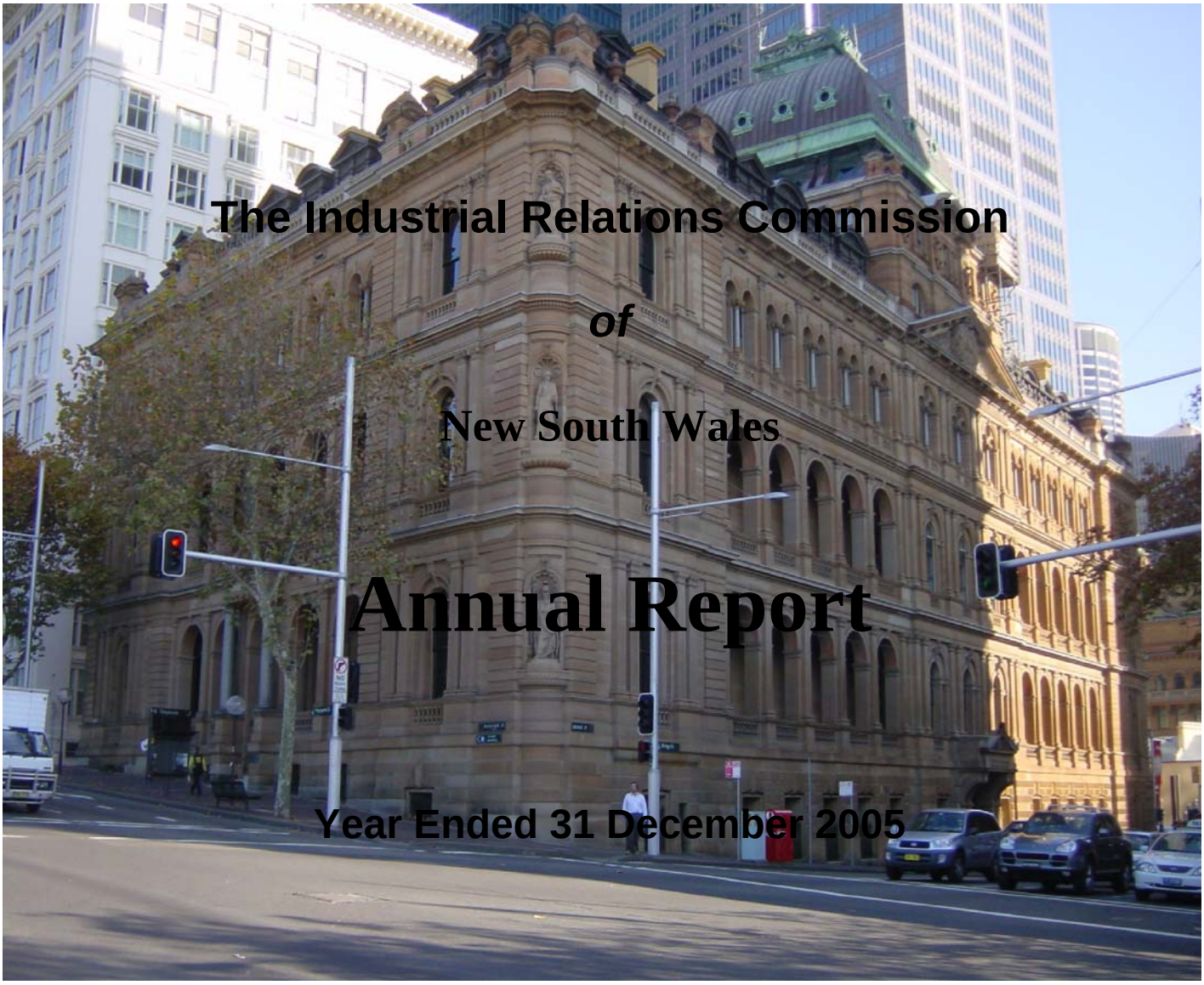

The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2005

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of

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Annual Report

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The President

Industrial Relations Commission of New South Wales

47 Bridge Street Sydney

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

Dear Minister,

I have the honour to furnish to you for presentation to Parliament the Tenth Annual Report of the Industrial Relations Commission of New South Wales made pursuant to section 161 of the *Industrial Relations Act* 1996 in respect of the year ended 31 December 2005.

Yours faithfully,

The Honourable Justice F. L. Wright
President

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Cover: **Chief Secretary's Building, Sydney**: *renovated and refurbished during 2004-2005 this historic James Barnet designed building(1878) provides accommodation for the Industrial Court and Industrial Relations Commission of New South Wales.*

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The principal place of business of the Commission is 47 Bridge Street, Sydney. We acknowledge that this land is the traditional lands of the Gadigal people of the Eora nation and that we respect their spiritual relationship with their country. The Industrial Relations Commission of NSW also conducts proceedings in other locations across the State and we acknowledge the traditional custodians of other regions.

INTRODUCTION

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

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

On 15 June 2005 John David Stanton was appointed as a Commissioner of the Industrial Relations Commission of New South Wales.

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

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

I wish also to express my thanks to the Research Associates to the President, Mr. Alexander Giudice and Mr. Damien Timms for their valuable assistance throughout the year.

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

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

I acknowledge the dedication and commitment of the Members of the Commission in their approach to the duties and responsibilities under the Act. During the year the Commission continued the process of reviewing its operations with the result that early in 2006 the Commission will implement new procedures for the allocation and listing of unfair dismissal matters before Commissioner Members. This will have significant benefits for parties and has required significant input from Members to develop and I thank those Members whose enthusiasm and support has brought this change to fruition.

ABOUT THE COMMISSION

The Industrial Relations Commission of New South Wales is the industrial tribunal and industrial court for the State of New South Wales. The Industrial Relations Commission is constituted as a superior court of record as the Commission in Court Session (from 9 December 2005 the Commission in Court Session has been known as the Industrial Court). It has jurisdiction to hear proceedings arising under various industrial and related legislation.

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

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

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

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

The Industrial Court 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 Industrial Court determines proceedings for avoidance and variation of unfair contracts (and may make consequential orders for the payment of money); prosecutions for breaches of occupational health and safety laws; proceedings for the recovery of underpayments of statutory and award entitlements; superannuation appeals; proceedings for the enforcement of union rules; and challenges to the validity of union rules and to the acts of officials of registered organisations.

Full Benches of the Commission and the Court 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 Industrial Court is constituted by at least three judicial members.

Specifically, the Industrial Court exercises jurisdiction in the following circumstances:

- proceedings for an offence which may be taken before the Commission (including proceedings for contempt) the major area of jurisdiction exercised in this area relates to breaches of the *Occupational Health and Safety Act* 2000 and of its predecessor, the *Occupational Health and Safety Act* 1983;
- proceedings for declarations of right under s 154;
- proceedings for unfair contract (Part 9 of Chapter 2);
- proceedings under s 139 for contravention of dispute orders;
- proceedings under Parts 3, 4 and 5 of Chapter 5 – Registration and regulation of industrial organisations;
- proceedings for breach of an industrial instrument;
- proceedings for the recovery of money payable under an industrial instrument other than small claims under s 380 (which are dealt with by the Chief Industrial Magistrate or an Industrial Magistrate);
- superannuation appeals under s 40 or s 88 of the *Superannuation Administration Act* 1996;

- proceedings on appeal from a Member of the Commission exercising the functions of the Industrial Court; and
- proceedings on appeal from an Industrial Magistrate or any other court.

MEMBERSHIP OF THE COMMISSION

JUDGES AND PRESIDENTIAL MEMBERS

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

President

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

Vice-President

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

Presidential Members

The Honourable Justice Francis Marks, appointed 15 February 1993;

The Honourable Justice Monika Schmidt, appointed 22 July 1993;

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

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

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

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

Deputy President John Patrick Grayson, appointed 29 March 2000;

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

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

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

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

COMMISSIONERS

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

Commissioner Raymond John Patterson, appointed 12 May 1980;

Commissioner Peter John Connor, appointed 15 May 1987;

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

Commissioner Inaam Tabbaa, appointed 25 February 1991;

Commissioner Donna Sarah McKenna, appointed 16 April 1992;

Commissioner John Patrick Murphy, appointed 21 September 1993;

Commissioner Ian Walter Cambridge, appointed 20 November 1996;

Commissioner Elizabeth Ann Rosemary Bishop, appointed 9 April 1997;

Commissioner Janice Margaret McLeay, appointed 2 February 1998;

Commissioner Alastair William Macdonald, appointed 4 February 2002;

Commissioner David Wallace Ritchie, appointed 6 September 2002.

Commissioner John David Stanton, appointed 16 June 2005.

INDUSTRIAL REGISTRAR

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

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

DUAL APPOINTMENTS

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

The Honourable Justice Frederick Lance Wright

The Honourable Justice Francis Marks

The Honourable Justice Monika Schmidt

The Honourable Deputy President Rodney William Harrison.

ANCILLARY APPOINTMENT

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

OVERVIEW

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

INDUSTRY PANELS

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

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

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

REGIONAL AND COUNTRY SITTINGS

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

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

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

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

There were a total of 718 (749)[1] sitting days in a wide range of country courts and other country locations during 2005. During the early part of 2005, in addition to the regional Member for the Newcastle-Hunter Valley region, Deputy President Harrison, Newcastle was assisted by Sydney-based Commissioners, however, since the appointment of Commissioner Stanton in June 2005 there have been two regional Members based permanently in Newcastle. The Commission sat in Newcastle for 272 (252) sitting days during 2005and dealt with a wide range of industrial matters in Newcastle and the Hunter district.

The regional Member for the Illawarra - South Coast region, the Honourable Justice Walton, Vice-President together with Deputy President Grayson, deal with most Port Kembla steel matters and other Members also sit regularly in Wollongong and environs. There were a total of 184 (172) sitting days in Wollongong during 2005.

The Commission convened in 43 other regional locations in 2005 including Albury, Armidale, Ballina, Bathurst, Bowral, Coffs Harbour, Dubbo, Gosford, Goulburn, Griffith, Tamworth, Wagga Wagga and Queanbeyan.

[1] Numbers in brackets are figures from 2004

MAJOR JURISDICTIONAL AREAS OF THE COURT AND THE COMMISSION

UNFAIR DISMISSALS

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

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

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

TABLE A

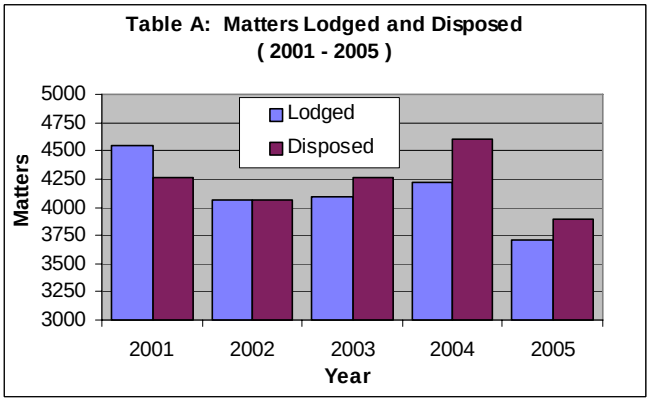


TABLE B

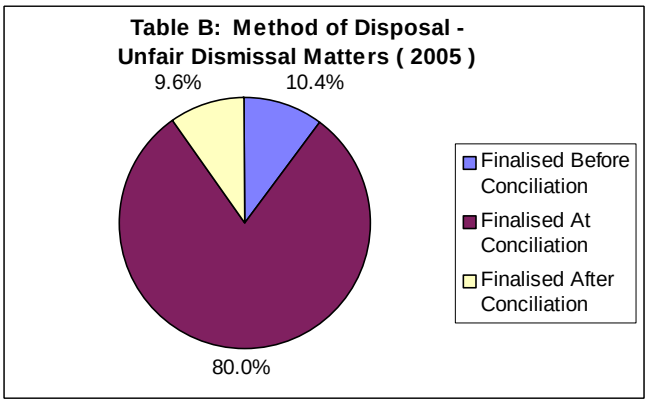
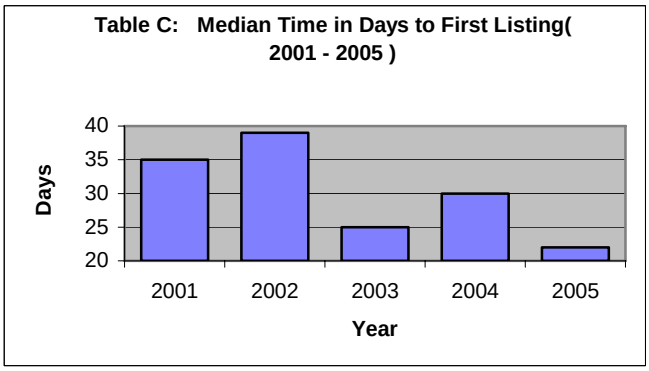
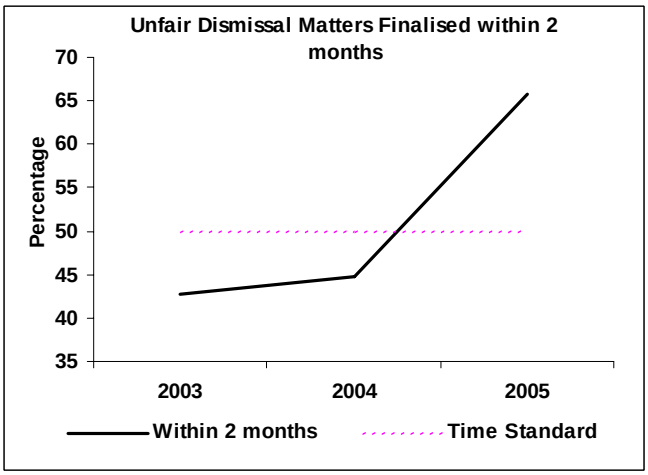


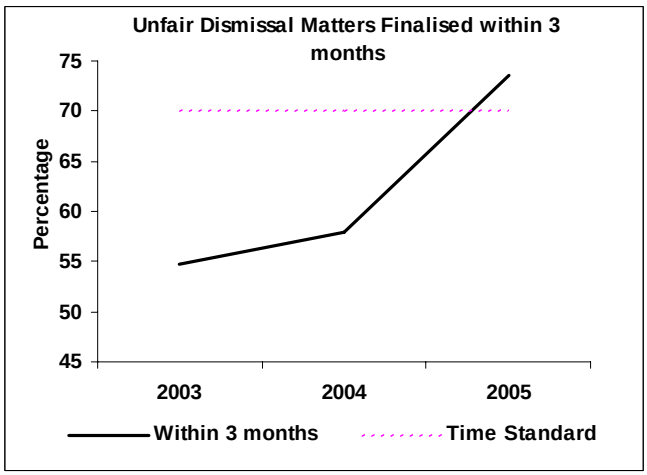
TABLE C



The Commission has undertook a significant review of in this area in early 2003 and implemented a number of new strategies to ensure that these types of matters are dealt with in a more efficient and timely way. Table D evidences that these strategies have been a success.

TABLE D



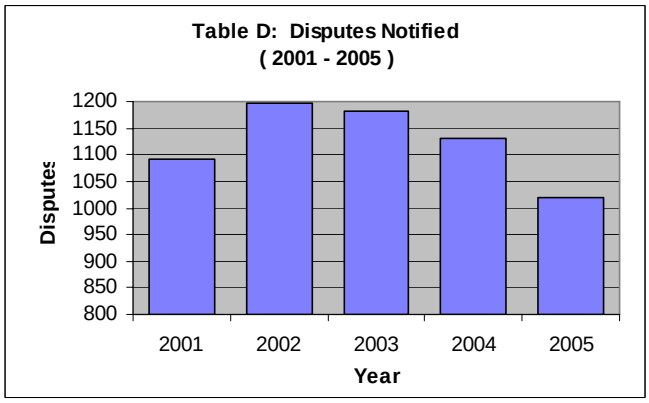


INDUSTRIAL DISPUTES

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

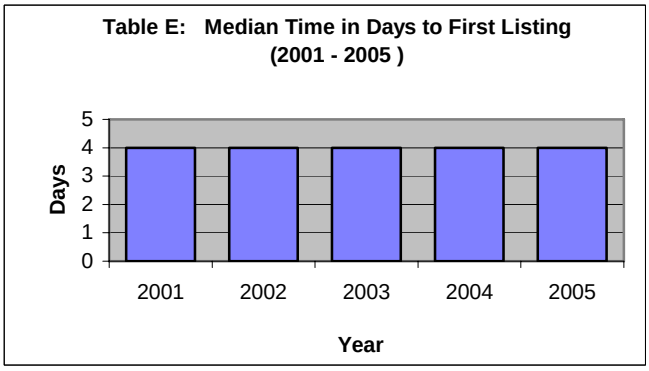
"Industrial dispute" is a broadly defined term linked, as it is, to the definition of "industrial matter" in s 6 of the *Industrial Relations Act* and this area of the Commission's jurisdiction remains high. The table below shows disputes filed in the previous five years:

TABLE E



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

TABLE F



DETERMINATION OF AWARDS AND APPROVAL OF ENTERPRISE AGREEMENTS

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

The Commission is given power to:

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

AWARD REVIEW

The last major round of the triennial Award Review process commenced in the later part of 2003 and continued throughout 2004.

During 2005 only a relatively small number of award matters (74) fell for review.

Towards the end of 2005 the Commission commenced planning for the next major round of the Award Review process which is likely to occur in the later part of 2006.

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

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

TABLE G

Awards and Enterprise Agreements	2001	2002	2003	2004	2005
Application to make award	152	123	108	131	194
Application to vary award	426	334	338	296	332
Application enterprise agreement	369	307	348	336	359
Terminated enterprise agreement	152	172	180	219*	171
Review of awards (Total) (Notices issued)	591	0	233	431	74
Awards reviewed	447	1	97	442*	67
Awards rescinded	515	0	15	93*	16
* = data revised since previous report.					

STATE WAGE CASE 2005 [2005] NSWIRCOMM 213

On 7 June 2005 the Commission issued a summons pursuant to Part 3 of Chapter 2 of the *Industrial Relations Act* 1996 to show cause why, after considering the decision of the Australian Industrial Relations Commission in the *Safety Net Review - Wages, May 2005 Case*, Print PR002005, it should not adopt the decision.

The Full Bench noted the reservations expressed by a number of the major parties over the size of the increase flowing from the National decision in light of what they regarded as underperformance of the State economy, however, no party contended that there were good economic or other reasons for not adopting the National decision. The Commission, upon its own assessment of the economic material, considered that no good reason existed for declining to adopt the National decision.

Accordingly, the Full Bench granted an increase in rates of pay by the amount of $17 per week adjusting relevant allowances by 3 per cent in State awards, in accordance with the provisions of s 50 of the *Industrial Relations Act* 1996, having given consideration to the National decision.

UNFAIR CONTRACTS

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

Due to pending legislative amendments in 2002 designed to limit the class of applications that could be brought before the Commission, filings significantly increased in the later part of 2001 and early in 2002:

TABLE H

Section 106 Filings

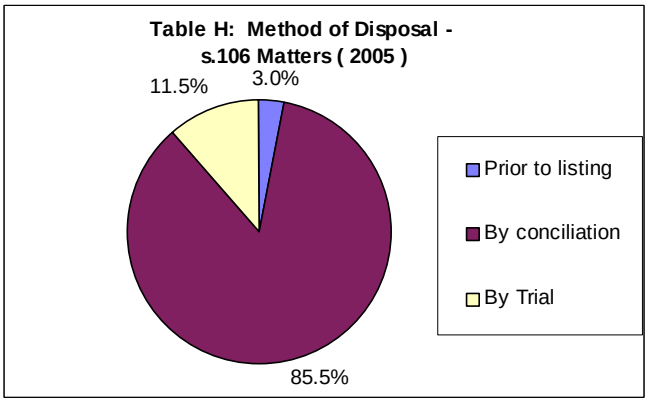
Year	**2001**	**2002**	**2003**	**2004**	**2005**
No.	956	894	631	550	473

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

A major initiative of the Commission during 2004 was to pilot the diversion of resources at a particular time during the year to conciliation in light of the high settlement rate at this stage of proceedings. This initiative continued throughout 2005 and, as in the previous year, was co-ordinated by her Honour Justice Schmidt and again proved highly successful. Two periods of time were set aside during the year (March/April and November) with over 200 files falling into the program. Of that number 53 per cent were settled at the conciliation and a further 15 per cent were stood over with reasonable to high prospects of settlement; a further 5 per cent of matters settled prior to the matter being called for conciliation. In recognition of the success of the initiative the Commission has already set aside three blocks of time in the 2006 calendar for the continuation of the initiative.

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

TABLE I



OCCUPATIONAL HEALTH AND SAFETY PROCEEDINGS

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

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

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

TABLE J

Occupational Health and Safety Prosecutions

	2001	**2002**	**2003**	**2004**	**2005**
No.	188	183	152	186	174

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

CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION

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

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

FULL BENCH

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

During 2005 Full Benches finalised in excess of 100 matters the majority of which involved appeals. A "snapshot" of the significant decisions are referred to hereunder. Other significant decisions may be found in Appendix 2.

CFMEU v Newcrest Mining Limited [2005] NSWIRComm 23

This matter arose out of a notification under s 130 of the *Industrial Relations Act* 1996 by the CFMEU of a dispute with Newcrest Mining regarding disciplinary proceedings. At the compulsory conference between the parties, the respondent indicated that it did not accept that the Commission had jurisdiction to exercise any powers under the *Industrial Relations Act* 1996 in relation to the matter, including powers of conciliation. The respondent filed a motion to such effect, with the applicant then seeking a reference to the Full Bench of the Commission pursuant to s 193 of the Act. The respondent then served Notices under s 78B of the *Judiciary Act* 1903 (Cth) on the Attorneys-General of each of the States and the Territories and the Commonwealth, with the Attorneys-General of New South Wales and the Commonwealth intervening.

The respondent's notice of motion sought two orders: one, that the Commission had no jurisdiction to deal with the purported dispute notification dated 23 September 2004 [later amended on 5 November 2004] filed in the proceedings; and two, that the purported dispute notification be set aside. The two principal grounds upon which the respondent sought to rely were that: upon their proper meaning and construction, the provisions of Chapter 3 Part 1 of the *Industrial Relations Act* did not operate with respect to employees whose terms and conditions of employment are governed by an Australian Workplace Agreement (AWA) made pursuant to the *Workplace Relations Act*

1996 (Cth) (WR Act); and, in particular, the operation of Chapter 3 Part 1 of the IR Act would be inconsistent with the provisions of the WR Act concerning the settlement of disputes between parties to an AWA and, in the present case, the express terms of the AWA in question.

It was thus contended that the Commission was without jurisdiction to exercise any power in relation to the applicant's dispute notification pursuant to s 132 of the IR Act, such jurisdiction being excluded by the operation of s 109 of the Constitution. After consideration of the relevant state and Commonwealth laws, the Full Bench considered whether Part VID of the *Workplace Relations Act* evinced an intention to "cover the field". The Full Bench found that it did not, citing the High Court's decision in *Dingjan; Ex parte Wagner* (1995) 183 CLR 323 in support. The Full Bench then found that s 170VQ of the WR Act was valid for the purposes of s 51(xx) of the Constitution as it protected in a direct way the "activities, functions, relationships or business" of the corporation party to an AWA; however, the Full Bench also considered that there were limits to the extent to which the corporations power could be used to support a law to exclude a State award or State agreement.

Additionally, the Full Bench noted that the legislature had chosen not to use the language of s 152(1) of the WR Act in relation to Pt VID of the same Act, preferring to take a more limited approach of excluding a State award or State agreement from applying to an employee's employment where the employee was a party to an AWA.

Finally, the Full Bench held that there was no direct inconsistency between Pt VID of the WR Act and Pt 1 of Ch 3 of the IR Act. Consequently, it was held that the respondent had not made out its case on the basis of either the "cover the field" test or the "direct inconsistency" test that Pt 1 of Ch 3 of the IR Act had no operation in the manner claimed. Accordingly, the Full Bench held that the Commission did have the power to deal with the notification of an industrial dispute by the CFMEU; and the respondent's motion was dismissed.

Ove Arup and Ors v Inspector Mansell [2005] NSWIRComm 49

This appeal concerned issues of practice and procedure arising out of an occupational health and safety prosecution. An application was made by way of a notice of motion to re-open appeal proceedings and vacate orders. The primary issue was whether judgment and orders had been perfected and whether the Commission in Court Session was an intermediate court of appeal or court of last resort.

The Full Bench held that it was clear from the authorities that if the Commission in Court Session was an intermediate appellate court, in the absence of any express conferral of power to do so, no power would exist to re-open a perfected judgment or order. Central to the applicants' contentions, however, was that the Commission in Court Session was not an intermediate appellate court but rather a court of last resort by virtue of s 179 of the *Industrial Relations Act.* It was held that there was no express referral in the Act of the power that the applicants sought to be exercised in the proceedings and it was not considered that there was any inherent power by reason of the description of the Commission in Court Session as a superior court of record in s 152 of the Act. A question which did arise, however, was whether the existence of s 179 in the statute created an implied power to re-open appeals on the basis that the Commission in Court Session was a court of last resort.

Consequently, it was held that the Commission in Court Session was a court of last resort and thus, despite the authorities which held that once an order disposing of a proceeding had been perfected that proceedings were at an end in that court and were beyond recall by that court, in order to avoid an "irremediable injustice", circumstances may render it appropriate for a Full Bench of the Commission to re-open proceedings. It was however found that in this case neither exceptional circumstances nor an irremediable injustice existed such as to warrant re-opening of the appeal proceedings. In coming to this conclusion the Full Bench found that the principle of finality in litigation was tantamount in the public interest and overcame any other circumstances that existed. The notice of motion was dismissed and costs were ordered against the applicants

Morrison v Powercoal Pty Ltd & Anor (No 2) [2005] NSWIRComm 6

These interlocutory proceedings were brought by way of a notice of motion seeking the vacation of hearing dates for sentencing relating to earlier guilty findings for offences under the *Occupational Health and Safety Act* 1983. The offences, occurring in the coalmining industry, resulted in a workplace death. The respondents sought prerogative relief in the Court of Appeal, based on: (i) a challenge to the jurisdiction of the Commission in Court Session to hear and determine criminal prosecutions in occupational health and safety; and (ii) the respondents' concern that s 179 of *Industrial Relations Act* 1996 (the privative clause) might be a bar to gaining prerogative relief if Commission in Court Session proceeded to conviction and sentence.

In deciding the matter, the Full Bench had regard to the lateness of the jurisdictional and other challenges made by the respondents, which were not previously raised in the proceedings. In refusing the applications made by the respondent, the Full Bench stated that the concern expressed in relation to the effect of s 179 was not a basis to vacate the hearing on sentence. The policy and legislative intention regarding the interruption of criminal proceedings was noted, in that it is generally undesirable to interrupt or interfere with prosecutions prior to conviction and sentence. It was held that there was no prejudice to the respondents' jurisdictional challenge if the Commission proceeded to conviction and sentence. Furthermore, the fact that there was no additional avenue of appeal open to the respondents did not provide a special circumstance that required the Court to stay its hand and not proceed to sentencing in order that the respondents may seek prerogative relief.

Morrison v Powercoal Pty Ltd & Anor (No 3) [2005] NSWIRComm 61

These proceedings were brought by way of appeal regarding an occupational health and safety prosecution involving corporate and personal respondents in the coalmining industry. An accident occurred on 17 July 1998 at the Awaba colliery resulting in a workplace fatality. At first instance the charges were dismissed against the two defendants, then subsequently overturned on appeal by the Full Bench. This judgment deals with the sentencing and costs aspects of that decision. The approach to sentencing was considered by the Full Bench and the application of s 51A of *Occupational Health and Safety Act* 1983 ("the 1983 Act") was addressed. The questions that were posed included: whether for the purposes of s 51A of the 1983 Act the relevant date is the date the conviction is recorded or the date of the previous offence; and subsequently, where two offences are heard concurrently whether conviction and sentence in both should result in one of the offences being treated as a second offence for the purposes of s 51A of the 1983 Act. It was found after consideration of the principles concerning s 51A of the 1983 Act, that where an offender is convicted of more than one charge on the same day, a court has no power to impose a sentence for a "second and subsequent offence" in respect of the second conviction.

The personal respondent applied for the application of s 10 of the *Crimes (Sentencing Procedure) Act* 1999. It was held that s 10 was to be applied in extraordinary and highly exceptional circumstances. Consideration was given to the personal respondent's culpability as opposed to that of the corporate respondent and it was found to be a situation were s 10 should be applied. As to costs, the issues raised were whether the court has the power to make a costs order in an appeal under s 197A of the *Industrial Relations Act* 1996; and the exercise of discretion in respect of whether the appellant is entitled to a costs orders in relation to the trial at first instance and costs on

appeal. Consequently, the Full Bench ordered that convictions were to be recorded and fines imposed against the corporate respondent, and that a costs order against the corporate respondent relating to costs at first instance and on appeal be made. In relation to the personal respondent, no convictions were recorded, all charges were dismissed and no order as to costs was made.

Country Energy v Malone [2005] NSWIRComm 78

At first instance, the appellant contended that the statutory transfer of liabilities from Advance Energy to itself did not include the transfer of criminal liability and that, therefore, the appellant could not be prosecuted for an offence under s 15(1) of the *Occupational Health and Safety Act* 1983. The trial judge rejected that contention. The appellant sought leave to appeal and appeal pursuant to s 196(1) of the *Industrial Relations Act* 1996 and s 5F of the *Criminal Appeal Act* 1912. The appellant also made an application for declaratory relief pursuant to s 154 of the *Industrial Relations Act*. The focus of the application was on the question of the statutory transfer of criminal liability.

The appellant argued that the transfer of liabilities from Advance Energy to the appellant under the provisions of the *Energy Act* and the Energy Regulation did not include a transfer of criminal liability. After referring to the relevant statutory provisions, the Full Bench found that the trial judge erred in his conclusion as to the appellant being the "universal successor" of Advance Energy, thereby resulting in a transfer of criminal liability. The Full Bench made a detailed analysis of the term "universal successor", ultimately finding that there was nothing in the references to such term in either clause 7 of the Regulation or in any of the case law that indicated an intention of the legislature (or regulation maker) to make the appellant the same legal entity as its predecessor and thereby transfer criminal liability.

The Full Bench then considered the appellant's application for declaratory relief because the decision in *Morrison v Joy Manufacturing Co Pty Ltd* [2004] NSWIRComm 107 precluded the instant appeal under s 5F of the *Criminal Appeal Act*. The Court noted that although the use of the phrase "in relation to a matter which the Commission has jurisdiction" in s 154 of the *Industrial Relations Act* may be somewhat ambiguous, it held that the intention of the legislature was to grant power to provide declaratory relief in areas where the subject matter of the issue between the parties related to an area of the Commission's jurisdiction. Accordingly, the Court held that although it may not have power to uphold the present appeal because the decision in *Morrison v Joy Manufacturing*,

the question of whether the Commission in Court Session has power to decide whether a proceeding has been properly commenced is a matter within the Court Session's jurisdiction, therefore, the Court was seized of the necessary jurisdiction to grant the declaratory relief sought. After noting the traditional reticence of superior courts to grant declaratory relief in criminal proceedings, the Court considered that the particular circumstances of this case made it appropriate for relief to be granted. The appeal was dismissed, but declaratory relief was granted.

Morrison v Coal Operations Australia Ltd (No 2) [2005] NSWIRComm 96

This judgment dealt with the issues of penalty and costs arising from the findings and orders in the substantive appeal proceedings and the further submissions of the parties *in Morrison v Coal Operations Australia Limited* [2004] NSWIRComm 239, where the decision of *Peterson* J acquitting the respondent was set aside and offences charged against the respondent were established. The proceedings in the first instance alleged two offences against the respondent arising from an accident that occurred on 6 July 1998 at the Wallarah Colliery at Crangan Bay in Lake Macquarie. The Colliery was being operated by the respondent when, on that day a section of the roof fell in causing fatal injuries. The respondent was subsequently charged with two offences under s 15(1) of the *Occupational Health & Safety Act* 1983.

The relevant principles followed on sentencing were found within the statutory provisions of the *Crimes (Sentencing Procedure) Act* 1999, in particular ss 3A, 21A. It was noted that these provisions are not to be construed as a departure from settled principles of sentencing practice, or an abandonment of the discretion that is essential to any system calling for individualized justice: *R v Way* (2004) 60 NSWLR 168. The objective seriousness of the offence was the starting point for any consideration as to penalty: *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 464. Further, the principle of foreseeability was a factor in determining the objective seriousness of an offence as part of the sentencing process *Capral Aluminium Ltd v WorkCover Authority of New South Wales* (2000) 49 NSWLR 610. The principles of general and specific deterrence in *Capral* were also considered. The relevant considerations taken into account were that the respondent had no prior convictions; the offences did not fall within the worst type of offence category; the minimum support rules relied upon by the respondent were found to be inadequate; the principle of totality; and the respondent's remorse and contrition. The principles of restraint in Crown appeals were applied and recognition of double jeopardy was noted by the Full Bench.

WorkCover Authority of New South Wales (Inspector Ian Hannah) v Keough's Plant Hire Pty Ltd [2005] NSWIRComm 118

This case involved an application by the WorkCover Authority for leave to appeal and appeal against a decision of an Industrial Magistrate that was delivered in connection with a prosecution by the appellant brought against the respondent for a breach of s 8(1) of the *Occupational Health and Safety Act* 2000. The respondent pleaded guilty to that breach and at first instance a monetary penalty of $3,500 was imposed. The issue on appeal was whether the monetary penalty was sufficient, with the appellant arguing that the penalty was manifestly inadequate. The appellant sought leave to appeal but nevertheless submitted, during the course of the hearing of the appeal proceedings, that there was an appeal as of right. In support of this approach, the appellant referred the Full Bench to s 197(2) of the *Industrial Relations Act* 1996 and argued that the operation of this provision negated the need to seek leave to appeal. Notwithstanding this contention, the Full Bench held that leave to appeal was required in this case and that the penalty imposed was manifestly inadequate in that the magistrate had failed to consider and apply appropriate principles of sentencing. The appeal was upheld. The Full Bench made an order setting aside the penalty made at first instance and imposed a penalty of $25,000

The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan [2005] NSWIRComm 198

Pursuant to s 196 of the *Industrial Relations Act* 1996 and s 5AA of the *Criminal Appeal Act* 1912, the appellant appealed against two decisions of *Walton* J, Vice-President; the first as to determination of guilt, the second as to penalty. His Honour's decisions were made in relation to five charges laid against the appellant pursuant to s 15(1) of the *Occupational Health and Safety Act* 1983. The charges arose out of a series of assaults against various teachers aides by students attending Kurrambee School for Special Purposes at Werrington, with particular reference to one incident on 9 February 1999. A significant majority of the students at the school suffered from some degree of both intellectual and physical impairment. The Full Bench noted that the issues for determination related principally to the identification of the relevant risk and causation. As to risk, the Full Bench held that the practice of categorising risks into "general" and "specific" or, as the respondent did in its submissions at first instance, "potential" and "actual", may in some cases lead to confusion regarding just what was the relevant risk. The Full Bench further noted that such distinctions were a feature of the appeal and that much energy was expended by the appellant in arguing about which risk the trial judge was addressing, ultimately irrelevantly. Ultimately, the Full

Bench held that *Walton* J was alert to the need to identify the relevant risk appropriately and did so. On the question of causation, the Full Bench dealt with each charge in turn, the first of which related to the failure to provide adequate human resources. Despite the appellant's extensive submissions as to the alleged errors of the trial judge, including his Honour's reference to dealing with possible defences including closing the school entirely, the Full Bench found that there was no basis upon which the appeal should be upheld.

The second charge dealt with whether there was adequate emergency equipment in place to permit the teachers aides to call for assistance. Again, the Full Bench took a common sense approach to the question of causation and found that there was no error by the trial judge. The third charge considered whether any or adequate information and instruction was provided to the relevant teachers aide in relation to one of the violent students. The failures on the part of the appellant were particularised in the charge as: first, the fact that the appellant allowed the student to attend the school without providing any information concerning his behavioural problems or details of strategies to manage or control him; and second, the appellant's failure to follow its own enrolment procedure. The trial judge found that the factual elements of the two failures were established beyond reasonable doubt. The Full Bench identified the central issue as being whether the appellant's failures as earlier outlined were causally connected to the risk to the teachers aide's health and safety on the day of the incident. The Full Bench assessed all of the evidence and found that the trial judge had made no appealable error. The Full Bench held that it was proven beyond reasonable doubt that if adequate information had been provided to the school in a timely fashion regarding the student's behavioural problems or details of any strategies which could have assisted the School staff to manage or control the student's behaviour, the staff would have been in a position to adopt measures that would either have eliminated the risk of assault or significantly reduced that risk. As to the failure to follow the enrolment procedure, the Court held that had that procedure been followed, relevant information would have brought to light the extent of the student's behavioural problems; accordingly, it was open to the trial judge to find as he did.

The appellant also sought to appeal the sentence imposed as manifestly excessive. The Court rejected that submission, holding that the sentences were well within the appropriate range given the objective seriousness of the offences. The Full Bench dismissed the appeal and ordered the appellant pay the respondent's costs.

Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award, Re [2005] NSWIRComm 219

This matter related to an application by the New South Wales Teachers Federation under s 169(4) of the *Industrial Relations Act* 1996 to vary the *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2001) 327 NSWIG 582, with particular emphasis on its application to both temporary and casual school teachers.

The Federation also sought to amend, in identical terms, the Award made by the Full Bench in *Re Crown Employees (Teachers in Schools and TAFE and Related Employees') Salaries and Conditions Award* (2004) 133 IR 254. This second application was made as the 2000 consent Award expired on 31 December 2003 and the provisions of the 2000 consent Award relevant to these proceedings were replicated, without change, in the 2004 Award.

The applications to vary the awards sought: first, to reduce the period of work that a part-time casual school teacher must undertake before being classified as a temporary school teacher; and second, to ensure that a temporary school teacher is subject to the same pay scale as a permanent school teacher by recognising prior periods of non-permanent service (by removing the phase-in period agreed in the 2000 consent Award and replicated in the 2004 Award). The Full Bench held that the Federation's application could, in substance, be framed by two questions: first, was there any basis to justify changing how the definition of temporary school teachers applies to part-time casual school teachers? and second, was there any basis to justify unravelling or unwinding the phase-in arrangements reflected in clause 27.5 of the 2004 Award?

After considering the large amount of evidence from the parties, the Full Bench held that the Federation had failed to establish the threshold requirements to the variation of an award, either under s 169(4) or s 17(3)(c) of the Act. The paucity of evidence relating to the first subject group (non-permanent teachers employed in one engagement for one to four days a week for eight weeks or more) made it impossible for the Commission to accept the Federation's allegations of unlawful discrimination in relation to part-time casual teachers. In that regard, the Full Bench found that the Federation's reliance on the decision in *Amery and 7 Ors v The State of New South Wales* [2001] NSWADT 37 was misplaced.

Although the Commission found there was some evidence in support of the Federation's second claim, it also noted that the evidence suffered from a lack of distinction between teachers who had

just qualified as temporary school teachers, and those who had been working as temporary school teachers for some time. The Full Bench was not persuaded that there were substantial reasons to vary the 2004 Award on either ground. It found there were powerful public policy reasons against doing so. Accordingly, the Commission ordered that the application be dismissed.

State of New South Wales (NSW Police) v Inspector Covi [2005] NSWIRComm 303

These proceedings concerned an appeal against conviction pursuant to s 196 of the *Industrial Relations Act* 1996 ("the Act") from decisions at first instance in relation to a charge laid against the appellant pursuant to s 15(1) of the *Occupational Health and Safety Act* 1983. The Full Bench delivered judgment in which the appeal was dismissed. The case involved a police officer who was struck by a motor vehicle whilst performing speed detection duties. A plea of not guilty at first instance was entered by the employer. At first instance it was emphasized that employers are obliged to minimize or reduce risks which may be created by external factors outside the employer's control. The risk was identified at first instance as being the general risk of collision between a police officer and a motor vehicle on the roadway - whether such a collision be deliberate or accidental. The Full Bench held this approach to be correct.

The Full Bench rejected the proposition put by the appellant that the causal nexus between the defendant's failures and the risk of being struck by a motor vehicle was not established. The Court held that the correct approach to causation was that found in *WorkCover Authority of New South Wales (Inspector Glass) v Kellogg (Aust) Pty Ltd* (No 1) (1991) 101 IR 239, which stated, relevant to these proceedings, that it is not necessary to demonstrate a causal connection between conduct of the defendant and the precise circumstances of the accident which gave rise to the prosecution. Rather, the causal connection must be between that conduct and the risk to safety. As a final statement, the Full Bench noted the appellant's erroneous reliance on the doctrine of *novus actus interveniens* and stated that this approach unnecessarily limits the scope of the risk the subject of the charge.

East Coast Brokers Pty Limited v The Commonwealth of Australia (Department of Defence) and another [2005] NSWIRComm 371

This matter concerned a challenge by the Commonwealth to the jurisdiction of the Industrial Relations Commission in Court Session to grant relief under s 106 of the *Industrial Relations Act* 1996 to East Coast Brokers. The challenge was based on the operation of s 109 of the Constitution.

The Commonwealth had contracted with Serco Sodexho Defence Services Pty Limited to supply services, which included cleaning services, at HMAS Albatross and HMAS Creswell, two Defence establishments located in New South Wales. Under the terms of the contract Serco could use the services of subcontractors. One such subcontractor was East Coast Brokers.

In March 2003, East Coast was notified that its services had been terminated. The ostensible reason for the termination of the contract was an alleged breach of occupational health and safety requirements by the applicant whilst undertaking work at HMAS Albatross. East Coast consequently filed a summons for relief under s 106 of the *Industrial Relations Act* on 24 February 2004. On 24 March 2004 the Commonwealth filed a notice of motion challenging the Commission's jurisdiction to deal with the summons. Following a reference pursuant to s 193 of the Act, a Full Bench was constituted to deal with the Commonwealth's motion.

The Full Bench identified three issues to be determined: whether there was a direct inconsistency between s 9A of the *Defence Act* and s 106 of the *Industrial Relations Act*; whether there was a direct inconsistency between s 16(4) of the *Occupational Health and Safety (Commonwealth Employment) Act* 1991 and s 106 of the IR Act; and whether Defence Instruction (Navy) ADMIN 30-3 issued pursuant to the *Defence Act* evinced an intention to deal completely with the field of occupational health and safety in defence establishments, thereby giving rise to an indirect inconsistency with s 106 of the IR Act.

After setting out the tests for inconsistency as they were identified in, *inter alia*, *Barry v Australian Broadcasting Corporation* (2002) 112 IR 33, the Court considered any inconsistency between the *Industrial Relations Act* and the *Defence Act.* The Court examined the purpose of s 9A of the *Defence Act*, finding that while there was no doubt s 9A was a law of the Commonwealth for the purposes of s 109 of the Constitution, its "substance was no more than an allocation of responsibilities" and was silent "about the displacement of State laws". It was also held that the two sections do not intersect "in any conceivable way", and that in any event, "it could not be said that s 106 of the IR Act takes away or varies a right, privilege, duty, power or immunity conferred by s 9A of the *Defence Act*."

On the question of inconsistency between s 106 of the IR Act and s 16(4) of the OHS Act, the Commonwealth did not contend that there was any inconsistency *simpliciter*, rather, that the variations to the Serco contract would alter, impair or detract from the operation of s 16(4) of the

OHS Act. The Full Bench held that there was no inconsistency between "a Commonwealth law that obliges the Commonwealth to take all reasonably practicable steps to protect the health and safety at work of contractors and orders under s 106 of the IR Act that would require the Commonwealth to follow certain procedures before taking steps to remove a contractor from performing further work". As to the Commonwealth's submissions as to indirect inconsistency, it was contended that the Defence Instructions evinced an intention to deal completely with the field of occupational health and safety in Navy establishments. However, for reasons given in relation to direct inconsistency, the Full Bench declined to accept the Commonwealth's contention. While the Commonwealth also sought to rely on the decision in *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, the Full Bench found that case to be distinguishable. The Full Bench also referred to the decision in *Re Residential Tenancies Tribunal of New South Wales and Henderson and Anor; Ex parte The Defence Housing Authority* (1997) 190 CLR 410, finding that as in that case, the relevant Commonwealth law did not exclude New South Wales law; and, far from being inconsistent with State law, was dependent upon its existence for its own effective operation.

The final question considered by the Full Bench was the applicant's submission that the rights and obligations of the parties arose under contract, rather than under any enactment. The Full Bench, relying on the decision of the High Court in *Griffith University v Tang* (2005) 79 ALJR 627, found that the conferring of a general responsibility for occupational health and safety pursuant to the relevant Defence Instruction was not sufficient to support the proposition that the Defence Instruction itself was the statutory source empowering the Commonwealth or its agent to unilaterally alter or affect the legal rights of a contractor acquired under a contract that is subject to the general laws of a State. Accordingly, the Full Bench found that the Commonwealth had not made out its case that s 106 of the *Industrial Relations Act* had no operation in the manner claimed by the applicant. The Court found that it had power to deal with the summons for relief filed by the applicant and dismissed the Commonwealth's motion.

TIME STANDARDS

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

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

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

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

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

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

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

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

THE REGISTRY

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

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

REGISTRY CLIENT SERVICES

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

Client Service staff are situated in five locations - 47 Bridge Street, Sydney (Principal Registry); Hospital Road Court Complex, Sydney; 237 Wharf Road, Newcastle; 90 Crown Street, Wollongong; and Parramatta Local Court, Cnr George and Marsden Streets, Parramatta;.

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

INFORMATION MANAGEMENT & ELECTRONIC SERVICES TEAM

The Information Management and Electronic Services Team is responsible for the preparation of industrial awards, enterprise agreements and other orders made by Members of the Commission, for publication in the New South Wales Industrial Gazette, which is available in both electronic and

hard copy format. This process is required and driven by legislative requirements and enables the enforcement and implementation of awarded or approved employment conditions for employees. This team is also responsible for the maintenance of records relating to participants to awards and records relating to the Industrial Committees and their members.

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

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

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

During 2005 this team:

- launched changes to the *NSW Industrial Gazette* website to incorporate new searching facilities.
- published on the Commission's website: information, current list and orders, relating to Industrial Committees.
- redesigned internal systems to publish on the website new lists of current awards, their orders and the record of participants. These lists will be published to the website in the first quarter of 2006.

INDUSTRIAL ORGANISATIONS TEAM

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

- registration, amalgamation and consent to alteration of the rules of industrial organisations;
- election of officers of industrial organisations or for special arrangements in relation thereto;
- Authority to Enter Premises for union officials;
- Certificates of Conscientious Objection to membership of industrial organisations;
- special rates of pay for employees who consider that they are unable to earn the relevant award rate because of the effects of impairment;
- special arrangements in respect of the keeping of time and wage records and the provision of pay slips; and
- postponement of the time for taking annual leave.

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

Applications / Renewals for Certificates of Conscientious Objections				
2001	***2002***	***2003***	***2004***	***2005***
203	214	199	191	175

Special Wage Matters - Year End Current Files					
	2001	***2002***	***2003***	***2004***	***2005***
Special Wage Permits	-	823	765	1213	1110
* SWS - P	-	101	212	262	246
** SWP - MC	-	244	244	269	300
TOTAL	**1150**	**1168**	**1201**	**1744**	**1656**

Special Wage Matters - Matters Lodged				
2001	***2002***	***2003***	***2004***	***2005***
1063	1268	1281	1786	1734

* Applications in cases where a State award covers the employment provisions of the applicant and the employer participates in the 'Supported Wage System' program conducted by the Federal Department of Employment and Workplace Relations.

** Wage Agreements filed under the 'Supported Wage System' in respect of employment covered by a State award that includes a 'Supported Wage System' clause. NOTE: Permit not required to be issued as the 'Supported Wage System' clause provides for means by which a special rate of pay can be agreed between the employer and employee.

EXECUTIVE AND LEGAL TEAM

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

THE ATTORNEY GENERAL'S DEPARTMENT

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

OTHER

ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 27 April to 29 April 2005. The first day covered a variety of topics with presentations by the Honourable Paul Munro, former Depuy President of the Australian Industrial Relations Commission (*Forms of Employment*); Dr. Marian Baird, Senior Lecturer, University of Sydney, Discipline of Work and Organisational Studies (*Parental Leave Research*); Mr Ernie Schmatt, Chief Executive Officer, Judicial Commission of New South Wales (*Complaints against judicial officers*); and Ms Jeanette Richards, barrister (*Insolvency and claims of unfair dismissal*). On the second day of the conference sessions were given by the Honourable Justice Terry Sheahan, President, Workers Compensation Commission of New South Wales (*The New Workers Compensation Regime);* his Honour Judge Jack Goldring, District Court of New South Wales (*National Judicial College of Australia*); Dr Grant Lester, Consultant Psycghiatrist, Victorian Institute of Forensic Mental Health (*Dealing with Difficult Litigants*) and His Honour Judge Roger Dive, Senior Judge of the Drug Court of New South Wales (*Presentation Skills*). The Annual Conference was well attended and it continues to provide an invaluable opportunity for Members of the Commission to discuss matters relevant to their work. The presentations and ensuing discussions proved relevant and practical. Appreciation is expressed to the eminent presenters, to all those who contributed as participants and the officers of the Judicial Commission whose assistance is invaluable. The development of the Annual Conference, substantially assisted by the Judicial Commission exercising its mandate to advance judicial education has, once again, proved a most successful initiative. Thanks go to those members of the Commission's Education Committee who designed and delivered a conference that has added much to the professionalism with which the Commission seeks to advance in all its work.

TECHNOLOGY

Medium Neutral Citation

Since February 2000 the Commission has utilised an electronic judgments database and a system of court designated medium neutral citation. The system is similar to that in use in the Supreme Court and allows judgments to be delivered electronically to a database maintained by the Attorney General's Department (*Caselaw*). The judgment database allocates a unique

number to each judgment and provides for the inclusion of certain standard information on the judgment cover page.

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

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

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

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

COURT USERS' GROUP

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

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

In 2005 the full Users' Group met on the7 June 2005.

COMMITTEES

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

COMMISSION RULES

Pursuant to section 186 of the *Industrial Relations Act*, the rules of the Commission are to be made by a Rule Committee comprising the President of the Commission and two other Presidential Members appointed by the President. There is also scope for co-option of other Members. There were no amendments to the rules of the Commission in 2005, however, a Working Party comprising Members of the Commission, the Attorney General's Department, representatives of the Bar Association and Law Society of New South Wales was formed. That Working Party commenced a comprehensive process of reviewing the Commission's Rules with a view to ensuring that the Rules provide the proper mechanism for matters before the Commission to be dealt with in a timely and appropriate manner, particularly having regard to recent introduction of the *Uniform Civil Procedure* Act and Rules. It is likely that significant amendment to the Rules will occur in the near future.

COMMISSION PREMISES

I am pleased to report that in early September 2005 the Commission commenced a major relocation exercise consequent upon the completion of renovation and refurbishment of the Chief Secretary's Building, 47 Bridge Street, Sydney. This involved the relocation of a number of Members from 50 Phillip Street and the Hospital Road Court Complex and all Members from Flight Centre, 815 George Street, Sydney to the new premises. In addition, a number of Members were also relocated to the Hospital Road complex from 50 Phillip Street to allow for an upgrade to the air-conditioning within that part of the complex to take place.

Congratulations must be extended to the Government Architect, the Department of Commerce (who were the Project Managers) and the Attorney General's Department (for their input on design and development of the various court and hearing rooms) on the restoration of this 125 year old

building. The building provides modern facilities for the Commission and the parties in a building that encapsulates much of the history of early New South Wales.

As noted elsewhere, it is appropriate that an institution such as the Commission which is and has been for over a century, part of the social fabric of New South Wales should operate in a location that is part of the State's history. I have previously expressed my appreciation of the efforts of the Building Committee chaired by the Vice-President, his Honour Justice Walton and which also includes the Honourable Justice Kavanagh and the Industrial Registrar, Mr. Grimson. They should be well satisfied with their efforts.

Following the completion of the upgrade to air-conditioning within the 50 Phillip Street wing during 2006-2007 true co-location and the consequent benefits thereof will finally be achieved.

AMENDMENTS TO LEGISLATION ETC

The legislative amendments enacted during 2005, or which came into force that year, affecting the operation and functions of the Commission are reported at Appendix 5.

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

PRACTICE DIRECTIONS

On 23 December 2005 *Practice Direction No.* 17 was published. *Practice Direction No. 17* will commence on 9 January 2006 and will replace *Practice Direction No. 11.* The purpose of this Practice Direction is to facilitate the resolution of unfair dismissal matters before the Commission by ensuring that such proceedings are conducted before the Commission in an efficient and expeditious manner and that practitioners and others who appear before the Commission do all they can to facilitate the just, quick and cost effective disposal of unfair dismissal proceedings before the Commission. The *Practice Direction* is linked to a new system for the allocation of hearing dates for the arbitration of unfair dismissal matters in both the Sydney metropolitan and regional areas of New South Wales which will commence early in 2006.

CONCLUSION

This has been a year in which the Commission, its Members and staff, have continued to consolidate achievements made in previous years. The Commission has continued to look for opportunities to ensure that its practices and procedures remain responsive to the needs of parties appearing before the Commission and the community in general.

The year ahead is will be one of the most significant in the 103 year history of the Commission. In terms of those challenges I am reminded of the words of a former President of the Commission, the Honourable Bill Fisher, in a speech he delivered on 30 April 2002 at a function marking the centenary of the Commission:

> What we are left with at the end of the century in New South Wales is an institution that has never been more useful to the people of New South Wales - that is vigorous; that is legally informed; ... this, therefore, is a century of success. It has marked an evolution which, at times, has been difficult because this country has been through difficult times. I mean the dreadful days of the Depression of the thirties; for that matter, the problems that were presented by war and post-war reconstruction, the problems that were presented by great swings at times in the success of our economy and meeting our peoples needs have been challenging to the Industrial Commission of New South Wales. The Industrial Commission, however, has always risen to meet the challenge and that's something that I am proud to be able to repeat at the end of one hundred years.

I have no doubt that this Commission will continue to rise to meet the challenges presented during 2006 and into the future.

APPENDIX 1

INDUSTRY PANELS

PANEL A

Industries

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

PANEL B/C

Industries
Clerks
Clothing, Textile and Allied Industries
Clubs
Commercial Travellers/Sales (Salesmen, etc.)
Crown (including Juvenile Justice but not including RTA and Prisons/Corrective Services with Panel E or Police with Panel D)
Dental
Education
Funeral and Undertaking
MSB, Ports Authorities etc (except Newcastle with Panel N)
Professionals
Real Estate Industry
Rural and Allied Industries
Shop Employee and Allied Industries
Universities/Colleges of Advanced Education

PANEL D

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

PANEL E

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

APPENDIX 2

OTHER SIGNIFICANT FULL BENCH DECISIONS

Eraring Energy and Construction, Forestry Mining and Energy Union (NSW) [2005] NSWIRComm 13

The origin of this appeal may be traced to the respondent's contention at first instance that the appellant had failed to pay two of its employees in accordance with the Eraring Energy Employee Consent Award 2002. The basis of the claim was that the two workers had been underpaid as a result of the appellant's incorrect application of clause 10.42 of the Award which specifically applied to the classification, "Operator Eraring". At first instance it was held that clause 10.42 of the Award did not apply because both employees did not come within the classification of "Operator Eraring". The principal reason relied upon by the appellant for leave to appeal to be granted was alleged misapplication of award interpretation principles.

The Full Bench granted leave to appeal as the issues raised were held to be of sufficient importance to warrant leave to appeal being granted. The Full Bench noted that while at first instance the issue was correctly identified as the interpretation and application of the Award, the proper approach to the interpretation of such instruments was not applied, as insufficient attention was given to the actual words of the award, as well as the context in which they appeared.

The Full Bench found that there was an incorrect focus on the acting status of the two employees and an erroneous distinction drawn between acting Operators Eraring and permanently-appointed Operators Eraring. The Full Bench found that the principal question was whether the two employees were Operators Eraring, in accordance with the terms of the Award. After considering the relevant terms of the Award, the Full Bench held that it was not open to rely on clause 15.2 to support the findings, that the two employees did not come within the classification of Operator Eraring and that therefore, clause 10.42 had no application in this case. Accordingly, leave to appeal was granted and the decision at first instance was set aside.

Bluescope Steel Limited (formerly BHP Steel Limited) v The Australian Workers' Union, New South Wales (No 2) [2005] NSWIRComm 36

This Full Bench decision related to the earlier decision in *Bluescope Steel Limited (formerly BHP Steel Limited) v The Australian Workers' Union, New South Wales* [2005] NSWIRComm 222 where it was found that the failure to despatch urgent product to Electrolux breached clause 9 of the Enterprise Agreement between the AWU and the company, and also breached one of the dispute orders made by Commissioner Connor. The present decision went to penalty for the AWU's breach of the dispute order. In deciding what approach to take to the determination of the penalty, the Full Bench took account of: the fact that the AWU knew that the work not done was important to the company; the fact that the AWU had undertaken to honour the terms of clause 9 of the Agreement; subsequent undertakings by union members to ensure compliance with further urgent dispatch; and the importance of deterring the Union and its members from engaging in similarly serious breaches in the future.

However, the Full Bench declined to impose any penalty so as to give the Union and its members a chance to demonstrate their commitment to honour the agreement made by the company. The Full Bench fixed a period of two years for such purpose with the matter to be re-listed on application if there was further industrial action. In deferring penalty, the Full Bench emphasised the seriousness of the offence, given there had been a breach of both an agreement and orders of the Commission.

Re Nursing Homes &c., Nurses' (State) Award (No 4) [2005] NSWIRComm 88

These proceedings were brought by way of an application by the New South Wales Nurses' Association to vary the award in regards to salaries and other matters. In respect of wages, the Association sought increases of 27.5 per cent to wage rates for all classifications under the Award, together with consequential adjustments to wage related allowances. The wage fixing principles relevant to the proceedings were the special case, work value and adjustment of allowances and service increments.

After a thorough analysis of the evidence at the hearing, the Full Bench concluded that all nursing classifications under the Award should receive wage increases on both special case and work value grounds. An averaging approach was taken by the Commission with regard to the impact of work value change and the relevant special case factors.

Accordingly the Full Bench determined to increase the rates of pay for all nursing classifications under the Award by six per cent from the beginning of the first pay period to commence on or after 30 March 2005 and a further six per cent from the beginning of the first pay period to commence on or after 30 March 2006 (these increases were in addition to certain interim increases awarded earlier, largely by consent). The Award will expire on 29 March 2007.

Glass v Flexible Packaging (Australia) Pty Limited [2005] NSWIRComm 93

This case involved a prosecution appeal against a sentence imposed by an Industrial Magistrate, brought pursuant to s 197 of the *Industrial Relations Act* 1996. Leave to appeal was granted on the basis that the appeal raised matters of such importance in that there is a clear public interest in ensuring that the penalties imposed by the Magistracy for occupational health and safety offences reflect the important social purposes of the legislation and the related need for adequate sentences. The respondent entered a guilty plea at an early stage to an offence under s 8(1) of the *Occupational Health and Safety Act* 2000.

The Full Bench found that the sentence imposed was manifestly inadequate, was based on identifiable material errors and did not reflect the objective seriousness of the offence or take into account general and specific deterrence. Insufficient weight was given to the consideration that the risk was reasonably foreseeable, with the Court noting that reasonable foreseeability is not diminished by the absence of previous similar accidents. The appeal was ultimately upheld, and the respondent resentenced. A conservative approach was taken by the Full Bench when imposing a penalty which was at the lower end of the range of available sentences having regard to the principle of double jeopardy.

Solo Waste Aust. Pty. Limited v Inspector McDonald [2005] NSWIRComm 106

These proceedings involved an appeal under s 196 of the *Industrial Relations Act* 1996 against a decision in which the appellant, Solo Waste Aust. Pty Limited, was convicted and fined $290,000 for an offence under *Occupational Health & Safety Act* 1983. The essential issue was whether the appellant, a corporate trustee which administered two separate trusts, was a prior offender having been previously convicted of an offence under occupational health and safety legislation, in relation to a trust called the Rico Family Trust. The essence of the appellant's contention was that the Solo Waste Trust, which was the subject of the conviction at first instance, should not have attracted the higher statutory maximum under s 51A of the 1983 Act, because the nature of the relationship between the appellant and the Solo Waste Trust was such that the appellant was a legal entity separate and distinct from the entity which was convicted in relation to the Rico Family Trust.

Regard was had to the nature of a trust and it was noted that, a trust is not a juristic person, nor can it be prosecuted under the 1983 or 2000 *Occupational Health & Safety Acts*. A trust is an arrangement for the holding and administration of property under which property is vested in a trustee or trustees which is held by them on behalf of another for a particular purpose. The property is legally vested in the trustee. The right of a trustee to be indemnified out of the trust funds only exists as against those liabilities which have been properly incurred in the administration of a trust. The Full Bench held that no error was discernable at first instance, the appellant was a previous offender as defined in s 51A of the 1983 Act, and accordingly the appeal was dismissed and an order for costs was made against the appellant.

Tieman Industries Pty Limited v Inspector Littley [2005] NSWIRComm 127

These proceedings involved an appeal by Tieman Industries Pty Limited against a decision at first instance where the appellant was convicted of an offence under s 15(1) of the *Occupational Health and Safety Act* 1983 and a fine of $275,000 was imposed. Leave to appeal is not required: *Workcover Authority of New South Wales Inspector Dawson v PlastaChem Pty Ltd and Others* (2001) 110 IR 351 at 359. The reasons for appeal were primarily that the penalty imposed was manifestly excessive. The Full Bench found no specific error in sentencing reasons at first instance and held that the finding that there was an "element of foreeseeability", was open at first instance.

Nevertheless the Full Bench concluded, after careful consideration, that the sentencing decision on its face demonstrated error by reason that the penalty imposed was manifestly excessive. This form of sentencing error, identified for example in *Dinsdale v The Queen* (2002) 202 CLR 231 at 325, had been recently examined by the Full Bench of the Court in *WorkCover Authority of New South Wales (Inspector Downie) v Menizes Property Services Pty Ltd* (2004) 136 IR 449 at 457 to 460. These authorities suggest that a sentence which warrants a conclusion that it is excessive, does not depend for this conclusion on the attribution of identified specific error in the sentencing remarks. However, the first instance judgment, did identify a number of factors which would have reduced the objective seriousness of the offence. It did not appear that these matters had been taken sufficiently into account in the assessment

of the penalty. Accordingly, the appeal was upheld, the penalty was quashed and a fine of $130,000 was imposed by the Full Bench.

Inspector Jorgensen v Daoud [2005] NSWIRComm 135

These matters were referred to the Full Bench pursuant to s 5AE of the *Criminal Appeal Act* 1912 and s 196 of the *Industrial Relations Act* 1996 for determination of a point of law purportedly relating to the Court's jurisdiction. The initial proceedings involved a prosecution brought under s 26 of the *Occupational Health and Safety Act* 2000. The issue raised related to the Court's lack of jurisdiction to hear the proceedings for a prosecution brought under s 26 of the 2000 Act. Central to this argument was s 50 and 53 of the *Occupational Health and Safety Act* 1983 and the Full Bench decision of *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253 at [162] - [163], which discussed ss 50 and 53 of the *Occupational Health and Safety Act* 1983.

Four questions were referred pursuant to s 5AE *Criminal Appeal Act* 1912 by the judge at first instance, but it was found not to be necessary to answer all questions. The Full Bench held that the question to be answered was based on one of the questions referred, that of the statutory interpretation of s 26 of the 2000 Act. It was held that an offence is created by virtue of s 26 of the 2000 Act, but that the offence is a contravention of the actual provision contravened by the corporation (for example, a contravention of s 8(1)). Further, it was found that an inaccurate reference to an incorrect statutory provision does not, of itself, invalidate the charges.

Inspector De Leon-Stacey v The Salvation Army (NSW) Property Trust [2005] NSWIRComm 147

The appellant appealed against the sentence imposed by the Industrial Magistrate at first instance, contending that the sentence imposed was manifestly inadequate. At the outset of proceedings, counsel for the respondent conceded that leave to appeal should be granted and that the appeal should be upheld. The Full Bench of the Court noted that the respondent's concession was "entirely appropriate" given the inadequacies of the decision by the Industrial Magistrate in two respects: first, inadequate attention was paid to the fundamentals of sentencing under the *Occupational Health and Safety Act* 2000 which require an assessment of the objective seriousness of the offence and a proper evaluation of any discounts that might apply in relation to subjective features; and second, the manifest inadequacy of the penalty.

In sentencing the respondent, the Full Bench took account of the objective seriousness of the offence mitigated by relevant subjective features. The Full Bench also noted that the principle of double jeopardy was applicable in this case. Given the manner in which the appeal came before the Full Bench, it was held that no order should be made as to costs. Accordingly, an appropriate fine in accordance with accepted sentencing practices was imposed, with a moiety granted to the prosecutor.

Inspector Yeung v Donald Edwin Wilson t/as Wilson's Tree Service [2005] NSWIRComm 158

These proceedings were brought by way of an appeal by the prosecution from a sentence at first instance on the basis that the penalty imposed was manifestly inadequate and that an order for costs was against accepted principles. The initial proceedings concerned a breach of the *Occupational Health & Safety Act* 1983 ("the Act"), where the personal defendant pleaded guilty to a charge under s 8(2) of the Act. The approach taken on prosecution appeals against sentence was considered by a Full Bench in *WorkCover Authority of New South Wales (Inspector Buggy) v Weathertex Pty Ltd* (2003) 127 IR 60 at [45] - [55], which was adopted by the Full Bench in these proceedings. Furthermore, the effect of financial hardship on penalty was considered at length by the Full Bench.

It was held that the penalty fixed must ultimately reflect the objective seriousness of the offence and must not be inconsistent with the criminality of the offence. Whilst the determination of the penalty made at first instance was at the discretion of the judge, it was found that the level of penalty applied reflected a significant discount as a result of the defendant's submissions regarding the financial hardship of the personal defendant. The Full Bench upheld the appeal, and found that the penalty imposed was manifestly inadequate, notwithstanding the acceptance of the approach taken at first instance as to the issue of the respondent's means. The penalty that was imposed at first instance was accordingly set aside and an increased the penalty imposed.

Da Silva and Sunlake Real Estate Pty Ltd t/as L J Hooker Morisset [2005] NSWIRComm 193

The appellant was employed by the respondent until his services were terminated for alleged poor performance. The appellant subsequently made an application for relief under s 84 of the *Industrial Relations Act* 1996. The application was listed for hearing on 8 October 2004. On that day, neither party appeared and the matter was dismissed for want of prosecution after an ex parte communication from the respondent. The appellant subsequently sought leave to appeal

and, subject to leave being granted, appealed against that decision. The ground relied on was that he had been denied natural justice.

The Full Bench held that the appellant had been denied natural justice given that he was unaware that an application had been made, albeit via telephone, by the respondent to have the application dismissed; and that therefore, the appellant was denied the opportunity to be heard in respect of the respondent's application. The Full Bench held that the failure at first instance to provide the appellant with an opportunity to respond to the application to dismiss his case for want of prosecution constituted a miscarriage of justice in a manner which attracted appellant intervention under the principles in *House v The King* (1936) 55 CLR 499. Leave to appeal was granted, the appeal upheld, and the decision quashed.

Re Motels, Accommodation & Resorts (State) Award [2005] NSWIRComm 248

This matter concerned an application by Employers First to vary the Motels, Accommodation & Resorts (State) Award under s 17 of the *Industrial Relations Act* 1996. The Full Bench determined to limit its amendments to three clauses, two of which were contested. The first of those dealt with arrangements for payment of an allowance and, if appropriate, penalty rates for overnight stays and work performed in the course of overnight stays. The second contested clause dealt with entitlements of regular part time employees to public holidays without loss of pay if the public holiday fell on days the employee would normally work.

The Full Bench commenced its reasoning by noting the earlier Full Bench decision in *Re Pastoral Industry (State) Award (2000)* 104 IR 168 which was authority for the proposition that the counterpart award principles which have been developed over many years by the Commission continue to have application and support and complement the Commission's award making powers and the requirements of the Act, although they do not require that strict counterpart status must be maintained between state and federal awards, irrespective of the terms of the Act or standards set by the Commission. After considering the submissions of the parties, the Full Bench held that the counterpart award principles, properly applied in the context of the Commission's award making powers (and in the light of the actual variations sought), warranted the granting of the application made by Employers First. The Full Bench also noted that proper adherence to the counterpart award principles would require that the casual conversion clause of the federal award should be imported by way of variation under s 17 of the Act into the State Award.

English v Aradlay Insurance Brokers Pty Ltd [2005] NSWIRComm 253

The appellant sought leave to appeal and appealed against the judgment at first instance where the trial judge declined to find that the appellant's contract with the respondent was unfair in that it failed to provide for reasonable notice or redundancy pay in the circumstances of the appellant's termination of employment. The matter came to a head with the sale of the respondent's business, whereby the sale agreement provided for continuation of employment on no worse terms than available with the respondent. The appellant was employed in a branch managerial role, and alleged that the purchaser declined to offer ongoing employment, offering instead a franchise arrangement. The business was taken over gradually by the purchaser with the respondent operating the business during the changeover period. Further employment was arranged with another franchise by the purchaser during the changeover period. However, the appellant failed to reach an agreement with the purchaser on the terms of the franchise and ended the employment relationship.

Leave to appeal was granted, with the Full Bench noting that error was demonstrated in relation to severance pay, but no error was established in relation to a period of notice. The general law principles of mitigation of damages were considered to be relevant but not decisive as to what award is made. The authorities clearly state that there is no obligation on an employee to take employment of a different or inferior kind. The contract was said to be unfair in that it failed to provide an appropriate level of severance pay where ongoing employment was not secured by the respondent. There was a significant difference between the employment and possible franchise arrangement not recognized in the original decision. The appeal was upheld and the respondent was ordered to pay 20 weeks' severance pay and the appellant's costs.

Hollingsworth v Commissioner of Police, New South Wales Police Service [2005] NSWIRComm 279

These proceedings were made by way of an application for leave to appeal and on appeal against a decision refusing an application by the appellant for declaratory relief under s 154 of the *Industrial Relations Act* 1996 ("the Act"). Two questions arose with the approach taken by the trial judge: firstly, was the trial judge correct in finding that there was no basis to grant relief on the appellant's first claim by reference to general principles of contract law rather than reference to the express terms of the agreement the subject of the proceedings, and secondly, was the trial judge correct in dismissing the whole of the proceedings notwithstanding no express withdrawal of the appellant's second claim when

the appellant was clearly indicating that she was only proceeding in respect of the first claim and in circumstances where she had not responded directly to the possible adjournment raised and "offered" by the trial judge?

It was found by majority that the trial judge erred in two respects. It was held that a serious miscarriage of justice occurred which denied the appellant the right to have her case decided according to law. The issues for consideration included the construction of the agreement between the parties, and whether an error occurred in the construction of the agreement. Notwithstanding the fact that the question of the utility of granting relief to the appellant on appeal was considered, the Full Bench granted leave to appeal and make an order that the appeal be upheld. The matter was remitted to determine the application for declaratory relief subject to further conciliation proceedings.

Yetzotis v Crown in the Right of the State of New South Wales (Commissioner of Corrective Services) [2005] NSWIRComm 302

This appeal was against the decision of an Industrial Magistrate dismissing an application for recovery of money under s 365 of the *Industrial Relations Act* 1996. The Full Bench considered the interpretation of s 371 of the Act, a provision which requires that conciliation be attempted before an order can be made. The Full Bench held that the language of the provision is straightforward and imposes a mandatory obligation on conciliation. Any failure to exercise this obligation renders the subsequent decision invalid. In addition, the Full Bench noted the importance of compliance with this obligation, especially when there is a real potential for settlement, as there was in these proceedings. On this basis, the appeal was upheld and the matter was remitted to the Local Court to be dealt with in accordance with the Act, with particular regard to s 371

Sydney Water Corporation and Australian Services Union (New South Wales and Australian Capital Territory Branch) [2005] NSWIRComm 305

These proceedings were made pursuant to an application for appeal against a judgment at first instance granting an interim dispute order, pursuant to ss 136 and 137 of the *Industrial Relations Act* 1996 restraining Sydney Water Corporation from dismissing two employees, represented by the Australian Services Union, until further order of the Commission. Consideration was given to the relevant principles governing the breadth of discretion to be applied to a broad range of disputes.

It was held that in dispute proceedings there is a limited role for the application of the tests formulated in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 as adopted in *Hill v Director General of the Department of Education and Training* (1998) 85 IR 201. Upon an analysis of the decision at first instance and the dispute, it was found that there was a genuine dispute that was broader than threatened dismissal of the two employees. The Full Bench held that the balance of convenience favoured the granting of the interim order. Accordingly leave to appeal was granted. However the appeal was dismissed.

Tempo Services Ltd v Strezouski [2005] NSWIRComm 329

This case involved an appeal from declarations made concerning alleged invalidity of an award. The central issue in the proceedings was the validity of certain clauses of the award and whether any purported invalidity of those provisions is amenable to declaratory relief pursuant to s 154 of the *Industrial Relations Act* 1996 ("the Act"). The Full Bench emphasized the discretionary nature of the section and the considerable amount of legal learning on the grant of declarations. Reference was made to s 179 of the Act and the purpose of the section was emphasised by the Full Bench in respect of the proceedings on appeal, namely, to provide, in the widest way, finality to awards of the Commission to enable those working or employing under them confidence in their continuing force and effect.

The Full Bench held that the conclusion reached at first instance was in error and there was no power to make such a declaration. In any event, if there had been jurisdiction it would have been an inappropriate exercise of discretion to permit a collateral attack on an award in proceedings for declaratory relief pursuant to s 154 of the Act. Accordingly, leave to appeal was granted and the appeal was upheld. Declarations made at first instance were set aside and an order as to costs was made.

ASMOF (NSW) v CSAHS [2005] NSWIRComm 339

In 1993 when Professor Morris was head of the Royal Prince Alfred Hospital's Department of Nuclear Medicine, he was struck by a motor vehicle while crossing Missenden Road Camperdown (the street in which the Hospital is located) in the course of his employment with the CSAHS. Professor Morris brought proceedings against the motorist who caused his injuries; and those proceedings were settled in 1998. After various correspondence between the two parties, Professor Morris' employment was terminated in March of 1999. In March 2001, ASMOF made an application in

accordance with s 92 of the *Industrial Relations Act* 1996 for reinstatement of Professor Morris to the position of Staff Specialist in Nuclear Medicine on limited duties, the application being supported with relevant documentation. In May of that year, ASMOF sent the respondent a further medical report which expressed a view favourable to the Professor returning to work.

On 22 July 2003 within the two year time limit provided in s 93(3) of the Act, proceedings were commenced. The respondents at first instance filed a motion which sought various orders, including: an order that the proceedings be struck out or alternatively, an order that the Industrial Relations Commission had no jurisdiction to reinstate Professor Morris.

In granting the orders sought by the respondent, the Member at first instance considered the matter essentially as one of statutory construction. ASMOF appealed against the decision primarily on the ground that his Honour erred in the proper construction and application of the provisions of Part 7 of Chapter 2 of the *Industrial Relations Act* and, in particular, in the construction and application of s 91(1) of the Act. During the course of the hearing, it became clear that the issues raised by the appeal raised more general considerations; hence, the matter was drawn to the attention of the Minister who duly intervened pursuant to s 167(3) of the Act.

The appeal was upheld by majority. In doing so, it was noted that the accepted approach to statutory construction had been authoritatively set out in *Commander Australia Limited v Kerr* (2004) 134 IR 160 at 170. The majority also relied on the decision in *Cansino v South Western Sydney Area Health Service* (1999) 130 IR 1. What was important about the statutory scheme was that the remedies sought were discretionary and the various exercises of discretion under the scheme depended on factual findings as to the respective criteria laid down in the statute. Consideration was given to the meaning of the term "injured employee" within the overall context of the purpose of the Act. Reference was made to various secondary materials, namely the Minister's Second Reading Speech, in addition to the Minister's submissions. However, the majority emphasised the ordinary grammatical meaning of the relevant expression. While the Full Bench accepted the general thrust of the respondent's submissions, it accorded greater weight to the Minister's submissions to the extent that Parliament did not intend to narrow the class of persons eligible to seek the protection of Part 7 of Chapter 2 of the *Industrial Relations Act*. Accordingly, leave to appeal was granted and the appeal was upheld.

Austin v NF Importers Pty Ltd and anor [2005] NSWIRComm 353

This case was an appeal against a decision at first instance where it was found that the appellant's contract of employment was not unfair in relation to its termination. As the appeal sought predominantly to challenge findings of fact, the Full Bench relied on the decision in *Box Valley Pty ltd v Price* (2000) 97 IR 484 which restated the principle that such appeals will face a significant hurdle in obtaining leave to appeal. The Full Bench held that the facts as found by the trial judge were reasonably open and that there was nothing to suggest that the oral testimony of witnesses fell into the rare category of exceptions so as to manifest a clear or palpable error by the trial judge.

The other significant limb of the appellant's case related to whether the appellant was denied procedural fairness in not being granted an opportunity to respond to a particular belief that went to the heart of the alleged misconduct. In finding that there had been no denial of procedural fairness in this instance, the Full Bench relied on the decision in, *inter alia*, *Abboud v The State of New South Wales (Department of School Education)* (1999) 92 IR 32 and affirmed the proposition that failure to follow an appropriate procedure may result in a dismissal being harsh, unreasonable or unjust but not every failure of a procedural kind will warrant intervention of the Full Bench. Accordingly, leave to appeal was refused and the appeal dismissed.

Donovan and Sullivan t/as Blaze on Stage Pty Ltd [2005] NSWIRComm 362

At first instance the appellant's unfair dismissal claim under s84 of the *Industrial Relations Act* 1996 was dismissed for want of jurisdiction. It was found at first instance that the appellant was an independent contractor when he was performing promotional work at the Ryde Eastwood Leagues Club and, as a consequence thereof, that the appellant was not entitled to bring a claim of unfair dismissal under Pt 6 Ch 2 of the Act. Following that decision an application for indemnity costs against the appellant was made by the respondent with an order being made that the appellant pay the respondent's costs on a party to party basis. The appellant sought leave to appeal and, subject to leave being granted, appeal against both decisions.

As to the jurisdictional question, the Full Bench agreed with the finding at first instance that the appellant was not the respondent's employee. However, the Full Bench found that the appellant was an employee of the Leagues Club, as, in respect of the promotions performed, the appellant had to conform to an established program devised by the Club and perform within a cohesive team. Accordingly, leave to appeal the jurisdictional question was granted, but the appeal was dismissed.

On the question of costs, the Full Bench found that, given its findings on the jurisdictional question, the discretionary decision as to costs at first instance had to be reversed. In doing so, the Full Bench referred to and adopted the principles set out in *Bankstown City Council v Paris* (1999) 93 IR 209.

Harry Day v John Smidmore and others (No. 2) [2005] NSWIRComm 406

These proceedings were made pursuant to an application by the appellant for leave to appeal and appeal against a decision and order given at first instance on 18 November 2004 in a matter related to an application for non-disclosure orders. On 14 October 2005 the Full Bench gave judgment in *Harry Day v John Smidmore and Ors* [2005] NSWIRComm 320 in which it upheld an appeal from a first instance decision where an order had been made permanently staying proceedings brought by the appellant under s 106 of the *Industrial Relations Act* 1996 ("the Act"). There was a subsequent application by notice of motion by the respondents for non-disclosure orders in relation to the identity of certain persons named in the appeal judgment and in relation to certain allegations by appellant referred to in the appeal judgment.

The Full Bench considered r 151 of the Commission's Rules (the slip rule) which the Full Bench observed was not the appropriate source of power to amend the original reasons for decision in the manner proposed by the respondents. Consideration of the power to make non-disclosure orders under s 164A of the Act was made by the Full Bench, in addition to a comparison of the test under s 164A with the common law test. It was held, following an analysis of factors for and against granting the application, that the paramount consideration was that of open justice. Accordingly the application was granted and the respondents were ordered to pay the appellant's costs of the motion.

APPENDIX 3

TIME STANDARDS

Industrial Relations Commission

Applications for leave to appeal and appeal

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 6 months	50%	**63.0%**	⇧
Within 12 months	90%	**86.9%**	
Within 18 months	100%	**95.6%**	

Award Applications [including Major Industrial Cases]

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 2 months	50%	**74.4%**	⇧
Within 3 months	70%	**79.5%**	⇧
Within 6 months	80%	**85.8%**	⇧
Within 12 months	100%	**94.3%**	

Enterprise Agreements

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 1 month	75%	**86.7%**	⇧
Within 2 months	85%	**93.5%**	⇧
Within 3 months	100%	**96.8%**	

Industrial Disputes

Time to first listing	Standard for 2005/ Achieved in 2005		
Within 72 Hours	50%	**51.3%**	⇧
Within 5 Days	70%	**64.6%**	
Within 10 Days	100%	**82.4%**	

Applications relating to Unfair Dismissal

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 2 months	50%	**65.8%**	⇧
Within 3 months	70%	**73.5%**	⇧
Within 6 months	90%	**87.7%**	
Within 9 months	100%	**93.2%**	

TIME STANDARDS

Industrial Court

Applications for leave to appeal

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 9 months	50%	**63.3%**	⇧
Within 12 months	90%	**73.2%**	
Within 18 months	100%	**88.7%**	

Prosecutions under OHS legislation

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 9 months	50%	**20.2%**	
Within 12 months	75%	**37.1%**	
Within 18 months	90%	**55.4%**	
Within 24 months	100%*	**76.0%**	

*The Commission has set a target of 100% of finalisations within 24 months, however, recognises that this target may take some time to achieve given the current state of the Commission's lists in these areas, the complexity and length of hearings required in many of these matters and the required judicial resources.

Applications for relief from Harsh/Unjust Contracts

Time from commencement to finalisation	Standard for 2005/ Achieved in 2005		
Within 6 months	30%	**12.6%**	
Within 12 months	60%	**47.4%**	
Within 18 months	80%	**63.2%**	
Within 24 months	100%*	**72.4%**	

Key: ⇧ = areas where Commission has equalled or exceeded time standard

APPENDIX 4

COMMITTEES

Library Committee

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

Education Committee

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

Section 106 Committee

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

Award Review Committee

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

Building Committee

The Hon. Justice Walton, Vice President (Chair)
The Hon. Justice Kavanagh
Mick Grimson, Industrial Registrar
Simon Furness, Director, Asset Management Services, Attorney General's Department
David English, Asset Management Services, Attorney General's Department
[This committee co-opts other members as circumstances require]

APPENDIX 5

LEGISLATIVE AMENDMENTS

***Mine Safety (Cost Recovery) Act* 2005, Act No 116 of 2005**

This Act was assented to on 7 December 2005 and commenced on the same day. The Act makes provisions with respect to the funding of regulatory activities in relation to mine safety, and enacts legislation for a levy to cover the costs of implementing recommendations regarding workplace safety regulations. In brief, clause 4 of the Act proposes a Mine Safety Fund into which all levies will be paid. Clause 6 of the Act sets out that funds will only be spent on the Department of Primary Industries' regulatory mine safety functions and the costs associated with them. The Director-General may, under Clause 7, invest the moneys in the fund. The provisions are designed to ensure transparency and accountability in how Government manages the fund.

***Workers Compensation Legislation Amendment (Miscellaneous Provisions) Act* 2005, Act No 113 of 2005**

This Act was assented to on 7 December 2005 and commenced on 1 January 2006. The Act amends the *Workplace Injury Management and Workers Compensation Act* 1998 and the *Workers Compensation Act* 1987 with respect to dispute resolution procedures, insurance obligations, workers, costs and compensation for back injuries. Schedule 1 amends the *Occupational Health and Safety Act* 2000 to ensure that where WorkCover has not been notified of a serious incident, the time limit in which the authority can bring a prosecution is extended by six months. The purpose of such an amendment is to stop employers either deliberately or inadvertently avoiding prosecution by taking advantage of the two-year time limit on prosecutions. Schedule 2 gives effect to miscellaneous amendments to the *Workers Compensation Act* 1987, including permission to WorkCover to issue stop-work orders to uninsured employers and to increase and extend the payment of funeral expenses for work-related deaths. Schedule 3 contains amendments to the *Workplace Injury Management and Workers Compensation Act* 1998 to provide for the appointment of acting deputy presidents of the Workers Compensation Commission of New South Wales, to make procedural changes to the method of appointment of approved medical specialists, to permit the Workers Compensation and Workplace Occupational Health and Safety Council of New South Wales to establish committees, and to ensure that WorkCover may issue guidelines that specify the qualifications required by a medical practitioner to be permitted to assess the degree of permanent impairment of an injured worker. Consequential amendments are also made to the *Statutory and Other Offices Remuneration Act* 1975 and the *Workers Compensation (Dust Diseases) Act* 1942.

***Police Amendment (Death and Disability) Act* 2005, Act No 112 of 2005**

This Act was assented to on 7 December 2005 and commenced 30 January 2006. It amends the *Police Act* 1990 and the *State Authorities Superannuation Act* 1987 with respect to death and incapacity benefits for police officers as well as other purposes. On 9 May 2005, the Government formally announced a $105 million package of initiatives to overhaul the way in which NSW Police will support police officers who are killed or injured in the performance of their duty. The package was endorsed by the New South Wales Police Association on 23 June 2005. A major component of the package was a new death and disability scheme. The new Act facilitates the introduction of the new scheme, which will be established by a specified industrial award.

***Industrial Relations Amendment Act 2005*, Act No 104 of 2005**

This Act was assented to on 1 December 2005 and commenced on 9 December. The Act amends the *Industrial Relations Act* 1996. The major purposes of the Act are to clarify the Industrial Relations Commission's jurisdiction to declare void or vary unfair contracts, and to allow for challenges on questions of the jurisdiction of the Industrial Relations Commission in Court Session, but only after the processes of the Commission are complete. The amendments were deemed necessary in the light of a number of recent judgments in the Court of Appeal, notably *Mitchforce v Industrial Relations Commission & Ors* [2003] NSWCA 151 and *Solution 6 Holdings Ltd & Ors v Industrial Relations Commission & Ors* [2004] NSWCA 200. These decisions threw the scope of the IRC's unfair contracts jurisdiction into doubt and allowed parties to remove disputes from the IRC to the Court of Appeal before the IRC had had a chance to consider whether or not they fell within its jurisdiction.

The Act also made two other amendments. The Commission is now able, in exceptional circumstances, to accept an application in relation to an alleged unfair contract that is made out of time. The Act also changed the name of the Industrial Commission in Court Session to the Industrial Court of New South Wales.

***Shops and Industries Amendment (Special Shop Closures) Act* 2005, Act No 92 of 2005**

The Act was assented to on 24 November 2005 and commenced on the same day. The Act made amendments to the *Shops and Industries Act* 1962 with respect to the closure of certain shops on Sunday 25 December 2005, Monday 26 December 2005 and Sunday 1 January 2006. The Act limits trade for all retail outlets on Boxing Day for 2005 except for those businesses in designated tourist areas and for those businesses scheduled in the Shops and Industries Act 1962.

***Superannuation Legislation Amendment Act* 2005, Act No 52 of 2005**

The Act commenced on 8 July 2005. It amended various public sector superannuation Acts including, inter alia, the *First State Superannuation Act* 1992, the *Police Association Employees (Superannuation) Act* 1978, the *Police Regulation (Superannuation) Act* 1906, the *State Authorities Non-contributory Superannuation Act* 1987, the *State Authorities Superannuation Act* 1987, the *Superannuation Act* 1916 and the *Superannuation Administration Act* 1996. Amendments were made with respect to police hurt on duty benefits, death benefits, deferral and payment of benefits as a result of Government initiatives. The Act also affected adjustment of employer reserves, payment of Commonwealth co-contributions into public sector superannuation schemes and dispute procedures. The amendments are said to be cost neutral to the Government: some of the amendments will directly benefit some members of the public sector superannuation schemes, others are relatively minor, affecting the administration of public sector superannuation arrangements.

***Workplace Surveillance Act* 2005, Act No 47 of 2005**

This Act was assented to on 23 June 2005 and commenced on 7 October 2005. The Act repeals and replaces the *Workplace Video Surveillance Act* 1998, which applied only to video surveillance. The Act regulates surveillance of employees at work and creates a general prohibition on surveillance by employers of their employees at work unless employees have been given notice of the surveillance in accordance with the Act, or unless the surveillance is carried out under the authority of a covert surveillance authority issued by a Magistrate. Covert surveillance authorities can only be issued for the purpose of establishing whether or not an employee is involved in any unlawful activity at work. The Act regulates the carrying out of surveillance under a covert surveillance authority, and the storage, use and disclosure of covert surveillance records. Part 1 of the Act contains preliminary matters such as definitions. It defines 'covert surveillance' to be any surveillance by an employer of an employee while at work for the employer that is not in compliance with the notification requirements in Part 2. In effect this creates a presumption that surveillance is covert unless the notification requirements are met. An employee is considered to be 'at work' when he/she is at a workplace of the employer, or if he/she is anywhere else while performing work for the employer. Part 3 of the Act outlines prohibitions on surveillance. Part 4 provides the regulatory framework for covert surveillance of employees at work. These provisions have been based on those in the *Workplace Video Surveillance Act* 1998. The Act was subsequently amended on 24 November 2005 by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 2005

***Rural Workers Accommodation Amendment Act* 2005, Act No 37 of 2005**

The Act was assented to on 15 June 2005, although is not yet in force. This is an Act to amend the *Rural Workers Accommodation Act* 1969 to make further provision for the accommodation of certain rural workers and to amend the *Occupational Health and Safety Act* 2000. This Act arose out of the recent review of the *Rural Workers Accommodation Act* 1969 conducted by WorkCover as part of the Government's national competition policy obligations. The purpose of the review was to examine any restrictions on competition imposed by the Act, and to determine whether they were outweighed by a net public benefit. The review concluded that the occupational health and safety benefit of providing rural workers with accommodation in particular circumstances outweighed any restrictive effect of the requirement to provide it. Stakeholders who were consulted in the course of the review supported retaining the requirement on occupational health and safety grounds. Accordingly, the review recommended that the requirement in the 1969 Act to provide accommodation remain, but that significant structural amendments be made to the legislation. The Act gives effect to this recommendation. It significantly amends the 1969 Act while retaining the principal requirement that employees who, because of the nature of their work, are required to live on rural premises for more than 24 consecutive hours, must be provided with accommodation.

APPENDIX 6

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

Annual Holidays Regulation 2005

The object of this Regulation is to remake, without substantial change, the Annual Holidays Regulation 2000 which was repealed on 1 September 2005 by section 10 (2) of the *Subordinate Legislation Act* 1989. The *Annual Holidays Act* 1944 provides that bonuses paid to workers are to form part of the ordinary pay of a worker for the purposes of payment for annual leave. Section 2 (6) of that Act provides that bonuses received by a worker are not to be taken into account if the ordinary annual pay of the worker (excluding bonuses) exceeds the amount prescribed by the regulations. This Regulation prescribes the annual amount as $144,000 (the Annual Holidays Regulation 2000 prescribed the amount as $120,000). This Regulation relates to matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public. This Regulation is made under the *Annual Holidays Act* 1944 including sections 2 (6) and 15 (the general regulation-making power).

Apprenticeship and Traineeship Regulation 2005

The object of this Regulation is to remake, with only minor changes in substance, the Apprenticeship and Traineeship Regulation 2000, which was repealed on 1 September 2005 by section 10 (2) of the *Subordinate Legislation Act* 1989. This Regulation deals with the making of applications to establish apprenticeships and traineeships, the payment of the expenses of witnesses who are required to attend or give evidence at hearings of the Vocational Training Tribunal, procedures relating to appeals under the *Apprenticeship and Traineeship Act* 2001 (the Act), the form for an industry training officer's certificate of identification, the matters for which fees are payable under the Act, the amounts of those fees and the circumstances in which those fees may be waived or remitted, the keeping of progress cards for apprentices, the nomination of persons for appointment to the Vocational Training Tribunal and the Vocational Training Appeal Panel, and formal matters and matters of a savings nature. This Regulation (clause 8 excepted) relates to matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public. This Regulation is made under the *Apprenticeship and Traineeship Act* 2001, including section 81 (the general regulation-making power) and the sections referred to in the Regulation.

Children and Young Persons (Care and Protection—Child Employment) Regulation 2005

The object of this Regulation is to prescribe the matters necessary to complete the legislative scheme contained in Chapter 13 (Children's employment) of the *Children and Young Persons (Care and Protection) Act* 1998. In particular, this Regulation gives effect to a Code of Practice governing children's employment. The provisions of Chapter 13 of the 1998 Act are substantially the same as the provisions of Part 4 (Employment of children) of the *Children (Care and Protection) Act* 1987 which they replace. This Regulation is substantially the same as the Children (Care and Protection - Child Employment) Regulation 2001 which was made for the purposes of Part 4 of the 1987 Act. This Regulation repeals the Children (Care and Protection-Child Employment) Regulation 2001. This Regulation is made under sections 221, 223, 224 and 264 (the general regulation-making power) of the 1998 Act and clauses 1 and 5 of Schedule 2 to that Act.

Long Service Leave Regulation 2005

The object of this Regulation is to remake, without substantial change, the Long Service Leave Regulation 2000 which was repealed on 1 September 2005 by section 10 (2) of the *Subordinate Legislation Act* 1989. The *Long Service Leave Act* 1955 provides that bonuses paid to workers are to form part of the ordinary pay of a worker for the purposes of payment for long service leave. Section 3 (2C) of that Act provides that bonuses received by a worker are not to be taken into account if the ordinary annual pay of the worker (excluding bonuses) exceeds the amount prescribed by the regulations. This Regulation prescribes the annual amount as $144,000 (the Long Service Leave Regulation 2000 prescribed the amount as $120,000). This Regulation relates to matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public. This Regulation is made under the Long Service Leave Regulation 1955 including sections 3 (2C) and 15 (the general regulation-making power).

Workplace Surveillance Regulation 2005

This Regulation was made under the *Workplace Surveillance Act* 2005, including sections 23, 28, 35 and 44 (the general regulation-making power). The object of the Regulation is to prescribe the form of applications for covert surveillance authorities; prescribe the form of covert surveillance authorities; prescribe the form of reports on the use of

covert surveillance authorities and provide for the Minister to be advised of any application for, or issue of, a covert surveillance authority. This Regulation relates to matters of a machinery nature.

APPENDIX 7

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

Matters filed during period 1 January 2005 to 31 December 2005 and matters completed and continuing as at 31 December 2005 which were filed under the *Industrial Relations Act* 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

(other than in the Industrial Court)

Nature of Application	Filed 1.1.2005 – 31.12.2005	Completed 1.1.2005 – 31.12.2005	Continuing as at 31.12.05 (including previous years)
APPEALS	48	45	24
Appeal - from Industrial Registrar	1	1	0
Appeal - from an Award matter	5	3	2
Appeal - from a Child Protection matter	0	0	0
Appeal - from a dispute matter	12	8	6
Appeal - from an Enterprise Agreement matter	0	0	0
Appeal - from an unfair dismissal matter	27	29	14
Appeal - other	3	4	2
AWARDS	629	652	130
Application create new Award	195	209	43
Application vary an Award	332	336	69
Application vary – nominal term	6	3	4
Application – State Wage Case	1	1	0
Rescission of Award	5	6	1
Review of Award	74	83	7
Application for exemption (s.18)	13	13	2
Award - other	3	1	4
DISPUTES	1019	1023	516
s130 of the Act	1001	1007	502
s130, s380 of the Act	8	7	5
s332 contract determination	10	9	9
s332, s380 of the Act	0	0	0
Other	0	0	0
ENTERPRISE AGREEMENTS	359	337	56
Approval (Employees and Union)	5	4	2
Approval (Employees)	18	19	5
Principles for approval of Enterprise Agreements	0	0	0
Approval (Union)	336	314	49
UNFAIR DISMISSALS	3708	3893	924
Application (by individual only)	1764	1809	372
Application (representative)	1411	1544	378
Application (organisation representative)	526	532	171
Application (organisation – multiple)	7	8	3
OTHER	345	317	79
Contract Agreements	3	3	0
Contract Determinations	17	16	8
Contract of Carriage (claim for compensation)	0	8	1
Application under Child Protection (Prohibited Employment) Act	1	3	0
Application for Demarcation Order	8	2	9
Application under *Employment Protection Act* 1992	0	1	0
Registration pursuant to Clothing Trades Awards	93	87	7
Application extend duration of Industrial Committee	98	95	3
Application for reinstatement injured employee (by individual)	9	11	3
Application for reinstatement injured employee (by organisation)	12	10	6
Application for Review of Order under s181D *Police Service Act*	16	10	11
Application for Rescission of Order under s173 *Police Service Act*	9	7	3
Application for Relief from Victimisation s213 of the Act	45	30	23
Miscellaneous (not categorised)	34	34	5
SUB-TOTAL	**6108**	**6267**	**1729**

APPENDIX 8

MATTERS FILED IN INDUSTRIAL COURT

Matters filed during period 1 January 2005 to 31 December 2005 and matters completed and continuing as at 31 December 2005 which were filed under the *Industrial Relations Act* 1996.

INDUSTRIAL COURT OF NEW SOUTH WALES

Nature of Application	Filed 1.1.2005 – 31.12.2005	Completed 1.1.2005 – 31.12.2005	Continuing as at 31.12.05 (including previous years)
APPEALS	74	72	60
Appeal from Local Court (Industrial Magistrate)	28	27	19
Appeal – superannuation	8	8	9
Appeal – OHS prosecution	20	17	21
Appeal – against decision of VETAB	0	0	0
Appeal – s106 matter	13	15	7
Appeal – other	5	5	4
CONTRAVENTION	1	3	9
Contravention of Dispute Order s139 of the Act	1	3	9
HARSH CONTRACTS	473	565	725
Application under s106 of the Act	473	565	725
PROSECUTIONS	174	227	269
Offences under *Industrial Relations Act* or *Regulations* (s.397)	0	1	0
Prosecution – s8(1) *OHS Act* 2000	80	52	102
Prosecution – s8(2) *OHS Act* 2000	50	28	73
Prosecution – s9 *OHS Act* 2000	3	4	5
Prosecution – s10(1) *OHS Act* 2000	5	6	9
Prosecution – s10(2) *OHS Act* 2000	6	3	9
Prosecution – s11 *OHS Act* 2000	0	4	2
Prosecution – s13 *OHS Act* 2000	0	1	0
Prosecution – s20(1) *OHS Act* 2000	1	2	1
Prosecution – s26(1) *OHS Act* 2000	18	12	22
Prosecution – s81(1) *OHS Act* 2000	3	1	2
Prosecution – s92 *OHS Act* 2000	0	0	1
Prosecution – s94 *OHS Act* 2000	0	1	1
Prosecution – s15(1) *OHS Act* 1983	2	38	19
Prosecution – s16 *OHS Act* 1983	0	3	0
Prosecution – s16(1) *OHS Act* 1983	2	19	6
Prosecution – s16(2) *OHS Act* 1983	0	0	0
Prosecution – s17(1) *OHS Act* 1983	0	5	7
Prosecution – s18(1) *OHS Act* 1983	0	1	2
Prosecution – s18(2)(a) *OHS Act* 1983	0	0	2
Prosecution – s19(a) *OHS Act* 1983	0	0	0
Prosecution – s27(1) *OHS Act* 1983	0	2	0
Prosecution – s50(1) *OHS Act* 1983	4	44	6
OTHER	42	45	41
Declaratory jurisdiction (s154, s248)	9	8	10
Cancellation of registration industrial organisation	0	0	0
Civil Penalty for breach of industrial instrument	13	14	13
Monetary claim s357 of the Act	1	1	1
Monetary claim s365 of the Act	12	18	11
Monetary claim under *Long Service Leave Act* 1955	0	0	0
Miscellaneous (not otherwise categorised)	7	4	6
SUB-TOTAL	**764**	**912**	**1104**

TOTAL (IRC & IC MATTERS)	**6872**	**7179**	**2833**