR Act	0	1	0
S249, 282	Reference by Dep Ind Reg re industrial organisations	3	3	0
S266	Application for order enforcing provisions of s266 IR Act	0	0	0
S288	Application for Validation Orders under s.288 IR Act 1996	1	1	0
S301	Prosecution under s 301(3)	0	1	1
S343-4, 365,367	Order for recovery of money under ss343, 344, 365 & 367	23	4	45
S357	Civil penalty for breach of industrial instruments	0	0	0
S368	Order for recovery of unpaid Superannuation	0	0	0
S369	Application for order for payment of moneys	0	0	0
S379	Application under s379 of the IR Act 1996	0	0	0
S399	Prosecution under s399 of the Industrial Relations Act 1996	0	0	1
(various)	Applications under ss440, 441, 465 & 497 of IR Act 1991	0	0	0
CTAP1	CICS Appeal against a decision of Member in CICS matter	46	32	40
CTAP2	CICS Appeal against a decision of the F/Bench	0	1	0
CTAP3	Other CICS Appeals	0	0	0
CIM & LOCAL CT	Appeal against a decision of Chief Industrial Magistrate	21	17	15
SASB	Appeal re decision of State Authorities Superannuation Board	8	7	16
Sub Total		**1,259**	**706**	**1,959**

Total IRC and CICS Matters:	**8,644**	**8,271**	**5,690**