The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2008

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Annual Report

Year Ended 31 December 2008

The President

Industrial Relations Commission of New South Wales

47 Bridge Street Sydney

The Honourable J Hatzistergos MLC
Attorney General, Minister for Justice and
Minister for Industrial Relations
Level 31, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

22 May 2009

Dear Minister,

I have the honour of furnishing to you for presentation to Parliament the Thirteenth 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 2008.

Yours sincerely,

The Honourable Justice R P Boland
President

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Cover: **Commission premises**: *The collage on the front cover are exterior shots of the Commission's premises - centre, the principal registry at 47 Bridge Street, left, the Newcastle and Hunter regional registry at Wharf Road, Newcastle and, on the right, the Illawarra regional registry in Crown Street, Wollongong.*

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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 Thirteenth 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 Year 2008 saw the end of the stewardship of the Honourable Justice Lance Wright, the tenth President of the Commission. Justice Wright was sworn in as President on 22 April 1998 and retired on 22 February 2008 and, as noted by the distinguished speakers on the occasion of his farewell ceremony, left an indelible mark on the institution. While his accomplishments were many, he will be long remembered for his unfailing commitment to ensuring that the decisions of the Commission and the Court were both consistent and had that clarity of approach that allows litigants and their representatives to appear with confidence before the Commission. The attendees at his farewell ceremony indicated the respect with which Justice Wright was held. There were over 200 people in attendance to mark the occasion including Justice Michael Kirby of the High Court, the Chief Justice, Justice Spigelman, many other members of both state and federal courts and tribunals, practitioners, industrial organisations and members of the public. I echo the words of all speakers on that occasion in wishing both he and his wife, Rosalind, a long and happy retirement and offer my own thanks for the great shape in which he left the Commission.

I was honoured to accept a Commission from the Governor as the eleventh President of the Commission and I was sworn in at a private ceremony by the Chief Justice on 9 April 2008. During the period between the retirement of Justice Wright and my appointment, Justice Michael Walton was the Acting President. The Commission owes him a debt of gratitude for his strong leadership during that period and I thank him for his support, along with that of the other Members of the Commission, since my appointment.

The balance of the year brought with it a number of administrative challenges for the office of President, principal among them being a requirement to rationalise the Commission's resources in the face of a reduced workload brought about by changes to Commonwealth legislation commonly referred to as '*Work Choices*'. The effect of that legislation, constituted by amendments to the *Workplace Relations Act* 1996 (Cth), was to oust the jurisdiction of the Commission to deal with a wide range of industrial matters including disputes, awards and unfair dismissals involving constitutional corporations and their employees, as well as unfair contracts. The rationalisation included the appointment of a number of judicial Members to other Courts on a part time or acting

basis as well as a reduction in the number of Members by a process of voluntary redundancy. Regrettably, the contract of the Industrial Registrar, Mr Michael Grimson, who had served this Commission for over six years, was not renewed.

Much of this occurred at a time when I was actively involved in discussions with the Attorney-General and his Department about the future of the institution. In most circumstances this would be a difficult enough exercise, but in the situation where the federal government still had not finalised a legislative approach to what was outlined in its Forward with Fairness policy, and with the state government unable to commit to being a part of any national industrial relations framework until such time as federal legislation was finalised, these discussions were quite complex.

With the Attorney General assuming the additional portfolio of Minister for Industrial Relations in September 2008 communications were facilitated and I have been kept well advised (to the extent permissible given the secrecy surrounding the Commonwealth reforms) of developments in the negotiations between the Commonwealth and the State government. I remain confident that there will be an ongoing role for the Commission and the Court.

Commissioner Janice McLeay accepted a redundancy offer late in 2008 and completed her service with the Commission on 31 December 2008. Commissioner McLeay had served as a Commissioner for over 10 years and her diligence, sense of fair play and strong contribution to the ongoing development of Members via the Commission's Education Committee will be missed. On behalf of fellow Members and staff I wish Commissioner McLeay the best for the next stage of her career.

I note with appreciation the work of the staff in the Registry who have greatly assisted the members of the Commission in meeting the demands made during the year. Their dedication is greatly appreciated by the Commission. A team responds and reacts in much the same way as their leader and the registry teams are a true reflection of Mr Grimson's qualities as a leader and his commitment to service. It is with sincere regret that the Commission farewelled him as Principal Courts Administrator and Industrial Registrar at the end of the year. His expertise in courts administration, sense of humour and ability to 'get the job done' will be greatly missed.

I would also take this opportunity to thank Ms Lisa Gava who remained as Principal Associate following the retirement of the former President, together with my long term staff, Ms Monique

Brady and Ms Zoe Paleologos who job share the position of second Associate, all of whom took on the significant administrative burden of matters passing through the President's Chambers and who handle all matters with unparalleled skill and professionalism. I also commend the work of my Tipstaff, Mr John Maloney, who joined my chambers in the middle of the year after an extensive career working in the Supreme Court and whose assistance has been invaluable.

I wish also to express my thanks to the Research Associate to the President, Ms Emma Starkey for her valuable assistance throughout the year.

During the year and despite the various upheavals the Commission remained focussed on ensuring that it continued to meet the objectives of the *Industrial Relations Act*, particularly in ensuring that the Commission's 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.

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 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.

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.

The Full Bench of the Commission has appellate jurisdiction in relation to decisions of single members of the Commission and the Industrial Registrar. The Full Bench of the Industrial Court has jurisdiction in relation to decisions of single judges of the Court, industrial magistrates and certain other bodies. 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;
- 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; retired 22 February 2008.

The Honourable Justice Roger Patrick Boland, appointed President 9 April 2008; and as judicial member and Deputy President, 22 March 2000.

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;

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 Peter John Connor, appointed 15 May 1987;

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; resigned 31 December 2008;

Commissioner Alastair William Macdonald, appointed 4 February 2002;

Commissioner David Wallace Ritchie, appointed 6 September 2002;

Commissioner John David Stanton, appointed 23 May 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 held office as Industrial Registrar and Principal Courts Administrator of the Industrial Relations Commission from 26 August 2002 to 12 December 2008.

DUAL APPOINTMENTS

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

The Honourable Justice Roger Patrick Boland;

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.

The Honourable Justice Wayne Roger Haylen has held an appointment as Deputy President of the Administrative Decisions Tribunal and as Divisional Head of the Legal Services Division of that Tribunal since 9 June 2008.

The Honourable Justice Conrad Gerard Staff and the Honourable Justice Anna Frances Backman have held appointments as Deputy Chairpersons of the Medical Tribunal of New South Wales since 24 September 2008.

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 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. During 2008 the panel system was reviewed and a significant adjustment made to the assignments that reflect the ongoing needs of the community. Four panels are now in operation, each comprising a number of Presidential Members and Commissioners. Each panel is chaired by a Presidential Member of the Commission who allocates matters to the members of the panel. The panels deal with applications for awards or variations to awards, applications for the approval of enterprise agreements and dispute notifications arising in relevant industries.

Two panels now deal essentially with metropolitan (or Sydney-based) matters (down from four in 2007) and two panels specifically deal with applications from regional areas (down from three). The panel dealing with applications in the north of the State (including the Hunter region) is chaired by Deputy President Harrison. The panel dealing with applications from the southern areas of the State (including applications from the Illawarra-South Coast region) is chaired by Deputy President Grayson subject to the oversight of the Vice-President.

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

REGIONAL AND COUNTRY SITTINGS

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

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 Western Sydney. 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 earlier. 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 536 (502)[1] sitting days in a wide range of country courts and other country locations during 2008. There are two regional Members based permanently in Newcastle - Deputy President Harrison and Commissioner Stanton. The Commission sat in Newcastle for 250 (247) sitting days during 2008 and dealt with a wide range of industrial matters in Newcastle and the Hunter district.

The regional Member for the Illawarra - South Coast region, the Honourable Justice Walton, Vice-President together with Deputy President Grayson, deal with most Port Kembla steel matters and other Members also sit regularly in Wollongong and environs. There were a total of 178 (163) sitting days in Wollongong during 2008.

The Commission convened in over 40 other regional locations in 2008 including Albury, Ballina, Bathurst, Byron Bay, Coffs Harbour, Dubbo, Goulburn, Griffith, Lismore, Tamworth, Toronto, Wagga Wagga and Queanbeyan.

[1] Numbers in brackets are figures from 2007

MAJOR JURISDICTIONAL AREAS OF THE COURT AND THE COMMISSION

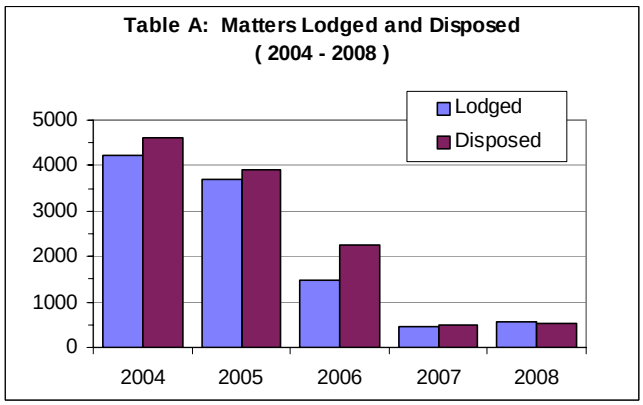
UNFAIR DISMISSALS

Prior to the introduction of the *Work Choices* legislation[2] a large and continuing volume of work arose 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 2008 (Table B); and median listing times (Table C). The significant impact that the *Work Choices* legislation has had on unfair dismissal filings within the Commission will be noted from Table A.

TABLE A



[2] *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth)

TABLE B

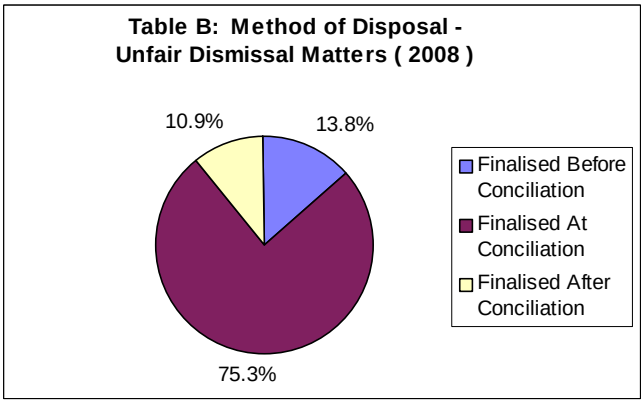
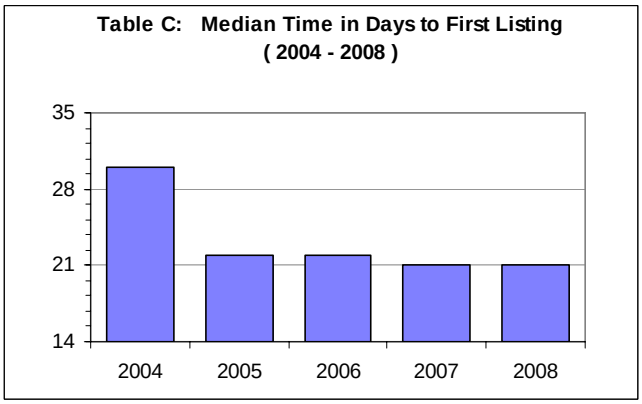
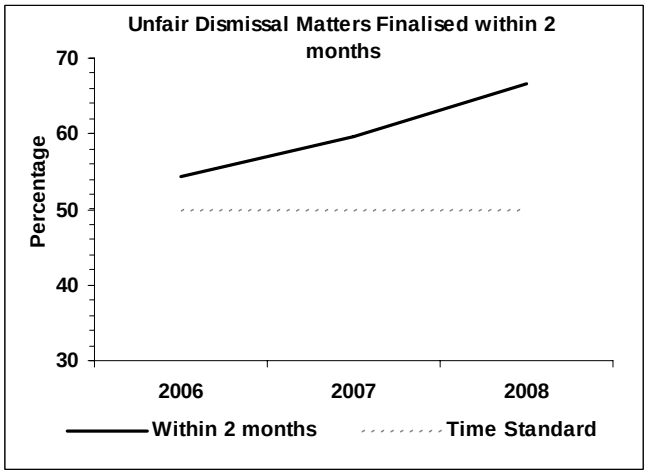


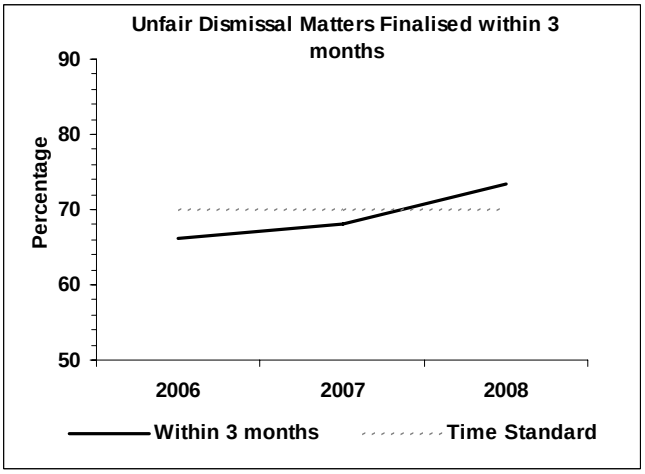
TABLE C



The Commission commenced a significant review in this area in early 2003 and implemented a number of new strategies to ensure that these types of matters were dealt with in a more efficient and timely way. At the commencement of 2006 the Commission introduced a new system for the allocation of hearing dates for the arbitration of unfair dismissal claims in respect of matters in both the Sydney metropolitan and regional areas of the State. *Practice Direction No. 17* was published to support the introduction of the new system. The time to final disposal of these types of matters initially slowed in 2006. Anecdotally, this would appear to have been as a result of the decrease in filings, which freed up Members to devote more time to individual matters in an attempt to bring the parties to a resolution prior to the matter going to hearing. Figures are now moving back to pre-*Work Choices* clearance rates as highlighted in the tables below.

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 is 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 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.

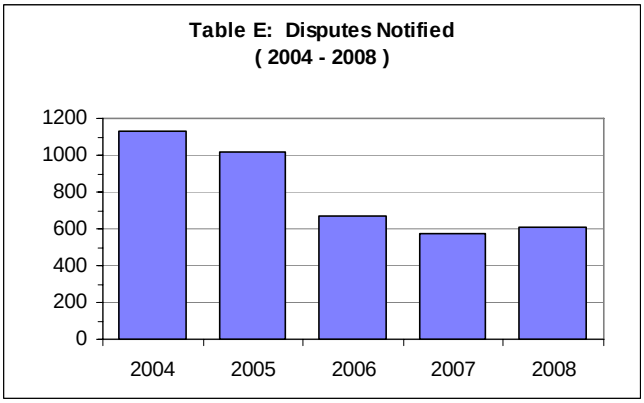
"Industrial dispute" is a broadly defined term linked, as it is, to the definition of "industrial matter" in s 6 of the *Industrial Relations Act* and this area of the Commission's jurisdiction remains significant.

The *Industrial Relations Act* was amended in 2006 to include s 146A, which provides that the Commission may assist parties who wish to refer disputes to the Commission where there is an agreement between the parties for this to occur. Such agreements, called 'referral agreements' may relate to a particular dispute or a particular class of disputes.

The Commission issued *Practice Direction No. 18* to facilitate the resolution of these types of matters. Whilst there is no requirement to have a referral agreement registered or certified by the Commission, provision was made within the above practice direction for copies of general referral agreements to be filed with the Commission. Since inception in 2006 there have been more then 300 agreements registered with Commission covering a broad range of industries throughout the State.

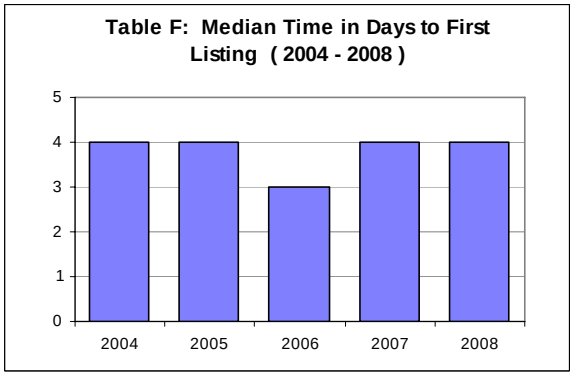
The table below shows disputes filed in the last five years:

TABLE E



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

TABLE F



DETERMINATION OF AWARDS AND APPROVAL OF ENTERPRISE AGREEMENTS

One of the important 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 triennial Award Review process commenced in the later part of 2007 and was effectively completed during 2008. As part of this process the Commission specifically identified over 300 matters that were deemed to have effect as enterprise agreements under clause 44C of Schedule 4 of the *Industrial Relations Act* 1996.

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) 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	2004	2005	2006	2007	2008
Application to make award	131	194	62	22	64
Application to vary award	296	332	479	201	252
Application enterprise agreement	336	359	224	28	35
Terminated enterprise agreement	219	173	145	19*	11
Review of awards (Total) (Notices issued)	431	74	0	572	308
Review - Awards reviewed	443	67	5	431*	364
Review - Awards rescinded	93	16	0	5*	12
Review - Awards determined to have effect as enterprise agreements	n/a	n/a	n/a	173*	168
* = data revised since previous report.					

STATE WAGE CASE 2008 [2008] NSWIRCOMM 122

On 27 June 2008, following an application by Unions NSW for a State decision pursuant to s 51 of the *Industrial Relations Act* 1996, the Full Bench of the Commission handed down the State Wage decision for 2008. The Commission increased minimum award wages by 4 per cent, and relevant allowances by a similar percentage increase. Pursuant to s 52 of the *Industrial Relations Act*, the Award Review Classification Rate (ARCR) was increased by $21.30 from $531.40 to $552.70.

The application by Unions NSW had sought a general wage increase of 4.5 per cent. The responses to this application were varied and included the Minister for Industrial Relations supporting an increase of $20.00 per week and employers either supporting the Minister's position or proposing an increase in the range of $10.00 to $13.00 per week.

In addition, the Catholic Commission for Employment Relations ('CCER') sought an order or an award be made in accordance s 52 of the Act, the effect of which would be to provide a minimum wage for adult employees who were within the Commission's jurisdiction but whose employment was not governed by an industrial instrument as defined in s 8 of the *Industrial Relations Act*. Unions NSW supported the CCER's proposal in respect for the making an order as opposed to an award, but all other parties and intervenors opposed the proposal.

In reaching its determination the Full Bench gave consideration to a number of factors such as - the state of the Australian and New South Wales economies; the economic state of industries most affected by the claim; income and expenditure characteristics of low paid workers and households; vulnerable workers; whether the increase should be a flat dollar amount or a percentage adjustment; what should be the amount of increase and why; and, as a final consideration, whether the Commission had jurisdiction to make an order or award in the nature of the CCER's proposal.

The Full Bench held that the proper balance between economic considerations and the needs of the low paid and the capacity of New South Wales to sustain an increase, resulted in an overwhelming case to increase minimum award wages by 4 per cent.

As to the proposal by CCER, the Full Bench found that there was an irresistible case on merit for the establishment of a minimum wage and could not find any jurisdictional impediment to granting CCER's application. However, the Full Bench considered it appropriate to make an order providing

for a minimum wage for the class of employee referred to in the CCER application, as opposed to the making of an award.

UNFAIR CONTRACTS

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

As with the unfair dismissal jurisdiction, the introduction of the *Work Choices* legislation in 2006 has impacted on filings with the Commission in this area. Table H shows the relevant trends:

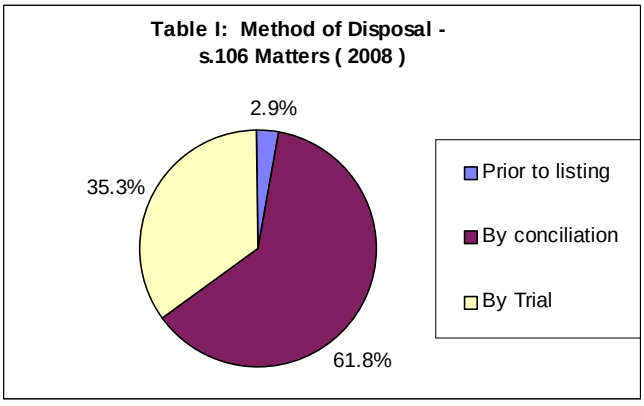
TABLE H

Section 106 Filings

Year	**2004**	**2005**	**2006**	**2007**	**2008**
No.	550	473	218	51	27

In light of the prospects of a high settlement rate at an early stage of proceedings the Commission had, since 2004, diverted resources at particular times during the year to conciliation. Given the significant decrease in filings this was not undertaken in 2008. While a significant percentage of matters still resolve at the conciliation stage (as the table below highlights), this rate has dropped considerably, mainly as a result of jurisdictional issues being raised that prevents resolution at an early stage.

TABLE I



During 2008 the Commission continued its initiative of targeting matters for expedited hearing. The Commission has a large number of aged matters that have been the subject of jurisdictional or other challenges in either this or other courts which has delayed the matters being concluded. This project was co-ordinated by his Honour Justice Staff and will continue in 2009 with the Commission determined to eliminate its aged backlog by the end of that year.

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, s 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 involving 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. This remains a significant area of the Commission's workload given the complexity and seriousness of the matters that fall for determination

TABLE J

Occupational Health and Safety Prosecutions

	2004	**2005**	**2006**	**2007**	**2008**
No.	186	174	193	93	185

As the table above shows there was a significant fall in prosecutions during 2007, which remains to be explained. Hopefully, given the nature of the matters that fall to be determined by the Industrial

Court, this is a mark of the success of programs initiated by government, employers and unions to improve workplace safety.

CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION

The *Child Protection (Prohibited Employment) Act* 1998 and associated legislation came into force in July 2000. This Act was repealed on 2 January 2007 and the relevant provisions relating to 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 were transferred to the *Commission for Children and Young People Act* 1998. As a result *Practice Direction No. 5* was repealed and *Practice Direction No. 19* issued in 2007. The Practice Direction provides the procedure for making an application to the Commission for an order.

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

Full Benches of the Commission and of the Court are constituted by the President pursuant to s 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 2008 Full Benches finalised in excess of 90 matters the majority of which involved appeals. A "snapshot" of the significant decisions is provided hereunder. Other significant decisions may be found in Appendix 2.

Caterpillar of Australia Limited & Ors v Gough & Gilmour Holdings Limited & Ors [2008] NSWIRComm 3; (2008) 170 IR 185

This matter concerned a jurisdictional challenge to unfair contract proceedings commenced by the respondent in relation to an overall arrangement and certain agreements between the parties. The

matter had an extensive history, with some 17 judgments being delivered in the substantive matter. This judgment was concerned with an application for leave to appeal and appeal from an interlocutory judgment of *Boland* J in which his Honour held that the Court had jurisdiction to hear an application by the first, second and third respondents to amend the Third Amended Summons in the form of the Sixth Further Amended Summons. That Summons sought to rely on s 106, 106(2A) and 106(5) of the *Industrial Relations Act* 1996.

Relevantly, the central issues on appeal concerned *Boland* J's decision to grant the respondent leave to amend their amended summons, whether the relevant contracts fell within the jurisdiction of s 106 of the *Industrial Relations Act* and the Court's power to order compensation under s 106(5). The Full Bench granted leave to appeal, but dismissed the first ground concerning the trial judge's decision to grant leave to amend. The Full Bench then turned to the central issue on appeal, the jurisdictional challenge. The Full Bench considered that the pertinent overall question was whether the relevant contracts and/or arrangements fell within s 106 of the *Industrial Relations Act*. Within that overarching question were two subset questions. The first, whether the contracts known as the 'Dealership Agreements' came within s 106(1) of the Act in terms of whether they were contracts whereby work was performed in an industry. The second, whether the 'Fourth Assurance' and the 'Last Resort Policy', which although were not contracts whereby a person performed work in an industry, could nevertheless be characterised as collateral contracts which fell within the jurisdiction of s 106(2A) of the *Industrial Relations Act*.

As to the first subset question, the Full Bench was satisfied that various findings of the trial judge in *Gough & Gilmour Holdings Pty Limited v Caterpillar of Australia Limited (No 11)* [2002] NSWIRComm 354 and the first instance judgment related directly to whether work was performed in an industry by the second and third respondents. The Full Bench set out his Honour's findings (which they held were reasonably open to him) that the second and third respondents performed work in the sales and service industry, either personally or through employees; that the second and third respondents actively participated in the management of the first respondent and the nature and breakdown of the relationship between the parties indicated that the second and third respondents had been performing work in the management of the first respondent. The Full Bench stated that although it was true that the second and third respondents were Dealer Principals and Managing Directors, they performed work in a managerial capacity and at a practical level. The Full Bench held that 'work was therefore performed within a corporate structure'. The Full Bench stated:

> The second and third respondents were not distant directors running the dealership solely through and by their employees but were actively involved in work at a number of different levels. They were not only Dealer Principals and Managers but also workers who were full-time "hands on" pivotal workers in the business on a day to day basis. Mr Gilmour, for instance, was the manager and operated as such as head of the sales team. Within the corporate arrangements it was inescapable that the second and third respondents were managers of work whose role was to perform work.

The Court then turned to consider whether the Dealership Agreements were agreements whereby work was performed, which they found they were. The Dealership Agreements set out active requirements on the second and third respondents to perform obligations such as to make sales, employ employees, promote and maintain equipment and to apply their qualifications and skills. Further, the Full Bench was satisfied that the contracts satisfied the jurisdictional requirements of s 106, that is, they were contracts where work was performed in an industry, and not commercial contracts.

In respect of the second question concerning whether the Fourth Assurance and the Last Resort Policy fell within s 106(2A), the Full Bench found that both of these were collateral arrangements because they were 'plainly auxiliary and related agreements' to the Dealership Agreements. The three agreements were between the same parties and they concerned aspects of the same overall work arrangement. As the Overall Arrangement had the performance of work as their significant purpose, the Full Bench held that the trial judge had been correct in finding that the Fourth Assurance and the Last Resort Policy were collateral contracts within s 106(2A) of the *Industrial Relations Act*.

Finally, the Full Bench found that the power to make money orders pursuant to s 106(5) extended to contracts that fell within the jurisdiction of s 106(2A), as those orders do not need to relate to the performance of work. As to the nature of those money orders, they were not limited to being only restitutionary in nature. The Full Bench dismissed the appeal.

An appeal has subsequently been lodged in the Court of Appeal against the decision of the Full Bench.

Muhkerjee v WorkCover Authority of NSW [2008] NSWIRComm 53; (2008) 172 IR 409

The appellant was convicted by the Chief Industrial Magistrate of falsely claiming a patient had visited him for consultations on 10 occasions following a workplace injury, and that consequently the appellant invoiced the insurer for payment for those consultations. In convicting the appellant, the Chief Industrial Magistrate had referred to written statements made by the patient, which were admitted into evidence despite the appellant's objections. The patient was not present in court and was never made available to be cross-examined by the appellant. The conviction was appealed under s 197 of the *Industrial Relations Act* 1996 on the grounds that the patient's evidence was wrongfully admitted; that the conviction was erroneous; and that the prosecution had failed to prove all elements of the offence charged.

The appellant submitted that the patient was a critical witness for the prosecution, and without her evidence the prosecution was doomed to fail. The patient had claimed to receive death threats which caused her to fear for herself and her children if she gave evidence. She was twice served with a subpoena, but refused to attend court to give evidence. She was finally not called by the prosecution, even though no bench warrant for her arrest was ever sought. The patient's written statements were tendered pursuant to s 65 of the *Evidence Act*, over the appellant's objections.

The respondent submitted that there was extensive evidence before the Court as to the patient's unavailability and steps taken by the prosecutor to compel her attendance. The respondent submitted that the serving of two subpoenas and the patient informing the prosecutor that she would not attend because of the fear arising from the death threats, satisfied the test of unavailability. Further that the test did not require all conceivable steps to be taken and that 'reasonable steps' required to be taken by s 65 of the *Evidence Act*, did not include the issuing of the bench warrant.

The Full Bench found that the relevant issue for determination in accordance with s 65 of the *Evidence Act* was whether 'all reasonable steps' had been taken by the prosecutor in securing the relevant witness' attendance in court. The Full Bench held that, contrary to the conclusions reached by the trial judge, it was clear that it was not a case where the witness was unavailable or where all reasonable steps had been taken by the prosecutor to bring the witness before the Court. Instead, the prosecutor had decided not to press either of the subpoenas, nor did the prosecutor seek a bench warrant. As all available steps had not been taken by the prosecutor, his Honour had fallen into

error in concluding that the requirements of s 65 had been met, and the Full Bench upheld the appeal.

Mukherjee v WorkCover Authority of New South Wales (No 2) [2008] NSWIRComm 86; (2008) 173 IR 176

This matter related to costs arising from a successful appeal from a conviction under s 253A of the *Workplace Injury Management and Workers Compensation Act* 1998. After judgment was delivered in the matter, counsel for the respondent conceded that the Industrial Court had jurisdiction to order costs in the appeal, but requested an adjournment, which was granted, to allow it to file submissions regarding costs of the proceedings at first instance. During the course of those submissions, the respondent withdrew its consent for costs on the appeal and submitted that its original consent should not be taken to mean the respondent conceded any of the matters set out in s 70(1) of the *Crimes (Appeal and Review) Act* 2001, had been established. Section 70(1) was concerned with 'Limit on costs awarded against public prosecutor' which provided costs orders were not to be awarded in favour of an accused person in summary proceedings unless the court was satisfied of one or more of the statutory exceptions. The respondent contended that the appellant bore the onus of satisfying these exceptions, and that that onus could not be satisfied in the current proceedings. As to the costs below, the respondent conceded that the Court had jurisdiction to award costs, pursuant to s 181 of the *Industrial Relations Act* 1996, but it was argued no order should be made pursuant to s 214 of the *Criminal Procedure Act* 1984 (which had similar terms to the *Crimes (Appeal and Review) Act*).

The appellant submitted it had been proper for the Court to make the costs order in relation to the appeal, and that the respondent's counsel should have known of the relevant section and that attempts to avoid the concession made at the hearing should not be permitted. As for the costs of proceedings below, the appellant submitted that there were exceptional circumstances warranting the making of a costs order against the respondent.

The Full Bench held that the respondent's attempt to withdraw its consent to the costs order during the course of its submissions and after judgment had been delivered ex tempore and a written copy of the judgment provided to the parties, was not available to the respondent. The failure of the respondent to refer the Court to the relevant section did not overcome 'what occurred at the hearing, when the order as to the costs of the appeal was made by consent'.

In relation to costs at first instance, the Full Bench held that it was appropriate to order costs against the respondent from a certain date, due to the conduct of the prosecutor in failing to seek a bench warrant for the attendance of the main witness. Instead the prosecutor tendered the witness's statements. This meant the appellant was never able to test those statements despite the witness being crucial to the respondent's case. The Full Bench found:

> To deprive the appellant of the opportunity of cross examining Ms Gamboa, because the respondent did not wish to pursue the steps available to it to secure her attendance and to compel her to give evidence, for reasons which it did not explain, was unarguably an unfair way in which to conduct this prosecution.

The Full Bench was satisfied that the circumstances were exceptional and ordered the respondent to pay the appellant's costs of the proceedings below on and from the date the respondent decided not to seek a bench warrant.

Metal Trades Training Wage (State) Award [2008] NSWIRComm 59; (2008) 174 IR 30

These proceedings arose from the award review process under s 19 of the *Industrial Relations Act* 1996. During the course of proceedings it became apparent that the Metal Trades (Training Wage)(State) Award had not been varied to include wage increases pursuant to the 2004, 2005, 2006 and 2007 State Wage Cases ("SWC"). *Macdonald* C made an ex tempore determination reflecting the parties agreement that the wage increases for the 2004, 2005 and 2006 SWC be incorporated into the award. However, as the parties could not agree on the operative date for the 2007 SWC increase, the matter was referred to the President to be dealt with as a Special Case in accordance with State Wage Case Wage Fixing Principles.

The Full Bench heard the matter and delivered an extempore decision the same day. The central dispute concerned the relevant operative date for the 2007 SWC increase. The applicants accepted they bore the onus to establish the relevant grounds for a special case, but contended that the factual situation of what had occurred was 'atypical of a contemporary award and sufficiently out of the ordinary to satisfy the criterion of "special"'. The applicants submitted that considering the extensive delay experienced by employees in receiving the SWC increases and the requirement under s 10 of the *Industrial Relations Act* that awards must fix reasonable conditions of employment, including timely application of SWC increases, that a special case had been established, and that the 2007 increase should be incorporated into the award. The Australian Federation of Employers and Industries maintained that the 12-month rule relating to SWC

increases should be maintained in respect of the 2007 SWC increase, and that, accordingly, implementation of the 2007 increase could not occur prior to 16 January 2009.

The Full Bench found that the delay clearly satisfied the requirements of a special case, and ordered the 2007 SWC increases to be applied in the manner sought by the applicants. The Full Bench found that it was 'open to reasonable conclusion that employers, either paid the minimum rate and consequently have had the benefit of the delay to the detriment of employees or have paid in excess of the award and will not be unduly inconvenienced by the variations sought in the time frame put by the Union'.

Linda Iris Neeson v Amora Company Ltd and Ors [2008] NSWIRComm 71; (2008) 172 IR 228

This matter concerned an appeal from the decision of a trial judge that proceedings brought under s 106 of the *Industrial Relations Act* were not within jurisdiction. The appellant had filed an unfair contract claim against five respondents. However, the trial judge found that the actual contract was a contract between the appellant and a company that was not a party to proceedings. There was no evidence to disclose a contract of employment between the appellant and third respondent, and that the appellant was seeking orders regarding the fifth respondent, despite proceedings against the fifth respondent being discontinued after settlement. Further, the trial judge found that there was insufficient territorial nexus between the contract and New South Wales. All the work performed by the appellant occurred in Thailand; the appellant was not required and did not report to staff of the respondent in Sydney; and the person who exercised direct supervisory authority over the appellant, the third respondent, was located in Melbourne. It was held that the appellant's employer and the second to fourth respondents did not carry on business in New South Wales and that the tangential or incidental communications between the appellant and persons within New South Wales was not sufficient to characterise the appellant's contract as one being in and of an industry in New South Wales.

The Full Bench refused leave to appeal as no issue of law or principle arose in the appeal. The appellant's substantive challenge was in relation to factual findings by the trial judge, however the Full Bench were unable to discern any error in those findings and dismissed the appeal.

Inspector Lai v Rexma Pty Ltd and Another [2008] NSWIRComm 78; (2008) 172 IR 210

The matter concerned an appeal from an Industrial Magistrate in relation to an incident in which an employee of the respondent had his fingers amputated in a plastic recycling machine. The trial judge imposed penalties totalling $21, 000 for the corporate respondent and $11, 000 for the second respondent. The appellant sought to appeal on the grounds that the sentences imposed were inadequate.

The Full Bench considered that the trial judge had been guided by the jurisdictional limit of the court, being $55, 000, instead of the maximum available penalty, being $550, 000. The appellant also submitted that the trial judge gave little or no consideration to evidence of prior incidents of a similar nature. The Full Bench determined that material concerning prior incidents was before the trial judge, was relevant to the assessment of objective seriousness of the offences because the respondent had prior knowledge of the risk but took no steps to address the risk, and found that the trial judge's failure to take the material into account constituted an error. The Full Bench noted, however, that the trial judge had found the offences to be serious.

The Full Bench concluded that in addressing the relevant factors and making a finding that the offences were serious, the trial judge fell into error, given the manifest inadequacy of the penalties and the errors upon which they were based. The Full Bench re-sentenced the respondents and imposed penalties totalling $45, 000 for the corporate respondent and $21, 800 for the individual respondent.

Stegbar Pty Ltd & Transport Workers' Union of New South Wales (on behalf of Cruickshank Transport Pty Ltd) [2008] NSWIRComm 104; (2008) 173 IR 350

This matter concerned an appeal from a decision of the Contract of Carriage Tribunal. Pursuant to s 346 of the *Industrial Relations Act* 1996, a contract carrier is entitled to bring a claim for compensation against a principal contractor, but must first establish five jurisdictional requirements in order to obtain compensation. At first instance, the Tribunal found that all five requirements had been established. The appellant appealed on the basis that the Tribunal had incorrectly found the respondent had satisfied three jurisdictional grounds including the finding of the existence of a head contract, a finding of custom and practice and the calculation of compensation.

The appellant submitted that a contract signed by the respondent in 2005 totally replaced an earlier contract and because it was not entered into according to the requirements of s 346(1)(b) of the Act, the first jurisdictional requirement had not been established. The Full Bench rejected this as there was evidence the contract was entered into by the respondent under duress, the contract was undated, contained no names of any person or entity designated as the carrier and there was no evidence of the respondent seeking independent legal and financial advice prior to signing the contract, a step that was required by the contract itself. Accordingly, it did not replace the 2003 contract, which itself satisfied s 346(1)(b).

In relation to the second ground concerning s 346(1)(c), the appellant submitted the Tribunal should not have accepted the evidence of Mr Cruikshank, the driver on whose behalf the respondent appeared, in relation to a goodwill fee as his evidence was hearsay, unsupported and uncorroborated. However, the Full Bench, having regard to the fact that the appellant chose not to call any evidence on the matter, that the evidence of Mr Cruikshank was the only evidence on the matter and that it was not strictly bound by the rules of evidence, rejected this ground of the appeal.

Finally, the appellant submitted that the Tribunal had failed to consider and apply in precise terms the principles for the quantification of compensation as mandated by the legislation. The Full Bench acknowledged that the Tribunal had provided a lack of specificity in its reasons, which led to a difficulty in assessing whether the Tribunal had regard to each and every principle. However, the Full Bench was satisfied on the evidence before it that the overall result was that the Tribunal had not misdirected itself in reaching its conclusion.

Leave to appeal, however, was granted, with the Full Bench accepting that the appellant was entitled to a review on the merits of the decision at first instance in light of the inadequacy of reasons provided by the Tribunal.

Thomson and another v S G Australia Limited and another (No 4) [2008] NSWRIComm 107; (2008) 174 IR 292

The appellants, Mr Thomson and his consulting firm, Bengoal Pty Ltd, brought unfair contract proceedings against the respondents relating to the appellant's termination and also in connection with certain entitlements to remuneration alleged to be due under the contract and arrangements that the appellants had with the respondents. At the time the appellants entered into their employment contract with the respondents they entered into a Deed with the respondent that the appellants

would not engage in business of a type the same or similar to that conducted by the respondents, for so long as the appellants were employed by the respondents.

Three judgments were issued by the trial judge. In the first, it was found that the termination was not unfair but that the inconsistencies between the language used in the written contract and the intention of the parties in relation to the terms of the contract, did give rise to unfairness. The trial judge also found that the conduct of the respondents in seeking to apply the provisions of the contract's special conditions clause did not reflect the intention of the parties and was also unfair. The respondents were ordered to pay the first appellant $1, 337, 536. However, no unfairness was found in relation to aspects of the respondents' treatment of transactions involving certain clients. In the second judgment, the trial judge refused the appellant's application to re-open the evidence. The third judgment amended certain monetary amounts ordered in the first judgment.

The grounds of appeal were extensive and included an allegation that the act by the first respondent in drafting the contract of employment was deliberate and intentional so as to deprive the first appellant of benefits he would have otherwise received and that the trial judge had erred on a number of matters, including his decision not to re-open proceedings and in relation to certain transactions.

The Full Bench found that up until the time a draft offer of employment was tendered it was not part of the appellant's case that the first respondent had deliberately drafted the contract with the intention that the express terms of the special conditions would operate to deprive the first appellant of the benefits he would have received. At the time of its tender, there was debate between Senior Counsel for the respondents and the trial judge, which resulted in the trial judge stating that the document was unsafe to rely on, to which Senior Counsel responded by saying that he would regard the draft offer of no assistance to the court and therefore would not refer the court to it. There was no response or reaction by counsel for the appellants. However, in his judgment, the trial judge referred to the draft offer. Following the judgment, the appellants sought to re-open the proceedings to admit further evidence. The trial judge dismissed the appellant's application. The Full Bench found that the alleged 'deliberateness' of the first respondent to deprive the first appellant was not asserted in any coherent or focused manner at first instance but was now being sought to be run on appeal. The Full Bench found that his Honour did not err in dismissing the application, and upheld the view of the trial judge that any re-opening would not have had any impact on the ultimate finding of unfairness.

The next issue in the appeal concerned circumstances surrounding the inclusion of the 'special conditions clause', which the appellants argued was unfair as it did not reflect the intentions of the parties. The Full Bench found that the first appellant had every opportunity to read and understand the terms of the special conditions and that he was a 'very experienced and knowledgeable individual, including in relation to the matters addressed in the special conditions clause'. Given these factors, it 'strained credulity' to believe the first appellant did not know what he was signing. The Full Bench was unable to see why the first appellant should not be held to the bargain he struck, and dismissed that ground of the appeal.

The third area of appeal concerned whether the first appellant was entitled to a bonus in respect of a certain transaction, know as the Newcrest Transaction. The central issue concerned whether the first appellant had earned revenue relating to that transaction prior to 31 December 2001, the relevant date in the special condition. The Full Bench found that given that the revenue was entered into the first appellant's accounts in August 2001, although it was not realised until February 2002, the first appellant was entitled to the benefit of that amount. The Full Bench found this ground of the appeal made out.

The Full Bench considered two further transactions but found no error in the trial judge's findings. The appeal was upheld only in respect of the Newcrest transaction.

Dlugolecka v Todber Pty Ltd t/as Leisure Lea Gardens Retirement Village [2008] NSWIRComm 113; (2008) 174 IR 73

This matter concerned an application for leave to appeal and appeal from a decision of the Chief Industrial Magistrate. A central issue in proceedings was whether pursuant to s 371 of the *Industrial Relations Act* 1996, the lower Court had used its best endeavours to bring the parties to settlement prior to making an order. On the evidence, the Full Bench found that s 371 had not been complied with and expressed concern with the matter being the latest in a series of appeals where conciliation had not occurred.

The Court held that leave to appeal and appeal should be granted, although it considered that it would not be just to effectively require the matter to be reheard and this would unnecessarily further increase the costs so far incurred by the parties. The Court held that if the matter could not be resolved by conciliation in the lower court, it should be determined on the evidence led at the trial below, although the relevant awards, a central issue in proceedings, would be required to be

tendered in the proceedings, as they had not originally been part of the evidence. The Full Bench referred the matter back to the lower Court.

Hanson Construction Materials Pty Ltd v William Pepper [2008] NSWIRComm 141; (2008) 176 IR 210

The respondent was employed by the appellant primarily to perform driving duties but was terminated after 33 years of employment due to a medical condition which affected his use of heavy and loud machinery. The respondent brought an unfair dismissal application against the appellant. At first instance, a Commissioner found that medical evidence showed that the respondent could have been placed in the role of operator in the control room, a position he had previously occupied for 3 to 6 months without incident, and which was suitable having regard to his medical condition. Accordingly, the appellant's failure to appoint the respondent to this position resulted in the respondent's dismissal being harsh. On appeal, the appellant contended that the Commissioner had erred in determining that the dismissal was harsh and that there was error in the approach to the remedy.

The Full Bench found that at first instance it had been considered whether the dismissal was unfair in the context of the appellant's failure to offer the respondent a position in the primary crusher control room. The Full Bench considered that approach to be consistent with the proper application of the statutory test under s 84. This was especially so given the primary consideration in the appellant's decision to dismiss the respondent was his inability to work in the control room, in particular, because of his medical condition. The Full Bench also found that on the evidence at first instance, including the medical evidence, it was open to the Commissioner to find that the position in the control room was suitable for the respondent and to order re-employment to the position of operator in the control room.

Accordingly, leave to appeal was refused.

TIME STANDARDS

In September 2004, in line with the process of reform 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 range of jurisdiction which the Commission exercises. The standards, and how the Commission performed against those standards, are set out in Appendix 3 of this report. It should be noted that, although the Commission is not meeting standards in some areas, significant improvements have been made in a number of areas as compared to previous years.

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 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 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 four locations - 47 Bridge Street, Sydney (Principal Registry); 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 parties to awards and records relating to 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.

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.

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.

In addition, the team examines part-time work agreements, to determine their acceptability for filing, as well as, processing applications for registration of employers of outworkers for determination by the Clothing Trades (State) Industrial Committee.

Applications / Renewals for Certificates of Conscientious Objections				
2004	***2005***	***2006***	***2007***	***2008***
191	175	179	189	189

Special Wage Matters - Year End Current Files					
	2004	***2005***	***2006***	***2007***	***2008***
Special Wage Permits	1213	1110	991	749	502
* SWS - P	262	246	219	214	161
** SWP - MC	269	300	189	243	276
TOTAL	**1744**	**1656**	**1399**	**1206**	**939**

Special Wage Matters - Matters Lodged				
2004	**2005**	**2006**	**2007**	**2008**
1786	1734	1433	1241	868

* 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

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.

OTHER MATTERS

ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 24 - 26 September 2008. The first day covered a variety of topics with presentations by Dianne Linnane, Vice President, Queensland Industrial Relations Commission (*State Industrial Relations - A view from the North*); Ms Gillian Calvert, NSW Commissioner for Children and Young People (*Children's Employment in NSW*); Ms Emma Stirling, Accredited Practicing Dietician, Institute of Health and Fitness (*Making Wise Lifestyle Judgments*); Professor Gordon Parker, Executive Director, Black Dog Institute (*Dealing with Depressed Litigants*) and a session on s 106 conciliations facilitated by his Honour Justice Michael Walton, Vice-President and her Honour, Justice Schmidt. On the second day of the conference sessions were given by Dr Vera Ranki, The Examined Life Institute (*The Examined Life - Ethics, Theory and Practice);* Ms Carolyn Penfold, Faculty of Law, University of Sydney (*Off-shoring to India - a Labour Law Perspective*); his Honour Justice Peter Johnson, Supreme Court of NSW, (*Controlling Unreasonable Cross Examination*) and his Honour Justice Michael Walton, Vice-President (*Open Forum - Methodology and Improvements*). The Annual Conference was once again 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.

COMMITTEES

A list of the committees in operation within the Commission is 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 Rules 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 2008.

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 completed a comprehensive review of the Commission's Rules in the later part of 2007, early 2008 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. Given the relevantly recent introduction of the *Uniform Civil Procedure* Act and Rules and the possible advantages to major stakeholders and clients if the Commission, or at least the Court, moved in a similar direction, it is likely that significant amendments to the Rules will occur in 2009.

COMMISSION PREMISES

In September 2005 the Commission commenced occupation of premises at 47 Bridge Street, Sydney (the *Chief Secretary's Building*) following renovation. During 2007 the balance of Members relocated from the Hospital Road Court Complex following completion of an upgrade to the air-conditioning within the 50 Phillip Street part of the complex allowing true co-location, with attendant benefits, to finally occur after many years.

AMENDMENTS TO LEGISLATION ETC

The legislative amendments enacted during 2008, 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

There were no new Practice Directions published during 2008.

CONCLUSION

In the conclusion to his final report as President, the Honourable Justice Lance Wright stated:

> "..it would be detrimental to forget the significant contributions that State tribunals, particularly this Commission, have made in developing an industrial landscape renowned for its fairness. In the last 100 years many important decisions that have shaped the industrial landscape, enshrined rights and encapsulated the importance of strong employee-employer relationships to enhance productivity have been made by tribunals across the country. It would be highly disappointing if the current experience of those tribunals was discarded or left to 'wither on the vine'."

It is also my strong view that this Commission and Court can continue to play a valuable role into the future. That this is so is evidenced, in part, by the success of ss 146A and 146B of the *Industrial Relations Act* 1996 where over 80 companies state-wide are using those provisions to ensure that they have ongoing access to this Commission to resolve their industrial disputes. In the Hunter region alone there are some 31 contractors linked to one major project who have agreed to appoint the Commission to assist in dispute resolution. In the Illawarra region, one of the largest employers in the State has confirmed its intention to continue to utilise the dispute resolution functions of the Commission.

While discussions between the federal and state government about the role that the Commission might play will no doubt continue into 2009, whether this Commission will play a central or peripheral role in any national industrial relations system is not the issue. This Commission has the potential to play a much wider role in the industrial affairs of this State. I will be actively recommending to the government that it broaden the jurisdiction of the Commission to encompass all employment, industrial relations and disciplinary matters with a view to ensuring that the capacity of this Commission is fully utilised and that the experience and expertise of the Members can be effectively utilised to ensure that any workplace issue can be resolved in a timely and cost-effective manner.

Additionally, I will be recommending that the State government actively lobby the federal government to remove the limitation placed on s 106 of the *Industrial Relations Act* 1996 by the

Workplace Relations Act 1996 (Cth) and its successor the *Fair Work Act*. For this jurisdiction to be restored would give access to an important remedy that has been available for over 50 years in this State and was limited by the previous federal government without any justification.

The Year 2009 will be an important one, not only for this Commission but for industrial parties across the State. The Commission has the capacity to deliver industrial fairness to all parties irrespective of their status; there is a state-wide infrastructure which provides timely access to parties - one of the keys for early resolution of disputes; there is a depth of experience in and knowledge of employment related and industrial matters that can be utilised to maintain industrial harmony - the key to ongoing productivity improvement across the State; and there is a demonstrated commitment to meeting the important objectives of the *Industrial Relations Act* 1996 and, in particular, the objective to provide an industrial framework that is fair and just.

I look forward to being able to report next year on the expanding role of this Commission as we move beyond the *Work Choices* legislation and progress towards an enhanced system that recognises the important and ongoing part that this Commission has to play in the affairs of the people of New South Wales.

APPENDIX 1

INDUSTRY PANELS

PANEL A

Industries:
Baking and Allied Industries
Brick, Tile and Pottery
Breweries
Building and Construction Industries
Cement and Lime Industry
Clothing, Textile and Allied Industries
Domestic and Personal Services (Cleaning, Restaurants, Catering, Hotels)
Electrical
Furniture
Gas Industry
Glass and Wood Industry
Grain Handling
Household Commodities
Journalists
Labouring
Manufacturing (including drugs)
Meat and Allied Industries
Metal and Allied Industries
Mining
Oil Industry
Optical, Watchmakers and Jewellers
Plant Operators, Engine Drivers and Allied Industries
Printing
Prisons/Corrective Services (generally, including regional areas) (**Not Juvenile Justice with Panel B)**
Quarrying
Security Industry
Storemen and Packers
Theatrical (Entertainment, Darling Harbour, Carnivals)
Transport (including **Rail, Bus and Ferry**)

PANEL B

Industries:
Clerks
Clothing, Textile and Allied Industries
Clubs
Commercial Travellers/Sales (Salesmen, etc.)
Crown (including Juvenile Justice but not Prisons/Corrective Services or Rail, Bus and Ferry - with **Panel A**)
Dental
Education
Fire Fighting
Funeral and Undertaking
Health Industry (except Health Surveyors Newcastle with Panel N)
NB entire Industry including Ambulance Service and Clerical occupations etc
MSB, Ports Authorities etc (except Newcastle with Panel N)
Leather, Rubber and Allied Industries
Local Government (except Newcastle with Panel N)
Miscellaneous
Nurses
Police
Professionals
Real Estate Industry
RTA
Rural and Allied Industries
Shop Employee and Allied Industries
Universities/Colleges of Advanced Education
Water Supply
Welfare

PANEL N

Relevant geographical areas north of Gosford (excluding Broken Hill) and including all Power Industry including County Councils.

PANEL S

Relevant geographical areas south of Gosford plus Broken Hill and including all Steel Manufacturing and Allied industries.

APPENDIX 2

OTHER SIGNIFICANT FULL BENCH DECISIONS

Hillman v Bankstown Handicapped Children's Centre Association Incorporated [2008] NSWIRComm 64

This matter concerned a jurisdictional challenge to proceedings brought under s 106 of the *Industrial Relations Act* 1996. It was contended that as the respondent was a constitutional corporation, s 16(1) of the *Workplace Relations Act* 1996 operated to remove the Commission's jurisdiction in respect of the respondent. The Attorney General for NSW, Unions NSW and the Minister for Industrial Relations intervened in the matter and the matter was referred to the Full Bench.

The first respondent was incorporated under the *Association's Incorporation Act* 1984 and was an organisation operating in the disability services and childcare sectors which provided welfare in the form of accommodation and support services and operated a pre-school. In order to carry out its programs, the first respondent received funding from a variety of sources including the Department of Ageing, Disability and Home Care ("DADHC") and the Department of Community Services ("DOCS"). The funds were provided on a non-acquitted basis (if the monies were not expended on an activity they had to be returned to the government department) and acquitted basis (that is, the money was not subject to the same requirements as non-acquitted and became the property of the respondent, although it was required to be allocated to a specific end).

The Full Bench found that the first respondent was a public welfare corporation whose character and attributes bore many similarities to the blood transfusion activities of the Red Cross in the decision in *E v Australian Red Cross Society* (1991) 27 FCR 310 at 343. However, that alone was not determinative of the question of whether the first respondent was a trading corporation for the purposes of s 51(xx) of the Constitution, and in turn the *Workplace Relations Act*. The question of whether a public welfare corporation was a trading entity depended on the entity's current activities. Further, the Full Bench was satisfied that the nature and purpose of such a corporation might be instructive in analysing whether the activities of an organisation constituted trading.

The Full Bench considered the acquitted activities of the first respondent and found that the analysis revealed that the first respondent was funded by acquitted grants which did not produce a profit and which covered the first respondent's costs. The activities were not bought or sold. The Full Bench held that the activities of the first respondent should properly be understood as social welfare activities provided to target groups, and stated that 'the activities were not of a commercial nature and could not be appropriately described as buying or selling at a profit or loss'. Accordingly, the acquitted activities were not trading activities.

The Full Bench also considered the non-acquitted activities, which it deemed were also activities of a public welfare nature. There was a contractual arrangement between DOCS and the first respondent for the first respondent to provide services to young people, of which DOCS funded on an estimated basis according to a service price list. However, to have the money paid out by DOCS, DOCS had to first approve the expenditure. The Full Bench was satisfied that these acquitted activities were not business transactions taking place in a market and concluded that the acquitted activities were not trading activities. The respondent's challenge was dismissed.

Carroll v Carroll [2008] NSWIRComm 103

The matter concerned an application for leave to appeal and appeal from a decision of the Chief Industrial Magistrate. The appellant had subsequently filed a notice of discontinuance, which the respondent opposed. The Court stated that the parties each raised serious allegations against the other, but considered it unnecessary to outline the various matters raised by either party. The Court took the view that the appellant did not strictly require the Court's leave to discontinue proceedings as the hearing of the matters had not commenced before the Full Bench, nor did the public interest permit the appellant to be compelled to pursue an appeal against a decision he no longer wished to challenge. Consequently, the proceedings were discontinued.

The Court had not heard the parties as to costs, but held that the appellant must pay the costs incurred by the respondent, on the usual party/party basis. However, the court ordered that should either party wish to be heard on costs, they had to file and serve submissions within 7 days of the decision being handed down.

University Teaching Hospitals' Association (Industrial) in New South Wales - Application for Cancellation of Registration [2008] NSWIRComm 105

The Court granted the Deputy Industrial Registrar's application for cancellation of the University Teaching Hospital's Association, for which the Association did not oppose. The Full Bench declined to grant an ancillary order sought by the Association that the Court approve of the establishment of a Special Purposes and Trust fund by the Sydney South Western Area Health Service, to which the Association's funds, approximately $261 500, could be transferred. The funds would have been used to support research, travel and education of health administrators employed within the public health system of New South Wales.

The Court declined to make the ancillary order for three reasons. First the power and jurisdiction of the Court was confined to the making of an order in relation to debts and obligations of the Association. The Full Bench held the disposal of assets could not be characterised as an obligation and that accordingly the Court had no jurisdiction to make such an order. Secondly, the Association's rules prevented selling or disposing of its main undertaking without the prior approval of members and Minister. Neither of these approvals had been obtained. Finally, the rules of the Association only provided for the Association's funds to be used in the context for which the Association was established, that is industrial representation in association with the role of teaching hospitals within the health system. The Full Bench found the transfer of the Association's funds to a different entity, and for the purpose of supporting research, travel and education of health administrators did not accord with the requirements of the Association's rules

Flanagan v Commissioner of Police [2008] NSWIRComm 138

The appellant sought leave to appeal and appeal from the decision of the first instance judge who declined the appellant's application for review of an order made by the Commissioner of Police under s 181D of the *Police Act* 1990, removing him from the NSW Police Force. The decision at first instance was based on consideration of the appellant's conduct and integrity in relation to an off duty assault incident and subsequent unauthorised accesses to the COPS system (computer based information system). The appellant did not deny his conviction for assault, but submitted the dismissal was harsh as there had been a significant and serious provocation that occurred whilst he was off-duty that gave rise to the assault.

The Full Bench held that at first instance the trial judge's approach to the appellant's evidence regarding the provocation had resulted in a denial of procedural fairness as to an issue that was critical to the determination of the appellant's application. The trial judge did not accept that the allegedly provocative statements attributed to the member of the public involved in the assault, were in fact made by that person. The rejection constituted a denial of natural justice because the appellant's integrity and credibility regarding what occurred in the gaming room of the hotel where the provocation was said to have occurred, did not form part of the reasons for the appellant's dismissal; the respondent did not challenge those aspects of the appellants evidence, or submit that it gave rise to a new issue as to the appellant's integrity and credibility; nor had the trial judge raised concerns as to the evidence in the course of proceedings.

The appellant had raised other grounds for appeal, which the Court stated were all matters which the Court would have been prepared to grant leave to appeal, however in light of their findings regarding procedural fairness, it was unnecessary for the Court to resolve those issues.

Crown Employees (Public Sector - Salaries 2008) Award [2008] NSWIRComm 142

The Public Service Association and Professional Officers' Association Amalgamated Union of NSW ("the PSA") sought a new award titled Crown Employees (Public Sector - Salaries 2008) Award. This decision dealt with a summons to produce served on the Secretary of the Treasury. The Secretary of the Treasury filed a notice of motion seeking orders that the summons be set aside as it lacked a legitimate forensic purpose and sought material which was objected to on public interest grounds.

The central argument of the Crown's case was that as the documents had been prepared for deliberations by Cabinet, they were 'Cabinet documents', thereby attracting public interest immunity privilege. Further, the contents of the documents dealt with matters of ongoing controversy in relation to policy matters of the Government. The PSA contended that there was a legitimate forensic purpose in requesting the documents, as the documents were 'clearly relevant to the matters in issue between the parties'. The PSA did not dispute that documents recording actual deliberations of Cabinet were subject to immunity, but as it was not clear whether any of the documents had actually gone before the Cabinet for deliberation, the inference to be drawn was that they had not. Accordingly, it was submitted that immunity in relation to the documents was more limited than documents recording actual deliberations of Cabinet.

The Full Bench was satisfied that the PSA had established a legitimate forensic purpose in requesting the documents. However, the Full Bench was satisfied that the documents were prepared for submission by the relevant Minister, for the purpose of formalising the State Budget and, accordingly, that the claim for public interest immunity had been made good. The Full Bench found that on the material it was difficult to see how the proceedings would be frustrated or impaired by the refusal to produce the documents and ordered the dismissal of the summons.

Windrum and Anor v Matrix Healthcare Pty Ltd t/as Combined Pathology and Anor [2008] NSWIRComm 146

The Full Bench did not consider that there was a significant question of law or principle that necessitated the granting of leave to appeal, but found that, as the trial judge had erred in a number of significant respects with the result being an outcome at trial that in the public interest and interests of justice could not be allowed to stand, the Full Bench allowed the appeal.

The two main issues for determination at first instance, and on appeal concerned whether there was a consent variation to the contract between the appellants and the respondents and whether the first appellant's conduct was such that it justified summary termination. At first instance, the trial judge had found that there was a consent variation. However, the trial judge also found the appellant's conduct justified summary termination. The trial judge found the contract unfair because it did not afford the first appellant procedural fairness, that is, allegations the subject of summary termination were not put to the appellant and nor was he given an opportunity to respond to them. However, the trial judge did not make an order to vary the contract, as the trial judge was of the opinion that the evidence was that, even if the allegations had been put to the first appellant, he would have had no defence or explanation for the allegations.

The Full Bench found on appeal that there had not been a consent variation. The conversation in which the first appellant indicated his intention to reduce his working hours, and the basis on which the respondent submitted that the first appellant agreed to the variation to his contract, was more in the nature of a statement of intention by the first appellant or an invitation to treat. Further, when the variation was put to the first appellant in a subsequent meeting, the first appellant made it quite clear to the respondents that he did not agree with what was being put to him.

As to the issue of summary termination, the Full Bench found that the respondent had previously waived its right to summarily terminate the first appellant due to overcharging, and as such could not rely on it as justification for summary justification at a later date. Further, the Full Bench found that the allegedly confidential information that was said to have been communicated was not in fact confidential, nor did the Full Bench consider that the first appellant had passed on information recklessly or with the intention of harming the respondents' business. The Full Bench went on to find that the overall conduct of the first appellant did not justify summary termination on the evidence, especially considering how serious a matter summary termination was. Whilst the first appellant's behaviour had been inappropriate, it fell far short of constituting an exceptional circumstance justifying termination.

Finally, the Full Bench concluded that the contract was unfair, and that the contract should have ensured that the first appellant was provided with 3 months notice. The appeal was upheld and the decision and orders of the trial judge were set aside.

Commissioner of Police and Raymond Sewell [2008] NSWIRComm 147

This matter was an appeal from the decision at first instance concerning a police officer who had been removed under s 181D(1) of *Police Act* 1990. The officer had an unblemished employment record since 1985, but had engaged in seven instances of sexual harassment of two females within a two-month period.

At first instance it was found that the order for removal was harsh and unfair and ordered that the respondent be reinstated without payment of lost salary to the NSW Police Force. The appellant sought leave to appeal, primarily on the issue of whether in the balancing exercise of competing interests, the trial judge's failure to take into account the respondent's lack of frankness and candour about the incidents of sexual harassment, gave rise to a substantial issue of principle or law.

The Full Bench found, that not only did the trial judge take into account the respondent's lack of candour and frankness, he gave it sufficient attention and balanced it against other facts and mitigating factors. The Full Bench drew a distinction with the trial judge's findings in *Hosemans v NSW Police (No 3)* [2005] NSWIRComm 161, where it was found that the applicant was untruthful, and the matter presently before the Commission, where the trial judge made qualified findings that the respondent was less than frank, in relation to a number of the harassment instances.

The Full Bench found no error in the trial judge's approach, and that it was open on the evidence to find the police officer's conduct aberrant and to measure the appropriate punishment accordingly. Leave to appeal was refused.

New South Wales Department of Education and Training and New South Wales Teachers' Federation (on behalf of Debra Balsters) [2008] NSWIRComm 151

The appellant sought leave to appeal, and if leave was granted, to appeal the decision at first instance that a teacher's dismissal was harsh and unreasonable. The factual circumstances concerned a teacher with a 16 year unblemished record. Following an annual review, a number of issues were raised, including the teacher's ability to control two students with Tourette's Syndrome, and the teacher was required by the school principal to enter a Teacher Improvement Programme. At the conclusion of the programme, the Principal determined that the teacher failed to demonstrate the standards required of a classroom teacher. The teacher was first removed from teaching and directed to perform non-teaching duties at a department district office, but was subsequently advised that her services were terminated.

The appellant's central submission was that the *Teaching Service Act* 1980 imposed a statutory requirement that students have a right to be taught by competent teachers and that teachers are responsible for performing their duties efficiently and competently. The appellant submitted that the failure of the teacher to fully satisfy the minimum teaching standards during the Teacher Improvement Programme should have resulted in the dismissal of the respondent's application at first instance. Therefore, it was contended that the trial judge had paid insufficient attention to the requirements of the *Teaching Service Act*, or misunderstood or misapplied the outcomes of the Programme.

The Court granted leave to appeal because of the general significance of the provisions of the *Teaching Service Act* and Teacher Improvement Programmes for the teaching service in New South Wales, and in particular, the discipline of teachers within it. However, the Full Bench dismissed the appeal, finding that the Deputy President at first instance had paid regard to the requirements of the *Teaching Service Act* and the outcomes of the Teacher Improvement Programme when he assessed whether the dismissal was harsh, unjust or unreasonable. The Deputy President was entitled to find that the teacher's dismissal was harsh and unreasonable and to exercise the discretion to reinstate her.

Director of Public Employment by her agent the Commissioner of New South Wales Fire Brigades and New South Wales Fire Brigades Employees' Union [2008] NSWIRComm 158

This matter concerned applications for leave to appeal and appeal two decisions at first instance in relation to a dispute between the parties. The dispute primarily concerned the proper construction of Clause 9.6.1 of the Crown Employees (NSW Fire Brigades Firefighting Staff) Award 2005, which dealt with the recall provisions in circumstances where off-duty firefighters were required to report for duty to maintain required staffing levels. An agreed statement of facts was tendered in proceedings, which both parties agreed was representative of the issue the Commission was required to determine. The issue concerned the situation where an employee was required to work one or two hour periods prior to their rostered shift. In such a situation did clause 9.6.1 apply, as submitted by the respondent and, therefore, pursuant to that clause the employee was entitled to a minimum four hour payment at overtime rates, even though an employee may have only worked one or two hours? Or rather, as the appellant argued, did the general overtime provisions apply, in other words, time and a half for one or two hours worked?

At first instance, the Commission considered that the relevant issue was whether the representative situation in the agreed statement of facts was in fact a true recall in the context of cl 9.6.1 of the Award. After considering the authorities of the Commission, the Commission at first instance rejected a number of first instance decisions relating to the interpretation of recall provisions and found in favour of the respondent. In a second decision, the Commission, at first instance, granted leave to reopen the proceedings and received further evidence. Ultimately, the first decision was maintained on the basis that there was nothing that disentitled a recalled firefighter to the payment rates pursuant to cl 9.6.1 'merely because the recall abuts a normal rostered shift for that firefighter'.

The Full Bench granted leave to appeal. The Full Bench was satisfied that the appeal raised a substantial issue with implications for the Commission's jurisprudence in that the Commission at first instance had opted not to follow a number of decisions of the Commission regarding the interpretation of recall provisions.

The Full Bench set out the principles governing award interpretation, namely that they are to be interpreted as any other enactment is interpreted. The Full Bench highlighted four principles of statutory (and therefore award) interpretation that were relevant to the current matter. These were that statutory construction must involve a purposive approach, that the context be considered in the first instance, that extrinsic materials may be considered and that attention must be given to the meaning and effect of the award as it appears from the plain and ordinary meaning of the words.

The Full Bench held that the ordinary meaning of recall was to 'call back' or to 'summon to return' and that accordingly, if the employee was off duty and was then summoned to return to duty, the employee had been recalled. Provided the employee satisfied the four elements of cl 9.6.1, that is that the employee was off duty; the employee was required to

report for duty; the purpose of the employee being required to report for duty was to maintain required staffing levels and the employee reported for duty, the employee would attract the payment prescribed by the provision. The Full Bench rejected the submission by the appellant that the entitlement to payment under the clause only arose where the employee was recalled to duty and then released from duty at the conclusion of the recall. It was held that to construe clause 9.6.1 in such a way would add an element or condition to the provision that it was not capable of bearing.

The Full Bench held that there was no error at first instance and accordingly dismissed the appeals.

Commissioner of Police and Wayne Edward Collins [2008] NSWIRComm 162

The Commissioner of Police sought to appeal against the decision at first instance that the removal of a police officer, found guilty of driving occasioning grievous bodily harm whilst under the influence, was harsh and that the officer be reinstated. The two central issues under appeal concerned the extent to which a trial judge was required to consider evidence adduced during proceedings, but which was not taken into account by the Commissioner in his decision to remove the respondent and the approach to be taken on review to the element of public interest.

The Full Bench found that the trial judge should have considered the evidence that was raised during proceedings, but not taken into account by the Commissioner, as the evidence, which was of an additional alcohol related incident and an assault charge (although it was subsequently dismissed), had the capacity to materially alter a finding that the dismissal was harsh. The Full Bench upheld the appeal and set aside the decision and orders at first instance, and reconsidered the question of whether the dismissal was harsh.

It was held that the additional alcohol related incident, which occurred 10 months after the driving incident, was significant because it provided a further recent example of conduct caused by the respondent's drinking. The Full Bench concluded that this factor, which was absent from the trial judge's analysis, operated to shift the balance in favour of a finding that the dismissal was not harsh and held that the respondent should be dismissed.

Public Hospital Medical Physicists (State) Award [2008] NSWIRComm 166

The NSW Department of Health sought leave to appeal and appeal against a decision of the Commission at first instance, which created a new classification and salary structure within a new award known as the Public Hospital Medical Physicists (State) Award. The grounds of the appeal were limited to two issues. The first, that the methodology given in evidence by a witness and used at first instance in the assessment of salaries was flawed and second, that the new award allowed the classification of employees as 'Medical Physics Specialists', with substantially increased pay, even though the employees did not have the relevant accreditation to meet the minimum qualification for the classification.

The Full Bench granted leave to appeal, largely on the basis of the second ground of the appeal. In the Full Bench's view, if the Department's contention was correct, then the decision at first instance would have had the effect of granting a salary increase to employees for the 'holding of an accreditation or qualification which they do not yet possess'.

Turning to the merits of the appeal, the Full Bench found that the first ground was not established. The Full Bench was not satisfied that at first instance the decision was based solely on the witness' methodology, nor did it consider that the appellant had sufficiently demonstrated that there were any material flaws in that methodology.

The Full Bench however, upheld the second ground of the appeal. The Full Bench found that it was necessary in fixing rates of pay and transitional arrangements to have regard to the distinction between employees with the relevant accreditation and those without accreditation. The fact that the transitional arrangements contemplated by the award resulted in employees being paid a full rate of pay when they did not have the full range of skills and responsibilities was untenable. As the number of employees affected by the award were 'not minimal', the Full Bench upheld this ground, but due to the insufficient evidence before it, remitted the matter back to the Commission as constituted at first instance to resolve.

Operational Ambulance Officers (State) Award and others [2008] NSWIRComm 168

This decision dealt with the resolution of a major industrial case involving the Ambulance Service of New South Wales, determined applications for new awards and set out the method for determining those applications. The proceedings were conducted largely by a process known as the 'Bluescope Model'. This model was originally laid down in *Re Notification under section 130 by the Minister for Industrial Relations of a Dispute between BHP Billiton and the Australian Workers' Union NSW and others re proposed strike action* [2002] NSWIRComm 378.

In the course of the process, the Commission was called upon to make 21 Recommendations in resolution of issues raised by the parties' applications. The parties prepared draft awards reflecting their agreement or the Commission's Recommendations. The Commission made the following new awards: Operational Ambulance Officers (State) Award; and Operational Ambulance Managers (State) Award

Rail Infrastructure Corporation v Inspector Victor Page [2008] NSWIRComm 169

This matter concerned an appeal from a judgment at first instance that the appellant was guilty of a contravention of s 8(1) of the *Occupational Health and Safety Act* 2000 in relation to an incident concerning a worker on a live electrical pole. The appellant sought to appeal pursuant to s5AA of the *Criminal Appeal Act*, which provided that a person convicted of an offence by the Supreme Court in its summary jurisdiction may appeal against the conviction (including any sentence imposed). A preliminary issue for determination by the Full Bench concerned the submission by the respondent that although the trial judge had made a bare finding of guilt, he had not imposed a sentence and that the absence of a determination as to sentence rendered the appellant's appeal under s5AA premature and incompetent. The Full Bench considered the meaning of conviction, both under the Act and at common law, and formed the view that a finding of guilty following a plea of not guilty by a court exercising summary jurisdiction constituted a conviction. The Full Bench considered that the trial judge's finding following a hearing on the merits, the giving of reasons and the making of findings, necessarily entailed a determination of guilt, and that that determination of guilt amounted to a conviction.

Turning to the merits of the appeal, the appellant raised 13 grounds. The grounds included that the trial judge had proceeded on a wrong assumption of the relevant risk; that the trial erred in his findings concerning the confusion and lack of understanding on the part of the work team as to the appellant's system of work; and that the trial judge had erred in considering the appellant's defence. As to the trial judge's findings concerning the confusion and lack of understanding by the defendant's employees, the Full Bench considered the detailed system of work that was established by the defendant, and which included a number of work permits and instruction forms.

The Full Bench then addressed the evidence of the defendant's employees concerning their understanding of how all the documentation relating to the system of work interacted and was to be applied. The appellant submitted that there was a safe system of work in place, but that the incident had occurred as a result of an isolated act of negligence by an employee. The Full Bench found that although certain employees were either careless or gave insufficient attention to documents, this was secondary to the primary cause of the risk which was that under the appellant's system of work the appellant failed to ensure adequate information and instruction was provided to its employees in relation to the documents used in the isolation procedure so that employees knew how to perform the undertaking safely. The Full Bench rejected all other grounds and dismissed the appeal.

JT & LC Tippett Pty Limited and RD & LF Tippett Pty Limited v WorkCover Authority of New South Wales [2008] NSWIRComm 177

The appellants appealed against a finding of guilt by the trial judge concerning an incident in which an employee was injured when his foot became caught in the rollers of a potato harvester as he attempted to clean the rollers. There were two main issues on appeal. The first concerned the conviction and whether the trial judge had gone beyond the particulars. The second issue concerned the sentence and fines imposed by the trial judge.

In respect of the first issue, it was the trial judge's finding that the system for cleaning rollers was inherently flawed in that it was confined to one employee acting alone in cleaning the rollers but allowed the involvement of several employees, that was disputed. The appellant contended that the risk as defined was not part of the prosecutor's case until it was raised in closing submissions. Nor, it was submitted, was there any evidence, with the exception one witness, on the matter. The Full Bench determined that the relevant question was whether the prosecution had done enough to put the appellants on notice of the specific risk. The Full Bench found that the particulars of the charge were broad enough to put the appellants on notice of what was the unsafe system and that the manner in which the trial was opened by the respondent, put the appellants on notice that the multiple operation for cleaning the rollers, which was the system, was unsafe.

In respect of the sentencing approach of the trial judge and the fines imposed, the appellant submitted that the trial judge should have approached the question of penalty and dealt with it in a global fashion. The factual circumstances were that the two appellants together conducted a rural enterprise as one economic unit being a partnership. The Full Bench distinguished the current matter to that in *WorkCover Authority (NSW) (Inspector Green) v Big River Timbers Pty Ltd* (2006) 156 IR 341 and found that the principle of totality did not arise, as the role of the entity, that is the partnership, was essentially in law, one employer entity. The Full Bench proceeded to adopt this finding in re-sentencing, and found the appropriate penalty to be $80 000 with each defendant paying 50 per cent of that amount.

Director of Public Employment and PSA (On behalf of Brown) [2008] NSWIRComm 221

The matter concerned an application for leave to appeal, appeal and cross-appeal from a decision at first instance ordering Mr Brown to be re-employed as a Youth Officer at a Juvenile Justice Centre, with certain conditions to be met. At first instance the Commission had found that the misconduct that formed the basis of Mr Brown's dismissal had been established, but found that the misconduct would not have warranted summary dismissal and that while the decision to dismiss was not unreasonable or unjust, it was harsh in the circumstances.

The appellant contended that following the findings that the assault of children detained in custody had occurred, public interest required that such children be protected from assault by staff employed at the detention centres. It submitted that at first instance the Commission had failed to take into account the *Children (Detention Centres) Act* 1987 and the *Children (Detention Centres) Regulation* 2005. The union's cross-appeal challenged the conclusion that misconduct had occurred and raised questions going to the test to be applied in determining whether excessive force had been used by an employee. Both parties made complaints regarding the failure to give reasons at first instance and to hear the parties in respect of the orders made.

The Full Bench granted leave to appeal on the basis that at first instance the Commission had approached the issues raised by the respondent's application on the basis of whether the misconduct established on the evidence would have warranted Mr Brown's summary dismissal at common law. The Full Bench found this resulted in the Commission falling into error. This was due to the fact that the *Public Sector Employment and Management Act*, which governed Mr Brown's employment contract, did not concern itself with the notion of summary dismissal. The court emphasised why the distinction between summary dismissal and dismissal on notice was important at common law. First, if conduct warranting dismissal had occurred, an employer need not give any notice of termination of employment to the employee. Secondly, if the dismissal was challenged, an evidentiary onus always falls on an employer to establish that the circumstances in which the particular dismissal occurred were such as to give rise to the right to summarily dismiss without notice.

The Court found that the misconduct had occurred but held that the Commission at first instance had fallen into error in deciding whether the dismissal was warranted. The Full Bench found that in determining the seriousness of the misconduct, the Commission at first instance had regard to factors which were actually relevant to the question of the harshness of the dismissal, and not the seriousness of the misconduct. The Full Bench held that the conclusion that the misconduct did not warrant dismissal was not available on the evidence as the assault was serious, deliberate and wilful. Given the seriousness of the misconduct, the personal and economic consequences of the dismissal did not leave open the conclusion that the dismissal was harsh. The appeal was upheld and the cross-appeal dismissed.

Robinson v Gosford City Council [2008] NSWIRComm 237

These proceedings concerned an appeal from a judgment of the Chief Industrial Magistrate dismissing the appellant's claims for overtime and entitlement to on call and call back allowances. The appellant was employed as a theatre operations co-ordinator under the Local Government (State) Award and gave evidence that he was not paid overtime but, instead, was required to take time off in lieu. The Full Bench granted leave on the basis that the award was an important industrial award and that the public interest dictated that leave to appeal should be granted.

The Full Bench found that his Honour had misstated and misapplied the overtime provisions of the Award in the decision below. Pursuant to the award, the relevant test was to first determine what were the agreed ordinary hours of the appellant and then to determine whether or not the appellant was directed to work outside of those ordinary hours. The Full Bench also found that the award required there to be agreement between the employer and employee which would allow the employee to elect either to be paid at the overtime rate, or to take time off in lieu. There was no evidence of such an agreement between the appellant and the respondent. The Full Bench ordered that the appellant was entitled to be paid at overtime rates under the award for all work directed to be performed outside of the ordinary hours of 9am to 5pm Monday to Friday and that the respondent was not entitled to set off any amount of time taken by the appellant in lieu of receiving his entitlement to overtime payments. The Full Bench dismissed the grounds of the appeal relating to on call allowance payments.

Terminals Pty Limited v NUW, NSW Branch (on behalf of Todd Bell) [2008] NSWIRComm 247

The central issue in this application for leave to appeal and appeal, concerned the receipt of medical evidence in proceedings under s 242 of the *Workers Compensation Act* 1987, despite that medical evidence not being available to the employer at the time of the initial application for reinstatement pursuant to s 241 of the *Workers Compensation Act* 1987. The medical evidence was subsequently relied on by the Commission at first instance for a finding that the

respondent's member, Mr Todd Bell, should be reinstated. Mr Bell had been terminated after the appellant had found he was no longer fit to perform the duties of his position as grade 4 terminal operator as a result of his back injuries.

The Full Bench found that there was nothing in the statutory provisions which required that applications made under ss 241 and 242 be 'one and the same'. The Full Bench did accept that the Commission would lack jurisdiction to deal with an application under s 242 unless an application under s 241 had previously been made, but found that it did not follow that additional material could not be produced and relied upon in the course of proceedings under s 242. Further, the power of the Commission to make orders under s 243 was to be exercised in light of medical evidence before it at the time the application for orders was being heard and determined and, therefore, it would make no sense for the Commission to be constrained from hearing and considering such evidence merely because it was not the same medical evidence available to the employer. Leave to appeal was granted, but the appeal was dismissed.

APPENDIX 3

TIME STANDARDS

Industrial Relations Commission

Applications for leave to appeal and appeal

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 6 months	50%	**50.0%**	50%	**75.1%**	⇧
Within 12 months	90%	**78.2%**	90%	**85.8%**	
Within 18 months	100%	**87.6%**	100%	**96.5%**	

Award Applications [including Major Industrial Cases]

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 2 months	50%	**66.5%**	50%	**52.7%**	⇧
Within 3 months	70%	**90.2%**	70%	**68.9%**	
Within 6 months	80%	**97.6%**	80%	**93.6%**	⇧
Within 12 months	100%	**98.6%**	100%	**98.8%**	

Enterprise Agreements

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 1 month	75%	**78.6%**	75%	**78.8%**	⇧
Within 2 months	85%	**89.3%**	85%	**94.0%**	⇧
Within 3 months	100%	**92.9%**	100%	**97.0%**	

Industrial Disputes

Time to first listing	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 72 Hours	50%	**47.1%**	50%	**43.5%**	
Within 5 Days	70%	**67.5%**	70%	**61.5%**	
Within 10 Days	100%	**88.4%**	100%	**85.9%**	

Applications relating to Unfair Dismissal

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 2 months	50%	**59.6%**	50%	**66.7%**	⇧
Within 3 months	70%	**68.0%**	70%	**73.4%**	⇧
Within 6 months	90%	**83.5%**	90%	**87.4%**	
Within 9 months	100%	**90.8%**	100%	**93.3%**	

TIME STANDARDS

Industrial Court

Applications for leave to appeal

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 9 months	50%	**70.6%**	50%	**53.5%**	⇧
Within 12 months	90%	**76.5%**	90%	**76.7%**	
Within 18 months	100%	**84.3%**	100%	**91.7%**	

Prosecutions under OHS legislation

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 9 months	50%	**21.4%**	50%	**20.8%**	
Within 12 months	75%	**35.3%**	75%	**34.5%**	
Within 18 months	90%	**61.3%**	90%	**51.1%**	
Within 24 months	100%	**84.4%**	100%	**64.1%**	

Applications for relief from Harsh/Unjust Contracts

Time from commencement to finalisation	Standard for 2007/ Achieved in 2007		Standard for 2008/ Achieved in 2008		
Within 6 months	30%	**10.6%**	30%	**16.7%**	
Within 12 months	60%	**26.1%**	60%	**25.5%**	
Within 18 months	80%	**41.6%**	80%	**30.4%**	
Within 24 months	100%	**54.2%**	100%	**37.3%**	

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

APPENDIX 4

COMMITTEES

Library Committee

The Hon. Justice Kavanagh (Chair)
The Hon. Justice Staff
Commissioner Macdonald
Mick Grimson, Industrial Registrar
Annette McNicol, Director, Library Services
Juliet Dennison, Librarian, IRC of NSW

Education Committee

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
Ruth Sheard, 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
Tome Simonovski, Information Manager

Building Committee

The Hon. Justice Walton, Vice President (Chair)
The Hon. Justice Kavanagh
Mick Grimson, Industrial Registrar
[This committee co-opts other members as circumstances require]

APPENDIX 5

LEGISLATIVE AMENDMENTS

***Mining Amendment Act* 2008 No 19**
This Act was assented to on 20 May 2008 and commenced in part on 1 August 2008, the remainder is not yet in force. Substantial amendments were made to the *Mining Act 1992* with the object of 'encouraging and facilitating the exploration of minerals in New South Wales, but having regard to the need to encourage ecologically sustainable development'. The Act prescribes authorised mining purposes, conditions and rights under exploration and mining licences, the requirements relating to records, rehabilitation of derelict mining sites, powers of inspectors and offences for obstructing a person from fulfilling their duties under the Act. The Act made minor amendments to the *Criminal Procedure Act* 1986 and *Fines Act* 1996 and inserted a new definition of colliery holder in the *Coal Mine Health and Safety Act* 2002. The Act repealed the *Mining Amendment (Miscellaneous Provisions) Act* 2004.

***Shop Trading Act* 2008 No 49**
This Act commenced on 1 July 2008. The Act specifies restrictions on trading days during which shops must be closed, a list of shops that are exempt from the restrictions (including small shops), that applications may be made to obtain an exemption and provides for enforcement of the restrictions.

***Rail Safety Act* 2008 No 97**
This Act was assented to on 3 December 2008 and is not yet in force. The Act when commenced will implement outcomes of the national rail safety reform process and is designed to secure improved safety in the rail transport industry. The Act will introduce general duties in the rail industry, similar to the duties in the *Occupational Health and Safety Act* 2000 and provides that proceedings for offences can be brought in the Industrial Court. The Act states that the *Occupational Health and Safety Act* 2000 continues to apply, but where there is any overlap or conflict between the two, the *Occupational Health and Safety Act* 2000 prevails. The Act also made amendments to the *Fines Act* 1996, *Industrial Relations Act* 1996 and *Mine Health and Safety Act* 2004

***Courts and Crimes Legislation Further Amendment Act* 2008 No 107**
This Act commenced in part on 8 December 2008. The amendment makes miscellaneous alterations to the *Criminal Procedure Act* 1986, *Criminal Appeal Act* 1912, *Evidence Act* 1995, *Evidence Amendment Act* 2007, *Industrial Relations Act* 1996, *Mining Act* 1992 and the *Mining Amendment Act* 2008.

***Fines Further Amendment Act* 2008 No 110**
This Act commenced in part on 8 December 2008. This Act provides for increased recovery of court fines and penalty notices and makes amendments to the *Fines Act* 1996 and *Fines Regulation* 2005.

***Institute of Teachers Amendment Act* 2008 No 120**
This Act was assented to on 10 December 2008 and is not yet in force. This Act once proclaimed will amend the *Institute of Teachers Act* 2004 and inserts in new definitions relating to 'teach' and 'teacher'. The act also provides for accreditation of teachers, including grounds for revoking and suspending accreditation, employment of new scheme and transition scheme teachers and specifies the relationship of the Act with other legislation.

***Statute Law (Miscellaneous Provisions) Act* 2008 No 62**
This Act was assented to on 1 July 2008 and commenced in part on 1 July 2008. The Act makes miscellaneous alterations to the *Fines Act* 1996, *Health Services Act* 1997, *Interpretation Act* 1987, *Occupational Health and Safety Act* 2000, *Occupational Health and Safety Regulation* 2001, *Police Act* 1990, *Police Regulation* 2000 and the *Shop and Industries Regulation* 2007.

Vexatious Proceedings Act 2008 No 80
This Act commenced on 1 December 2008. The Act enables a Court, upon being satisfied that a person has frequently instituted or conducted vexatious proceedings in Australia, to make a vexatious proceedings order against that person. The Act provides that the Industrial Court can make an order staying all or part of any proceedings in the Industrial Relations Commission, an order prohibiting the person from instituting proceedings in the Industrial Relations Commission, or any other order appropriate in relation to proceedings by the person in the Industrial Relations Commission. The Court can make such an order either on its own motion or on the application by an interested party.

APPENDIX 6

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

Education (School Administrative and Support Staff) Regulation 2008
This regulation commenced on 1 September 2008. The regulation makes provision for the medical assessment of a person for the purposes of determining whether the person is fit to carry out the duties of a permanent position.

Fire Brigades Regulation 2008
This regulation commenced on 1 September 2008. The regulation prescribes the appointment and conditions of service of fire-fighters, the functions and duties of fire-fighters, misconduct by fire-fighters, disciplinary action against fire-fighters and charges payable for certain services performed by fire-fighters. The new provisions provide for remedial action to be taken against a fire-fighter who is guilty of misconduct, as an alternative to disciplinary action and that a fire-fighter who makes a false or misleading statement in an application for appointment as a fire-fighter is guilty of misconduct.

Health Services Regulation 2008
This regulation commenced on 1 September 2008. This regulation covers the appointment of visiting practitioners, the transfer of accrued leave entitlements of persons transferring employment between the NSW Health Service and affiliated health organisations and other miscellaneous provisions relating to health services.

Nurses and Midwives Regulation 2008
This regulation commenced on 1 September 2008. This regulation provides for the registration of nurses and midwives and miscellaneous provisions concerning the nurses and midwives sector.

Police Regulation 2008
This regulation commenced on 1 September 2008. It makes provision for the appointment, promotion and management of police officers, administrative officers and temporary employees, the consumption of alcohol and the use of prohibited drugs, misconduct and unsatisfactory performance, leave entitlements and allowances.

APPENDIX 7

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

Matters filed during period 1 January 2008 to 31 December 2008 and matters completed and continuing as at 31 December 2008 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 1.1.2008 – 31.12.2008	Completed 1.1.2008 – 31.12.2008	Continuing as at 31.12.08 (including previous years)
APPEALS	**30**	**33**	**10**
Appeal - from Industrial Registrar	0	0	0
Appeal - from an Award matter	1	1	1
Appeal - from a dispute matter	7	7	3
Appeal - from an unfair dismissal matter	18	19	4
Appeal - other	4	6	2
AWARDS	**628**	**653**	**159**
Application create new Award	64	41	32
Application vary an Award	252	221	53
Application – State Wage Case	1	1	0
Review of Award	308	388	73
Award - other	3	2	1
DISPUTES	**609**	**582**	**264**
s130 of the Act	554	534	238
s130, s380 of the Act	5	3	3
s332 contract determination	25	23	10
s146A of the Act[3]	24	20	13
s146B of the Act	1	2	0
ENTERPRISE AGREEMENTS	**35**	**33**	**3**
Approval (Employees)	6	4	2
Approval (Union)	29	29	1
UNFAIR DISMISSALS	**560**	**523**	**164**
Application (by individual only)	269	248	53
Application (representative)	147	136	53
Application (organisation representative)	143	139	57
Application (organisation – multiple)	1	0	1
OTHER	**262**	**239**	**87**
Contract Agreements	2	1	1
Contract Determinations	29	15	17
Contract of Carriage (claim for compensation)	12	5	10
Application under Child Protection (Prohibited Employment) legislation	1	1	1
Application under Commission for Children and Young People Act	0	1	0
Registration pursuant to Clothing Trades Award	54	55	2
Application extend duration of Industrial Committee	45	50	0
Application for reinstatement injured employee (by individual)	5	5	2
Application for reinstatement injured employee (by organisation)	17	13	8
Protection of injured workers from dismissal - Workers Compensation Act 1987	1	2	0
Application for Review of Order under s181D *Police Service Act*	43	38	25
Application for Rescission of Order under s173 *Police Service Act*	14	15	4
Application for Relief from Victimisation s213 of the Act	21	23	8
Miscellaneous (not categorised)	18	15	9
SUB-TOTAL	**2124**	**2063**	**687**

[3] most applications under which a s 146A referral agreement is relied upon by the parties are filed as a s 130 dispute.

APPENDIX 8

MATTERS FILED IN INDUSTRIAL COURT

Matters filed during period 1 January 2008 to 31 December 2008 and matters completed and continuing as at 31 December 2008 which were filed under the *Industrial Relations Act* 1996.

INDUSTRIAL COURT OF NEW SOUTH WALES

Nature of Application	Filed 1.1.2008 – 31.12.2008	Completed 1.1.2008 – 31.12.2008	Continuing as at 31.12.08 (including previous years)
APPEALS	**63**	**55**	**47**
Appeal from Local Court (Industrial Magistrate)	23	14	16
Appeal – superannuation	12	10	12
Appeal – OHS prosecution	6	12	5
Appeal – against decision of VETAB	3	2	1
Appeal – s106 matter	15	15	11
Appeal – other	4	2	2
CONTRAVENTION	**1**	**1**	**0**
Contravention of Dispute Order s139 of the Act	1	1	0
HARSH CONTRACTS	**27**	**102**	**89**
Application under s106 of the Act	27	102	89
PROSECUTIONS	**185**	**139**	**215**
Prosecution – s8(1) *OHS Act* 2000	83	44	94
Prosecution – s8(2) *OHS Act* 2000	59	27	70
Prosecution – s9 *OHS Act* 2000	1	0	2
Prosecution – s10(1) *OHS Act* 2000	8	4	14
Prosecution – s10(2) *OHS Act* 2000	0	3	1
Prosecution – s11 *OHS Act* 2000	12	1	11
Prosecution – s20(1) *OHS Act* 2000	1	1	2
Prosecution – s26(1) *OHS Act* 2000	9	47	7
Prosecution – s81(1) *OHS Act* 2000	2	1	3
Prosecution – s136 *OHS Act* 2000	10	0	10
Prosecution – s15(1) *OHS Act* 1983	0	0	1
Prosecution – s18(1) *OHS Act* 1983	0	9	0
Prosecution – s50(1) *OHS Act* 1983	0	2	0
OTHER	34	39	23
Declaratory jurisdiction (s154, s248)	6	12	3
Cancellation of registration industrial organisation	3	6	0
Civil Penalty for breach of industrial instrument	0	1	0
Recovery of remuneration and other amounts	14	6	14
Unlawful Dismissal - s23 OHS Act 2000	4	3	2
Miscellaneous (not otherwise categorised)	7	11	4
SUB-TOTAL	**310**	**336**	**374**

TOTAL (IRC & IC MATTERS)	**2434**	**2399**	**1061**