The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2002

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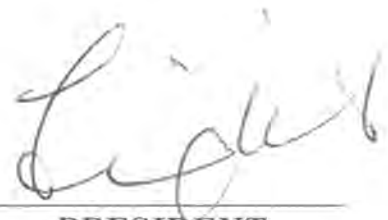
I have the honour to furnish to the Minister for presentation to Parliament the seventh Annual Report of the Industrial Relations Commission of New South Wales made pursuant to section 161 of the Industrial Relations Act 1996 for the year ended 31 December 2002.



PRESIDENT

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INTRODUCTION

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

The Commission is constituted by the President, Vice-President, Judicial Members, Deputy Presidents and Commissioners. At the end of the year the Commission was comprised of ten Judges, three Deputy Presidents and 13 Commissioners.

During the year the Honourable Mr Justice Barrie Hungerford retired. A farewell ceremony was held on 22 February 2002 to commemorate his Honour's service as a Member of the Commission and to mark his retirement later in the year. Speakers representing industry and the legal profession spoke warmly of his Honour's contribution to the work of the Commission and its jurisprudence. His Honour's distinguished service was characterised by vast practical knowledge of industrial relations gained through many years of experience at the industrial bar and as an industrial officer and also by great legal skill and erudition as a judge. His Honour's service commenced as a Member of the Industrial Commission on 13 July 1989 and continued for approximately 13 years until retiring on 31 May 2002. His Honour's service included the difficult transitional periods when new legislation was introduced in 1992 and 1996. The vacancy created by his Honour's retirement was filled by the appointment of Patricia Jane Staunton AM as a Deputy President and judicial member on 30 August 2002. At the time of her appointment her Honour was the Chief Magistrate of the New South Wales Local Court.

Two Commissioners were also appointed in 2002. Alastair William Macdonald and David Wallace Ritchie who assumed office on 4 February 2002 and 6 September 2002, respectively. Commissioner Macdonald and Commissioner Ritchie both come to the Commission after lengthy practical experience in the

field of industrial relations. They have held important offices in registered organisations and also made significant contributions in other ways such as in the work of the Commission's Users' Group, the Industrial Relations Society and in representation at peak union/employer body level. It is confidently expected they will each make a major contribution to the work of the Commission.

Also during 2002, Commissioner Ian Reeve Neal commenced pre-retirement leave. Commissioner Neal's appointment to the Commission occurred on 2 September 1996, coincident with the commencement of the new *Industrial Relations Act* of that year. The Commissioner previously had a distinguished career in public sector industrial relations and was Commissioner for Enterprise Agreements under the *Industrial Relations Act* 1991. His contribution was greatly valued by the Commission and the industrial community.

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

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

I wish also to express my appreciation to the Research Associates to the

President, Tom Chisholm (whose role was assumed early in the year by Anthony Howell) and Sharlene Naismith (whose role was assumed later in the year by Sue-Ern Tan), for their valuable assistance throughout the year, often providing research assistance at very short notice.

The Commission continues to be ably assisted by its librarian and the library staff. The services they provide to the Commission and practitioners are remarkable considering the severe resource constraints in place. Thanks are also due to the staff of other court and departmental libraries for the co-operation and assistance they provide to the librarian and to the Commission.

The work of the Commission has increased significantly over recent years resulting in Members of the Commission dealing with extended lists. The increase in the applications filed in the Commission is revealed by a comparison of applications made in the years 1990 and 2002. The following table compares those years:

MATTERS FILED

	1990	**2002**
TOTAL	1,495	7,432
Dispute notifications	438	1,191
Unfair Dismissals	2 *(s.95)	4,052
Award/EA applications	506	767
Unfair Contract applications	165	893
OHS prosecutions	13	180
Appeals	83	120

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

The dramatic increase in applications filed in the Commission in 1996 and 1997 generally levelled off in 2000. However, the above comparison of the number of applications received in 1990 and 2002 reveals the significant historical increase in the workload of the Commission. The increase in the previous year, 2001, was again very dramatic, being a 36 percent increase over the number of matters filed in 2000. The total number of matters filed in that year was unparalleled, representing an 18 percent increase on the number of matters filed in 1997, the previous year in which the number filed was a "record". The decrease between 2001 and 2002 of 16 percent in matters filed resulted, nevertheless, in the second highest year for matters filed, still ahead of the "record" year in 1997.

The following table displays a comparison of the number of applications filed from January to December 2002 as compared to the year 2001:

NEW MATTERS FILED

Calendar Years 2001 and 2002

FILED	Jan - Dec 2001	Jan - Dec 2002	Percentage change
Awards/Agreements	1,559	767	↓ 103 %
Unfair dismissals	4,532	4,052	↓ 12 %
Disputes	1,081	1,191	↑ 10 %
OH&S prosecutions	179	180	0 %
Unfair contracts	955	893	↓ 7 %
Appeals	119	120	0 %
All others	219	229	↑ 5 %
TOTALS	**8,644**	**7,432**	↓ **16 %**

ABOUT THE COMMISSION

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

The Commission is established by and operates under the *Industrial Relations Act* 1996. A Court of Arbitration (subsequently renamed and re-established as the Industrial Commission of New South Wales) was first established in New South Wales in 1901 and commenced operation in 1902. The present Commission is the legal and functional successor of that Court, the Industrial Commission which existed between 1927 and 1992, and also of the Industrial Court and Industrial Relations Commission which existed between 1992 and 1996. The Commission celebrated its centenary this year with a ceremony held on 30 April 2002.

The work of the Commission includes:

- establishing and maintaining a system of enforceable awards which provide for fair minimum wages and conditions of employment;

- approving enterprise agreements entered into between employers and their employees or one or more trade unions;

- preventing and settling industrial disputes, initially by conciliation, but if necessary by arbitration;

- inquiring into, and reporting on, any industrial or other matter referred to it by the Minister;

- determining unfair dismissal claims, by conciliation and, if necessary, by arbitration to determine if a termination is harsh, unreasonable or unjust;

- claims for reinstatement of injured workers;
- proceedings for relief from victimisation;
- dealing with matters including the registration, recognition and regulation of industrial organisations;
- dealing with major industrial proceedings, such as State Wage Cases;
- applications under the *Child Protection (Prohibited Employment) Act* 1998;
- various proceedings relating to disciplinary and similar actions under the *Police Service Act* 1990.

When sitting in Court Session, the Commission has jurisdiction to hear a range of civil matters arising under legislation as well as criminal proceedings in relation to breaches of industrial and occupational health and safety laws. The Commission in Court Session determines proceedings for avoidance and variation of unfair contracts (and may make consequential orders for the payment of money); prosecutions for breaches of occupational health and safety laws; proceedings for the recovery of underpayments of statutory and award entitlements; superannuation appeals; proceedings for the enforcement of union rules; and challenges to the validity of rules and to the acts of officials of registered organisations.

Full Benches of the Commission have appellate jurisdiction in relation to decisions of single members of the Commission (both judicial and non-judicial), the Industrial Registrar, industrial magistrates and certain other bodies. When exercising appellate jurisdiction involving judicial matters the Full Bench of the Commission in Court Session is constituted by at least three judicial members.

CENTENARY OF THE COMMISSION

The New South Wales Court of Arbitration was declared open on 30 April 1902 with the Attorney General of the day, the Hon Bernhard Ringrose Wise, expressing the hope that "it may become an effective instrument in the maintenance of industrial peace" for the people of New South Wales. That day marked a new province of law and order for the people of New South Wales that continues to this day. The Court of Arbitration was established by the *Industrial Arbitration Act* 1901. The first Members of the Court were the President, the Hon Henry Emmanuel Cohen and Messrs William Douglas Cruickshank and Samuel Smith. The Hon Mr Justice Cohen was a puisne judge of the Supreme Court of New South Wales.

On 30 April 2002 the Industrial Relations Commission of New South Wales thus celebrated its centenary and is the longest continuing industrial court or tribunal anywhere in the world. The occasion was marked by a ceremonial sitting of the Commission.

A number of other events were arranged to mark the Commission's centenary. These included, in addition to the ceremonial sitting on 30 April 2002, a dinner the same evening. The Chief Justice of New South Wales, the Hon Justice J J Spigelman attended the dinner as did the Hon Justice G Guidice, the President of the Australian Industrial Relations Commission and the Hon Judge W D Jennings, the President of the Industrial Relations Commission of South Australia. Also present were representatives of the industrial community and of the legal profession. The evening was hosted by the Hon Justice Walton, Vice-President of the Commission. Speeches were made by the President of the Commission, Justice Wright, the Hon W K Fisher AO, QC, President of the Commission between 1981 and 1998, and Professor Greg Patmore, the editor of the volume commissioned to mark the centenary. A ceremony was held on 24 October 2002 in the courtroom at the Newcastle Court House in which the first sitting of the Court of Arbitration was held in

May 1902. A plaque was then unveiled and is now in place at that Courthouse to mark the centenary. On 4 November 2002 a similar plaque was unveiled at 50 Phillip Street to also mark the centenary of the Commission. The plaque is now located at the entrance of the Commission premises in Phillip Street, Sydney. A team of academic historians and lawyers, led by Professor Greg Patmore, has been commissioned to prepare a biographical analysis of the Commission, focussing on its nine Presidents, commencing with Justice H E Cohen in 1902 and concluding with the period in office of Justice W K Fisher AO who retired in 1998.

MEMBERSHIP OF THE COMMISSION

Judges and Presidential Members

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

President

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

Vice-President

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

Presidential Members

The Honourable Justice Leone Carmel Glynn, appointed 14 April 1980;

The Honourable Mr Justice Barrie Clive Hungerford, appointed 13 July 1989; retired 31 May 2002;

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

The Honourable Justice Francis Marks, appointed 15 February 1993;

The Honourable Justice Monika Schmidt, appointed 22 July 1993;

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

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

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

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

Deputy President John Patrick Grayson, appointed 29 March 2000;

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

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

Commissioners

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

Commissioner Raymond John Patterson, appointed 12 May 1980;

Commissioner Peter John Connor, appointed 15 May 1987;

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

Commissioner James Neil Redman, appointed 3 February 1986;

Commissioner Inaam Tabbaa, appointed 25 February 1991;

Commissioner Donna Sarah McKenna, appointed 16 April 1992;

Commissioner John Patrick Murphy, appointed 21 September 1993;

Commissioner Ian Reeve Neal, appointed 2 September 1996;

Commissioner Ian Walter Cambridge, appointed 20 November 1996;

Commissioner Elizabeth Anne Rosemary Bishop, appointed 9 April 1997;

Commissioner Janice Margaret McLeay, appointed 2 February 1998;

Commissioner Alastair William Macdonald, appointed 4 February 2002;

Commissioner David Wallace Ritchie, appointed 6 September 2002.

Industrial Registrar

The Industrial Registrar is responsible to the President of the Commission in relation to the work of the Industrial Registry and, in relation to functions under the *Public Sector Management Act* 1988, to the Director General of the Attorney General's Department.

Mr Timothy Edward McGrath was appointed as Industrial Registrar and Principal Court Administrator of the Industrial Relations Commission of New South Wales on 27 October 1999 and left the Commission in August 2002 to take up the office of Assistant Director General, Courts and Tribunals, in the Attorney General's Department. It is a tribute to Mr McGrath that his distinguished contribution to the work of the Commission was recognised by promotion to this important office. Mr George Michael Grimson (Clerk of the Court of the Downing Centre) was appointed Acting Industrial Registrar from 26 August 2002.

Dual Appointees

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

The Honourable Justice Frederick Lance Wright

The Honourable Mr Justice Russell John Peterson

The Honourable Justice Francis Marks

The Honourable Justice Monika Schmidt

The Honourable Deputy President Rodney William Harrison.

ACTIVITY OF THE COMMISSION

Figures relating to the period 1 January to 31 December 2001 appear in brackets after the 2002 figures.

Members Sitting Alone

Matters filed and concluded

For the period 1 January to 31 December 2002, 7,432 (8,644) matters were filed in the Industrial Relations Commission of New South Wales, 6,749 (8,271) matters were concluded and 6379 (5,690) matters were continuing as at 31 December 2002 (see *Annexures A & B).*

For the period from 1 January to 31 December 2002, there were 463 (598) applications for the making variation or rescission of an award, 304 (371) applications for the approval of an enterprise agreement, and 1,191 (1,081) notifications of an industrial dispute *(Annexure A).*

During the year, 1,173 (1,259) matters were filed in the Commission in Court Session, 822 (706) were concluded and, as at 31 December 2002, 2,312 (1,959) were continuing. There were 893 (955) applications filed to declare contracts void or varied pursuant to section 106 of the Act *(Annexure B).*

Although the workload of, and consequent pressure on, the Commission has been very significant since the 1996 legislation commenced, it has been particularly significant in the present year because of the effect of the record number of filings in 2001.

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

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

matters are allocated to Deputy Presidents and Commissioners on a daily basis.

A total of 4,052 (4,532) applications under section 84 were filed during 2002, with 4,010 (4,410) being concluded and 2,146 (2,103) matters were continuing at the end of 2002 *(Annexure A)*. While the figure in this area for the year 2000 was less than the particularly high number of applications received in 1997 and 1998, there has been a general trend over the last few years of a steady increase in the number of unfair dismissal matters filed in the Commission. In the previous year, 2001, the filings reached the highest level ever, representing an increase of 36 percent over the year 2000 and an 18 percent increase over the highest previous year of 1997. This increase has had a substantial impact on the workload of the Commission with a particular burden falling upon Commissioners. Although a decline in filings of unfair dismissal applications occurred between 2001 and the current year, the numbers filed this year are still on a par with those of other years of particularly high filings, such as 1998.

Appeals to the Commission

For the period 1 January to 31 December 2002, 45 (44) appeals were lodged in the Commission (other than in Court Session). Of these, 30 (30) were appeals against a decision of a Commissioner; 12 (14) were against a decision of a Presidential Member. During 2002, 39 (25) appeals were concluded and, as at 31 December 2002, 37 (31) appeals remained active *(Annexure A)*.

A total of 75 (75) appeals were lodged in the Commission in Court Session for the period 1 January to 31 December 2002. These include 40 (46) appeals lodged against a judgment of a Judicial Member of the Commission sitting alone; 29 (21) appeals lodged against a decision of the Chief Industrial Magistrate or other Magistrates; and 6 (8) appeals lodged against a decision of the State Authorities Superannuation Board. During 2002, 44 (56) appeals

were concluded and, as at 31 December 2002, 103 (71) appeals remained active (*Annexure B*). The significant and continuing level of Full Bench activity in 2002 is reflected in the consideration of important Full Bench decisions later in this report.

Regional and Country Sittings

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

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

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

There were a total of 808 (756) sitting days in a wide range of Country Courts and other country locations during 2002 with two regional Members based permanently in Newcastle (The regional Member for the Newcastle-Hunter Valley region, Deputy President Harrison, and Commissioner Redman) at the commencement of the year. The Commission sat there for 296 (268) days during 2002. Deputy President Harrison and Commissioner Redman dealt with a wide range of industrial matters mostly of a regional nature in

Newcastle and the Hunter district.

The regional Member for the Illawarra - South Coast region, the Honourable Justice Walton, Vice-President 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 171 (180) sitting days in Wollongong during 2002.

Occupational Health and Safety Proceedings

A total of 180 (179) prosecutions were filed with the Commission in Court Session pursuant to the *Occupational Health and Safety Act*, for the period from 1 January to 31 December 2002. A total of 81 (112) prosecutions were commenced in relation to an offence under section 15 of that Act alleging a failure to ensure the health, safety and welfare of employees at work; 63 (39) prosecutions under section 16 alleging a failure to ensure the safety of non-employees; and 12 (11) prosecutions were commenced against the directors or managers of corporations under section 50 of the Act. (*Annexure B*)

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

STATE WAGE CASE

State Wage Case 2002 [2002] NSWIRComm 118; (2002) 114 IR 81

On 9 May 2002, the Commission issued a summons to show cause to industrial parties to appear before it to show cause why, after considering the decision of the Australian Industrial Relations Commission in the *Safety Net Review -*

Wages, May 2002 Case, the Commission should not take such action pursuant to Pt 3 of Ch 2 of the *Industrial Relations Act* 1996 as it may deem proper. The Commission delivered its decision on 31 May 2002.

The Commission decided to adopt the approach of the Australian Industrial Relations Commission and to increase all award rates by $18 per week. In doing so, the Commission observed that there was no serious suggestion by any party to the proceedings that the Commission should adopt a different approach. There were also no submissions that the AIRC's careful analysis of the state of the Australian economy was flawed or that the positive picture which emerged from it was wrong. In considering the state of the New South Wales economy and its future prospects, the Commission noted that whilst there were differences in emphasis between the parties' views and the degree of optimism about the state of the economy, it was not suggested that the New South Wales economy would diverge appreciably from the forecast for the national economy. The Full Bench reiterated what was said in the *State Wage Case 2001* that the situation of employees in low paid work remains an important consideration in State Wage Case proceedings.

In refusing the Labor Council's application for a general order, the Commission noted several reasons why increases in award rates should be by way of application. These included comity with the federal decision and administrative problems associated with the making of a general order in relation to the adjustment of a diverse range of allowances in many awards.

The Commission held that no proper basis had been established for the retention of Principles 8(g) and 8(h) and that any residual issue should be dealt with in special case proceedings. Directions were made to address the issue of "lagging awards" raised by the Labor Council.

OTHER SIGNIFICANT FULL BENCH DECISIONS

A number of significant decisions of Full Benches of the Commission in 2002 are briefly referred to in this section.

Barry v Australian Broadcasting Corporation [2002] NSWIRComm 14, (2002) 112 IR 33

In this appeal, the Full Bench considered whether section 106 of the *Industrial Relations Act* 1996 was inconsistent with section 32 of the *Australian Broadcasting Corporation Act* 1983 (Cth) to the extent that it purported to confer jurisdiction on the Commission in Court Session to make orders in relation to an alleged unfair contract of employment pursuant to which the applicant performed work for the Australian Broadcasting Corporation.

The Full Bench found that there was inconsistency between the State and federal statutory schemes. It was held that it was not possible to distinguish the judgment of the High Court in *Australian Broadcasting Commission v Industrial Court of South Australia* (1977) 138 CLR 399. The Court concluded that the Commission in Court Session had no jurisdiction to grant the relief sought by the applicant.

WorkCover Authority of New South Wales (Inspector Bultitude) v Grice Constructions Pty Ltd [2002] NSWIRComm 20; (2002) 115 IR 59; WorkCover Authority of New South Wales (Inspector Bultitude) v Grice Constructions Pty Ltd (No 2) [2002] NSWIRComm 234; (2002) 117 IR 278

In these proceedings, the Full Bench determined a prosecution appeal pursuant to s 197A of the *Industrial Relations Act* 1996 from an acquittal of a defendant of a charge alleging a breach of s 16(1) of the *Occupational Health*

and Safety Act 1983. The charge alleged a failure to adequately supervise a building project and, in particular, the erection of an unstable wall that was not properly braced.

The appellant appealed against the finding of the Chief Industrial Magistrate that a defence under s 53(a) of the *Occupational Health and Safety Act* had been established. It was held that the requirements for a successful s 53(a) defence were those set out in *WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182. In particular, that it was necessary for evidence to be adduced that the steps required (including any associated costs, etc) to avoid or overcome the risk to safety in the workplace were such that it was not reasonably practicable to take such steps. Leave to appeal was granted and the appeal was upheld.

In *Bultitude v Grice Constructions Pty Limited (No 2)*, the Full Bench dealt with the appeal insofar as it related to the issues of penalty and costs. It was emphasised that the primary consideration in sentencing under the *Occupational Health and Safety Act* is the objective seriousness of the offence, even where there may be multiple entities contributing to the breach of the statute.

Inspector Ian Batty v Graincorp Operations Limited [2002] NSWIRComm 49

This case involved a prosecution appeal pursuant to s 196 of the *Industrial Relations Act* 1996 and s 5D of the *Criminal Appeal Act* 1912 on the adequacy of the sentence imposed by the trial judge. The Full Bench held that the appellate court must approach the re-examination of penalty on a cautionary basis and that it was important to examine whether a clear and demonstrable error existed. It was held that such error had been demonstrated, that the penalty imposed did not adequately reflect the objective seriousness of the offence and upheld the appeal.

Little v Commissioner of Police (No 2) [2002] NSWIRComm 52; (2002) 112 IR 212

In this appeal the Full Bench granted leave to appeal on the grounds that it raised important questions as to the operation of Division 1C of the *Police Service Act* 1990 and the conduct of review proceedings by the Commission under that statute. The Full Bench found that the judge at first instance had erred in the way in which he approached s 181G of the *Police Service Act*. That provision has the effect of applying to proceedings brought under s 181E of the *Police Service Act* the provisions of Pt 6 of Ch 2 of the *Industrial Relations Act*, subject to the specified modifications of s 181G(1) of the *Police Service Act*. The decision of the Police Commissioner to remove an officer would be reviewable in a similar manner to that of dismissals otherwise reviewable under Pt 6 of Ch 2 of the *Industrial Relations Act*.

The Full Bench held that in determining whether the decision of the Commissioner of Police to remove an officer was harsh, unreasonable or unjust, the Commission is entitled to have regard to the process adopted; in particular, whether the Commissioner had adhered to the procedural requirements laid down by the Act.

The Full Bench allowed the appeal and found that the removal of the appellant was harsh, having regard to the consequences of the appellant's removal.

Re Crown Librarians, Library Officers and Archivists Award Proceedings - Applications under the Equal Remuneration Principle [2002] NSWIRComm 55, (2002) 111 IR 98

This matter concerned the first applications to come before the Commission pursuant to the Equal Remuneration principle established by the Commission in *Re Equal Remuneration Principle* (2000) 97 IR 177. The applications were

brought by the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales, the Public Employment Office and the Department of Education and Training. Each of the parties acknowledged that in the female dominated occupations to be covered by the proposed awards, the work of employees had been undervalued on a gender basis. The parties however differed as to how the undervaluation was to be remedied. The differences were reflected in the different awards, classification structures, career paths and rates of pay proposed. The Commission was therefore required to determine two major issues: first, whether rates of pay for librarians, library technicians and archivists should be increased to correct a gender-based undervaluation in rates of pay; second, the appropriate award coverage provisions, including classification and grading structures. The Full Bench held that the work of librarians, library technicians and archivists had been historically undervalued on a gender basis and that there had also been significant increases in the work, skill and responsibilities of such employees that had not been properly taken into account in fixing their rates of pay.

It was determined that there should be a single award applying to librarians, library technicians and archivists in the New South Wales public service and in the Technical and Further Education Commission. In relation to the classification and grading structures, the Full Bench determined that librarians and archivists should have a separate classification structure to that of library technicians; the new award applying to library staff and archivists should contain classification descriptors and there should be specific qualification requirements for grading of employees as well as provisions allowing for recognition of equivalent qualifications or experience. Important elements of the Public Employment Office's incremental and salary scales were adopted and the librarians' incremental classification scale and rates of pay were to apply to archivists.

WorkCover Authority of New South Wales (Inspector Keenan) v Lucon (Australia) Pty Ltd [2002] NSWIRComm 68; (2002) 112 IR 332

This matter concerned the reference to the Full Bench of the Commission in Court Session of questions arising from motions filed by the defendants in proceedings under s 15(1), 16(1), 17(1)(b) of *Occupational Health and Safety Act* 1983 seeking to have summonses against them struck out or, alternatively, dismissed or permanently stayed.

Leave was granted to re-argue the decision in *Ridge Consolidated Pty Ltd v WorkCover Authority (NSW) (Inspector Mauger)* (2000) 100 IR 156. The Full Bench held that a person may only be required to appear before the Commission in Court Session to answer a charge under the *Occupational Health and Safety Act* by an order made by a judge in accordance with s 4(1) of the *Supreme Court (Summary Jurisdiction) Act* 1967. A judge considering an application for an order under s 4(1)(a) of that statute is not required to be satisfied that there is prima facie case on material before the court. The Full Bench confirmed the decision in *Ridge Consolidated* and that proceedings for a summary offence under the *Occupational Health and Safety Act* are validly commenced when an application in accordance with r 219(1) is filed. It was also determined that rules 219(2) and 220 were invalid.

The Full Bench considered that the relevant applications were not invalid by reason of failure to specify reliance upon the extended time limits in s 49 of the *Occupational Health and Safety Act* 1983 since the time limit was not an element of offences under the statute. The Full Bench also confirmed that the decision in *Ridge Consolidated* that s 170 was capable of applying to summary proceedings for offences under the *Occupational Health and Safety Act* was correct.

Mitchforce Pty Ltd v Starkey [2002] NSWIRComm 85; (2002) 117 IR 122

This was an application for leave to appeal and appeal from a decision in which the contract between the appellant and respondent for the assignment of a lease of a hotel was found to be an unfair contract within the meaning of s 106 of *Industrial Relations Act* 1996.

Leave to appeal was refused in respect of both jurisdictional and non-jurisdictional issues. The Full Bench emphasised that a finding of unfairness is a matter of mixed fact and law and in reviewing such a determination an appellate court will give respect and weight to the conclusions of the trial judge. The Full Bench considered that the findings of the trial judge were reasonably open. In respect to the jurisdictional issues, the Full Bench considered that the law on jurisdiction conferred by s 106 of the Act, including that as to lease arrangements, was well settled. It was also clear that because a contract or arrangement might be characterised as a commercial arrangement that, of itself, was not a basis to conclude that it could not be challenged under s 106 of the *Industrial Relations Act*. The appeal was dismissed.

D & R Commercial Pty Ltd v Flood [2002] NSWIRComm 88; (2002) 113 IR 344

The appellant appealed against a finding that the respondent's dismissal was harsh, unjust or unreasonable and specifically, as to the order of compensation made at first instance. On appeal, the two issues for determination were the regard that could be given to matters raised in conciliation prior to arbitration and whether notions of fairness require Members to act in accordance with the rule of procedural fairness referred to as the rule in *Browne v Dunn*.

The Full Bench allowed the appeal in part, finding that the Commissioner erred in relying on matters disclosed in conciliation proceedings for the

purposes of assessing the credibility of a witness in arbitration. After considering relevant authorities on the requirements of procedural fairness, the Full Bench determined that whilst the Commission may inform itself on any matter before it in any manner it thinks just (see for example s 163(1)), and in so doing is not bound by the rules of evidence, the Commission must act according to "equity, good conscience and the substantial merits of the case" and must ensure that procedural fairness is accorded to the parties in the proceedings before it. It was not possible or appropriate to take into account the perceived inconsistency arising from the conciliation proceedings without having put the parties on notice and providing them with the opportunity of dealing with the matter. The Commissioner's failure to do so resulted in a denial of procedural fairness which affected the decision at first instance and therefore warranted appellate intervention.

IGA Distribution Pty Ltd v Moses (No 2) [2002] NSWIRComm 96; (2002) 114 IR 307

In this matter, the Full Bench considered an appeal from a decision reinstating the respondent who had been dismissed on the basis of incapacity arising from a workplace injury. The Full Bench held that the order of reinstatement was correctly made pursuant to s 89(1) of *Industrial Relations Act* 1996, having regard to s 89(8) of the Act. Leave to appeal was refused as to those matters. However, the Full Bench granted leave to appeal as to the issue of construction and operation of ss 89(1) and 89(2) of the *Industrial Relations Act* 1996. The approach of the former Full Commission in *Commonwealth Steel Company Limited v David Alfred Ward* (unreported, IRC93/3144, 16 December 1994) was held to be preferred to that in *Effem Foods Pty Ltd t/as Uncle Bens of Australia v Urban* (1977) 81 IR 431. The Full Bench considered that the proper interpretation of the phrase "available position" did not require the position to be vacant, in the sense that there must be a pre-existing, specified position designated by the employer which was vacant since this was an

unduly restrictive construction of the section. The words "another position which the employer has available" used in s 89(2) mean, on their proper construction, another position that the employer has available in the sense that such a position "exists"; that is, that another position is available to, capable of being used by, or at the disposal or within the reach of, the employer - whether or not it is vacant at the time. The question of vacancy, either in the former position or another position, remains a relevant factor for consideration in determining the practicability of reinstatement or re-employment.

Employers First v NSW/ACT Independent Education Union [2002] NSWIRComm 113; (2002) 115 IR 8

This was an application for leave to appeal and appeal against a decision in award proceedings involving a consideration of principle 10 of the State Wage Case principles. The judge at first instance had awarded substantial increases in salaries of teachers in early childhood education. Leave to appeal was refused on the ground that the appellant failed to demonstrate that there was any error in principle. It had been open at first instance to make the award under the Special Case principle having regard to the fact that no substantial issue was taken as to the findings concerning changes in work value. There was no requirement at first instance, and no warrant on appeal, to dissect the components of the wage adjustment granted by reference to the operation of various wage fixing principles. The appeal was dismissed.

Euphoric Pty Limited v Ryledar Pty Limited [2002] NSWIRComm 136, (2002) 117 IR 1

This matter concerned an appeal from an interlocutory judgment dismissing a notice of motion seeking that an application brought under s 106 of the *Industrial Relations Act* 1996 be dismissed for want of jurisdiction. The Full

Bench dismissed the appellant's argument that the trial judge should have properly disqualified himself from dealing with the motion given that he had conciliated the matter pursuant to s 109 of the *Industrial Relations Act* 1996. It was nevertheless emphasised that the conclusion in this case should be seen as essentially dependent on the particular and rare circumstances of the proceedings. The Full Bench emphasised that although it is desirable to determine questions of jurisdiction, where possible, at a preliminary stage, such a determination may be made only where the absence of jurisdiction is clear. The Full Bench held that a contract for the sale of a product imposing an obligation on the seller to deliver the product to the purchaser at a particular place or places does not provide sufficient basis for jurisdiction under s 106 of the *Industrial Relations Act* 1996.

Re Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award [2002] NSWIRComm 144; (2002) 116 IR 361

This matter concerned an application pursuant to s 169(4) of the *Industrial Relations Act,* by the New South Wales Teachers Federation to vary the relevant award, following the determination of the Administrative Decisions Tribunal in *Amery & Ors v The State of New South Wales* [2001] NSWADT 37. The Federation contended that the ADT, in that decision, found unlawful discrimination which arose from the award. The decision of the Full Bench dealt with the respondent's application for the proceedings to be dismissed on two grounds; first, upon an estoppel which it contended arose as the result of the conduct by the Federation and the agreement reached between the parties in proceedings before the Full Bench in 2001 which gave rise to the award; second, the limited power to vary awards provided by s 169(4) of the Act.

Whilst the Full Bench did not express a final view on the applicability of the doctrine of estoppel in the more strict sense in the context of arbitral proceedings setting conditions in an industrial instrument, it considered that

the history of the proceedings, including the conduct of the parties to the making the award, would be of particular importance to the exercise of the discretion vested in the Commission to re-open and vary an award, pursuant to s 16 or 17 of the Act or otherwise. The Full Bench considered that the construction of s 169(4) required a broad and purposive approach and it was necessary for the Commission to have regard to the express provisions of the *Anti-Discrimination Act*, including those dealing with indirect discrimination. However, the Full Bench noted that this requirement did not detract from the general discretion of the Commission as to whether it would re-open and vary the award. The respondent's motion was dismissed.

Abdullah Al-Shennag v Bankstown City Council Civic Services Group [2002] NSWIRComm 150, 118 IR 138

The appellant sought leave to appeal on the ground that, in the proceedings at first instance, there had been a failure to accord procedural fairness. The Full Bench applied the principles applicable to the granting of leave to appeal laid down in *Knowles v Anglican Church Property Trust (No 2)* (1999) 95 IR 380, finding that it was not possible to conclude that there was an erroneous exercise of discretion. The appellant also sought to challenge the findings of fact made by the commissioner at first instance. In refusing leave to appeal, the Full Bench applied the approach in *Box Valley Pty Ltd v Price* (2000) 97 IR 484, where it was held that mere contests as to findings of fact will generally, in the absence of other considerations, not attract leave to appeal. The appeal was dismissed.

SAS Trustee Corporation v Daykin [2002] NSWIRComm 124; (2002) 115 IR 172

In this matter, leave to appeal was granted by the Full Bench to allow the determination of the appropriate approach to multiple incapacity claims under

Police Regulation (Superannuation) Act 1996. The Full Bench held that an applicant for medical discharge under the *Police Regulation (Superannuation) Act* 1906, must, pursuant to ss 8 and 10B, be incapable, from infirmity of body or mind, from discharging the duties of the office (s 8). This did not require that the infirmity be attributable to a single condition; whether it is, or whether there are in existence other features which, taken together or separately, mean that the member has the necessary incapability, is a question of fact to be determined in each case. The Full Bench emphasised that where the incapability is said to derive from two or more independent conditions, it is not necessary to specify some relatively trivial condition which itself could not lead to incapability in the statutory sense. The appeal was dismissed.

Green v Brown [2002] NSWIRComm 177; (2002) 116 IR 21

This appeal arose from an extensive history of litigation, involving several proceedings before the Equity Division of the Supreme Court and an application pursuant to s 275 of the *Industrial Relations Act* 1991. The Full Bench considered the applicability of *Anshun* estoppel and considered that even if it could be said that it was unreasonable for the respondents not to have pursued to finality the full extent of their claims before the Equity Division of the Supreme Court, special circumstances existed which displaced the operation of the *Anshun* principle.

The judge at first instance made orders for compensation for legal costs and for indemnification in respect of proceedings in the Supreme Court. The Full Bench set aside those orders, holding that it would be extraordinarily rare for the Commission in Court Session to consider making orders that, in effect, reversed an essential part of the judgement of another court, including costs orders, since that would at least have the potential to amount to an unacceptable interference with proceedings before the other court.

The Full Bench considered that the trial judge's determination of the issues of the unfairness of the termination of the consultancy agreement, mitigation, valuation of the partnership agreement and calculation of interest were made in the exercise of relevant discretions and accordingly declined to interfere. The appeal was upheld in part.

Broken Hill Chamber of Commerce and CFMEU (NSW Branch) [2002] NSWIRComm 244; (2002) 118 IR 183, Broken Hill Chamber of Commerce and CFMEU (NSW Branch) (No 3) [2002] NSWIRComm 303

These proceedings arise from the same background of facts as the following pair of cases. In this matter, the Broken Hill Chamber of Commerce sought a stay of interim orders made at first instance which required it take no further steps to disturb or alter the status quo. In response to a dispute as to the application of the $18 *State Wage Case 2002* increase, the Chamber had held meetings of employees and proposed agreements under s 170LK of the *Workplace Relations Act* 1996 (Cth). The Full Bench applied the principles applicable to stay applications set out in *Re Transport Industry - Waste Collection and Recycling (State) Award* (2000) 102 IR 192, observing, in particular, that it is plain that the power to grant a stay is to be exercised in accordance with concepts of justice between the parties and to ensure that the relevant substantive appeal proceedings would not be rendered nugatory.

In *Broken Hill Chamber of Commerce and CFMEU (NSW Branch) (No 3),* the Full Bench refused leave to appeal as the issues in the matter were now moot (see *Re Broken Hill Commerce and Industry Consent Award* [2002] NSWIRComm 252; (2002) 118 IR 200) and as such, the grant of leave to appeal in respect of them, would result in the giving of an advisory opinion.

Re Broken Hill Commerce and Industry Consent Award [2002] NSWIRComm 252; (2002) 118 IR 200, Re Broken Hill Commerce and Industry Consent Award (No 2) [2002] NSWIRComm 309

The Full Bench heard an application by the Barrier Industrial Council to vary the rates of pay in the relevant award in accordance with the *State Wage Case 2002* decision (2002) 114 IR 81. The proceedings were to be dealt with under the Special Case principle as a result of the application by the Broken Hill Chamber of Commerce and associated employers that the increases not be granted. The Full Bench considered that the decision should be given as a matter of urgency and reasons for decisions were to be provided subsequently: see *Re Broken Hill Commerce and Industry Consent Award (No 2)* [2002] NSWIRComm 309.

The Chamber contested the Barrier Industrial Council's application for the *State Wage Case* increase on two grounds. First, that Principle 15 of the wage fixing principles (the economic incapacity principle) operated to exempt the award from the increase. Second, that the wage increase should be absorbed, through the operation of Principle 8(d)(ii). The Full Bench found that the evidence provided by the Chamber fell well short of demonstrating "very serious or extreme economic adversity" as required by the wage fixing principles, holding that although there is no specific test for what constitutes a "very serious or extreme economic adversity", there is clear authority that employers seeking an exemption from a *State Wage Case* decision have a heavy onus in making out a case of economic incapacity.

It was also held that it was not a case where the matter was to be determined by the operation of Principle 8(d) but rather by the Special Case principle because the relevant award included a clause that represented an agreement by the parties to the award to apply *State Wage Case* decisions subject to adherence to the procedure set out in the clause. The Full Bench emphasised that it was essential to ensure that industrial parties observe their bargains

and undertakings.

The Full Bench determined that the Special Case had been established in the matter which warranted the grant of the relevant increase. The subject award was accordingly varied.

Club Employees (State) Award and other Awards, Re [2002] NSWIRComm 362

The Full Bench in this matter dealt with an application by the Labor Council of New South Wales and associated unions for variation of a number of awards by the insertion of provisions for the deduction by employers of union members' membership fees from employees' pay.

The respondent employers contended that the Commission lacked jurisdiction to grant the application since the relevant statutory provision, section 6(2)(i) of the *Industrial Relations Act* 1996, did not provide the relevant power. The Full Bench rejected the jurisdictional objections.

The Full Bench considered the extensive evidence provided by the respective parties and determined that a case had been established for provisions for payroll deduction to be inserted into the subject awards. In doing so, the Full Bench observed that the case had been conducted by the representative union and employer parties on the basis that the proceedings were a test case on relevant issues. The Full Bench accordingly determined how the decision was to be applied to awards within the jurisdiction.

Strathfield Group Ltd v Hall [2002] NSWIRComm 373

This was an appeal against an interlocutory decision of a member of the Commission in Court Session in an application under the unfair contracts provisions of the *Industrial Relations Act,* dismissing a motion brought by the appellant seeking to have struck out certain aspects of the summons for relief

on the basis that they were beyond the Court's jurisdiction. The summons sought relief by way of variation to two contracts associated with the sale of a business. In refusing leave to appeal, the Full Bench emphasised the practice, both of this Court and courts of more general jurisdiction, that interlocutory appeals are to be discouraged. Further, the Full Bench emphasised that where a party intends to urge the Court to depart from well established authority, leave to re-argue should be sought. Failure to adopt that course will have a bearing on the question of leave to appeal, where such leave is a relevant consideration.

In the judgment of first instance, observations were made as to comments made by counsel for the appellant at the conclusion of the hearing of the motion. On appeal, the appellant argued that an apprehension of bias thereby arose. The Full Bench rejected the submissions as to apprehended bias by reference to the decision of the High Court in *Johnson v Johnson* (2000) 201 CLR 488. Leave was refused and the appeal was dismissed.

PARLIAMENTARY REMUNERATION TRIBUNAL

The Honourable Justice R P Boland, a judicial member of the Commission, has constituted the Parliamentary Remuneration Tribunal since 2 October 2001.

LEGISLATIVE AMENDMENTS

The legislative amendments enacted during 2002, or which came into force that year, affecting the operations and functions of the Commission include:

Apprenticeship and Traineeship Act 2001

This Act commenced on 1 January 2002 having been assented to on 1 November 2001. It repealed and replaced the *Industrial and*

Commercial Training Act 1989, introducing a new scheme to regulate traineeships and apprenticeships in New South Wales. The objects of the statute are the regulation and establishment, operation, transfer, variation, suspension and cancellation of apprenticeships and traineeships; to provide for the recognition of other trade qualifications; to provide for the resolution of disputes and the conduct of disciplinary proceedings in relation to apprenticeships and traineeships; to provide for rights of appeal against determinations under the Act and to establish administrative procedures in connection with the administration and enforcement of the Act.

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

From the Appeal Panel, an appeal is available to the Industrial Relations Commission by leave of the Commission. In appeal proceedings before the Commission, the Commission may exercise any function that could have been exercised by the Appeal Panel in making the determination the subject of the appeal and is not bound to act formally. The Act also provides for consequential amendments to the *Industrial Relations Act* to remove references to the *Industrial and Commercial Training Act* 1989.

Workers Compensation Legislation Further Amendment Act 2001

This Act commenced on 1 January 2002 having been assented to on 6 December 2001. It provided for the expansion of the jurisdiction of the Chief Industrial Magistrate and other Industrial Magistrates, to hear and determine applications to the Local Court under the *Building and Construction Industry Long Service Payments Act* 1986, *Essential Services Act* 1988, the *Occupational Health and Safety Act* 2000, the *Shops and Industries Act* 1962, the *Workers Compensation Act* 1987 and the *Workplace Injury Management and Workers Compensation Act* 1998. The Act also validated any decision or purported decision of an Industrial Magistrate made pursuant to any of those Acts. A new section 383A was also inserted in the *Industrial Relations Act,* providing that orders of an Industrial Magistrate or the Chief Industrial Magistrate under certain provisions of the *Occupational Health and Safety Act* 2000 and the *Workers Compensation Act* 1987, requiring the payment of monies may be enforced as if they were judgments of the Local Court.

Industrial Relations (Ethical Clothing Trades) Act 2001

This Act commenced on 1 February 2002 having been assented to on 19 December 2001. It related specifically to outworkers in the clothing

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

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

Courts Legislation Amendment Act 2002

The *Courts Legislation Amendment Act* 2002 commenced on 17 April 2002. The Act, *inter alia*, made clear that persons eligible for appointment as a judge of a New South Wales court included current

serving judges of New South Wales courts, judges of Commonwealth courts and judges of courts of other States and Territories. Section 149 of the *Industrial Relations Act* 1996 was amended accordingly.

Industrial Relations Amendment (Unfair Contracts) Act 2002

This Act commenced upon assent on 24 June 2002 and inserted a new sub-section in section 106, and new sections 108A and 108B. The Act introduced restrictions in the making of applications in the unfair contracts jurisdiction of the Commission. An application cannot be made if the remuneration package (defined as the total value of monetary remuneration and employment benefits including superannuation contributions payable by the employer) applicable to the contract of employment exceeds the "specified remuneration cap". The remuneration cap was set at $200,000, with provision for greater amounts to be prescribed by regulation. Another restriction is that applications for orders must be made no later than 12 months after the termination of the contract.

Compensation Court Repeal Act 2002

Following a series of legislative amendments and the establishment of the Workers' Compensation Commission on 1 January 2002, the *Compensation Court Repeal Act* 2002, commencing on 4 October 2002, provided for the abolition of the Compensation Court. As part of the consequential amendments to various statutes, section 96 of the *Industrial Relations Act* 1996 was amended to clarify the method of dealing with disputes as to an employee's fitness for employment.

Miscellaneous Acts Amendment (Relationships) Act 2002

This Act commenced on 1 November 2002 and extended to several Acts the definition of "de facto" introduced by the 1999 amendments to the *Property (Relationships) Act* 1984. The amended definition of "de facto" does not distinguish between same and opposite sex couples. The definition of "member of the family" in the *Industrial Relations Act* 1996 was amended with particular effect on mortality fund benefits and contracts and agreements in the areas of public vehicles and couriers.

Statute Law (Miscellaneous Provisions) Act (No. 2) 2002

This Act made a minor amendment to section 108 of the *Occupational Health and Safety Act* 2000, commencing on 29 November 2002, The amendment provides for the making of regulations to prescribe different amounts of penalties for offences dealt with by way of penalty notice. For example, depending on whether the offender is a corporation or a natural person, or the circumstances in which the offence is committed.

Fair Trading Amendment (Employment Placement Services) Act 2002

This Act created a new system for the regulation of employment agents engaged in the provision of employment placement services. It was assented to on 7 November 2002 and commenced operation on 17 February 2003. It repealed the *Employment Agents Act* 1996 and the *Employment Agents Regulation* 2001, and inserted provisions regulating the services of these agents into a new Part 5C of the *Fair Trading Act* 1987. The amendments to the *Industrial Relations Act* were consequential amendments, replacing reference to the now repealed *Employment Agents Act* 1996.

Rail Safety Act 2002

The *Rail Safety Act,* assented to on 29 November 2002, provided a new system of safety regulation in respect of the provision of rail services operating within or partly within New South Wales. It commenced operation on 8 February 2003. The amendments to the *Industrial Relations Act* provided additional protections to employees or prospective employees from victimisation by employers or industrial organisations, in relation to any notification of, or the giving of evidence in relation to, a "notifiable occurrence within the meaning of the *Rail Safety Act 2002*". A notifiable occurrence, in general terms, may be an omission by a staff member, the failure of equipment or a defect in a system of work, that has or may result in an accident involving a train, or substantial injury to a person or property.

Industrial Relations Amendment (Industrial Agents) Act 2002

This Act was assented to on 12 December 2002 and is to commence on 1 February 2003. It inserted a series of new provisions into the *Industrial Relations Act* (ss 90A, 90B, 181A, 406A) and amended s 181. These amendments involve regulating the provision of services by an "industrial agent" in unfair dismissal proceedings before the Commission. The amendments require industrial agents to take certain steps when they appear in proceedings before the Commission. These include the filing of a certificate that the industrial agent has reasonable grounds for believing that the claim has reasonable prospects of success and the requirement of disclosure of any costs agreement to both the client and the Commission. The Act also amended s 166 of the *Industrial Relations Act* as to representation of parties before the Commission.

Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002

This amending Act was assented to on 16 December 2002 and is to commence on 1 January 2003. It amended the *Electricity Supply Act* 1995 by inserting provisions designed to reduce greenhouse gas emissions associated with the production and use of electricity and to encourage participation in activities to offset the production of greenhouse gas emissions. It amended the *Industrial Relations Act* to add a new sub-section to s 210, providing protection to employees or prospective employees from victimisation, by either an employer or an industrial organisation, in relation to giving assistance to the Independent Pricing and Regulatory Tribunal or Scheme Administrator in the exercise of its functions under the *Electricity Supply Act* 1995.

Coal Mine Health And Safety Act 2002

The *Coal Mine Health and Safety Act* 2002 put in place special additional obligations, protections and procedures necessary for the control of particular risks arising from coal operations, designed to operate in addition to the general obligations imposed by the *Occupational Health and Safety Act* 2000, commencing on 13 June 2003. It repealed and consolidated a number of legislative instruments including the *Coal Mines Regulation Act* 1982 and the *Coal Mines (General) Regulation* 1999. The amendments to the *Industrial Relations Act* were consequential amendments to update the references throughout that statute to the *Coal Mine Health and Safety Act* 2002.

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

Occupational Health and Safety (Clothing Factory Registration) Regulation 2001

The *Occupational Health and Safety (Clothing Factory Registration) Regulation* 2001 commenced on 1 January 2002. It re-introduces the registration requirement for occupiers of clothing factories who are employers and respondents to a relevant clothing industry award, including awards made under the *Industrial Relations Act* 1996 and the *Workplace Relations Act* 1996 (Cth). The purpose of the registration is to facilitate inspection and enforcement of occupational health and safety requirements.

Legal Profession Regulation 2002

Clause 20 of the *Legal Profession Regulation* 2002, commencing on 30 August 2002, enables a "foreign lawyer" to provide legal services in relation to all kinds of arbitration proceedings, including but not limited to services relating to the arbitration of industrial disputes undertaken in accordance with Chapter 3 of the Act.

THE COMMISSION'S RULES

Pursuant to section 186 of the *Industrial Relations Act*, the rules of the Commission are to be made by a Rule Committee comprising the President of the Commission and two other Presidential Members appointed by the President. There were however no amendments to the rules of the

Commission in 2002.

PRACTICE DIRECTIONS

A number of new Practice Directions were issued by the President during the year pursuant to rule 89 of the *Industrial Relations Commission Rules* 1996.

Practice Direction No 8 was published in the Industrial Gazette of 12 April 2002. Its purposes were to enable prompt and timely notice to be provided to the Industrial Relations Commission of the likelihood of the commencement of a major industrial case and thereby to ensure, as far as practicable, the effective use of the Commission's resources in respect of such cases. The Practice Direction requires a registered organisation or other person or organisation to give notice in writing to the Industrial Registrar of its intention to make an application in respect of a major industrial case, as defined.

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

Practice Direction No 10 was published in the Industrial Gazette on 6 December 2002. It was made to clarify and remove doubts as to the requirements for Notices of Motion to be filed in proceedings under the

Industrial Relations Act 1996 and related legislation and also to ensure that an affidavit in support is filed with any Notice of Motion lodged in any matter before the Industrial Relations Commission of New South Wales. The Practice Direction requires, unless leave is otherwise granted by the Commission, that a party or person filing a Notice of Motion in a matter before the Commission, file an affidavit in support setting out briefly and concisely the facts upon which the Notice of Motion is based.

INDUSTRY PANELS

Under the power of the President to direct the business of the Commission pursuant to sections 159 and 160 of the Act, industry panels were reconstituted during 1998 to deal with applications relating to particular industries and awards. Adjustments have been made to the assignments to the panels as appropriate since then. Seven panels are now in operation, each comprising a number of Presidential Members and Commissioners. Each panel is chaired by a Presidential Member of the Commission who allocates matters to the Members of the panel. The panels deal with applications for awards or variations to awards, applications for the approval of enterprise agreements and dispute notifications arising in relevant industries.

Four panels now deal essentially with "metropolitan" (Sydney-based) matters. Three panels specifically deal with applications from regional areas. The panel dealing with applications from the Hunter region and North Coast is chaired by Harrison DP. The panel dealing with applications from the Western area of the State is chaired by Sams DP. The panel dealing with applications from the Illawarra-South Coast region is chaired by Grayson DP. The trial of the new panel arrangements concerning country and regional areas which commenced in late 2001 was successful and will continue.

ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 1 May to 3 May 2002. Presentations covered a range of topics. The first day focussed significantly on consideration of issues in the industrial tribunals of other States and court and forensic procedures. The Hon. Judge W D Jennings, President, Industrial Relations Commission of South Australia and Senior Judge, Industrial Relations Court of South Australia, spoke on the industrial tribunal of that State. Mr Chris Puplick AM, the Privacy Commissioner, Privacy Commission of New South Wales, spoke on *Access to Court and Commission Records.* Mr Paul Westwood OAM of Forensic Document Services Pty Ltd, gave a presentation on *Forensic Document Examination.* Sessions were also given by the President, Vice-President and Industrial Registrar on *Workload Issues.* The final session on the first day was on *Meditation as a Relaxation Technique* given by Ms Petrea King of the Quest for Life Centre. The Conference Dinner Address was by Mr Paul Brunton, Curator of the State Library of New South Wales.

On the second day of the conference sessions were given by the Hon. Mr Justice C S C Sheller of the Court of Appeal who spoke on *Aspects of Judicial Independence*; Ms Jamila Hussein, Lecturer at Law, University of Technology, Sydney who gave a paper on *Islamic Culture*; and Professor Russell Lansbury, Professor of Industrial Relations, University of Sydney and Dr Suzanne Jamieson, Senior Lecturer, Industrial Relations, University of Sydney who gave a joint presentation concerning *Challenges of New Forms of Work.* The final session on *Information Technology* was provided by the Hon. Mr Justice David Lloyd, Land and Environment Court of New South Wales, and Ms Joy Blunt, Senior Systems Officer - Training, Judicial Commission of New South Wales.

The Annual Conference was well attended. It continues to provide an invaluable opportunity for Members of the Commission to discuss matters

relevant to their work. The presentations, forums and discussions proved relevant and practical. Appreciation should be expressed to the eminent presenters, to all those who contributed as participants and the officers of the Judicial Commission whose assistance is invaluable. The development of the Annual Conference, substantially assisted by the Judicial Commission of New South Wales exercising its mandate to advance judicial education, has proved to be a most successful initiative with the potential to add to the professionalism which the Commission seeks to advance in all its work.

TECHNOLOGY

Medium Neutral Citation

Since February 2000 the Commission has utilised an electronic judgments database and a system of court designated medium neutral citation. The system is similar to that in use in the Supreme Court and allows judgments to be delivered electronically to a database maintained by the Attorney General's Department. The judgment database allocates a unique number to each judgment and provides for the inclusion of certain standard information on the judgment cover page.

The adoption of the system for the electronic delivery of judgments has provided a number of advantages to the Commission, the legal profession, other users of the Commission and legal publishers. The system allows unreported judgments to be identified by means of the unique judgment number and paragraph numbers within the body of the judgment. The judgments are now available shortly after they are handed down through both the Attorney General's Department web site (Lawlink) and the Australian Legal Information Institute site (AustLII). The introduction and maintenance of the system has been possible with the co-operation of members of the Commission and their staff and with the assistance of the Executive and

Strategic Services Division of the Attorney General's Department. Invaluable training and ongoing support has also been provided by staff of the Judicial Commission of New South Wales.

CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION

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

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

USERS' GROUP

The Industrial Relations Commission Users' Group was established in late 1998 to provide a forum for the major industrial parties and others who regularly appear before the Commission to provide feedback to the Commission and allow input into the Commission's practice and procedure. The first meeting was held in November 1998 and meetings were held during 1999 and 2000. The Users' Group did not meet as such in 2001 largely because of pressure of business associated with the demands of the s 19

review. Nevertheless alternative suitable consultations occurred with the "users" of the Commission. The Users' Group formally resumed in 2002 and was held on 25 September 2002. It was decided that the Users' Group would meet annually and be complemented by *ad hoc* sub-group meetings to deal with particular areas such as unfair dismissals, unfair contracts and occupational health and safety matters. The Users' Group continues to provide the useful forum for which it was established.

COMMISSION PREMISES

I have earlier reported that little discernible progress had been made with respect to the co-location of Judges and Commissioners in the premises at 50 Phillip Street. This remains an important goal of the Commission and would greatly enhance the efficiency and co-ordination of its activities. However, during the year, with the assistance of the Director General, senior officers of the Attorney General's Department and the Industrial Registrar, further positive developments have occurred in this area. It now seems reasonably clear that the Commission will assume occupancy of the major part of the Chief Secretary's Building. This building is adjacent to the Commission's premises at 50 Phillip Street and has in part, for some years, been occupied on a temporary basis by the Commission and Registry for courts, chambers and support areas.

Plans are well advanced for the refurbishment of the Chief Secretary's Building for permanent occupation by the Commission and the transfer of those Members and staff at Railway Square to a new 50 Phillip Street/Chief Secretary's Building complex. This will require the temporary relocation of certain courts, chambers and offices to Hospital Road and Railway Square to enable the refurbishment to go ahead. Invaluable and commendable work has been carried out on these matters by the Vice-President, the Hon. Justice Walton, the Hon. Justice Kavanagh, the former Industrial Registrar, Mr

McGrath and the Acting Industrial Registrar, Mr Grimson.

(Note: Annexures A and B attached)

ANNEXURES

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

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

ANNEXURE A

Matters filed during period 1 January 2002 to 31 December 2002 and matters completed and continuing as at 31 December 2002 which were filed under the Industrial Relations Act 1996.

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

(1940 or 1991 Acts) and 1996 Act ABBREVIATIONS	USAGE	FILED 1.1.2002 - 31.12.2002	COMPLETED 1.1.2002 - 31.12.2002	CONTINUING AS AT 31.12.2002 (inc prev. years)
AW	Application re new award/ variation/rescission of award	463	462	284
CA	Application for approval of a Contract Agreement	19	18	3
CC	Application re Industrial Committees	0	0	1
CD	Application re Contract Determination	9	10	10
CPA	Appln re Child Protection (Prohibited Employment) Act 1998	9	14	9
CTA cl 27A, 31, 33	Application cl 27A, 31, 33 of Clothing Trades Award	60	54	11
EA	Application re enterprise agreement (s 35), (s 43), (s 44)	304	292	96
EPA	Report under s 11 of the Employment Protection Act	1	0	2
IC	Application to establish Industrial Committee	20	18	9
PSA s173,174, 181	Application for review s 173, 174, 181 of Police Service Act	13	15	14
S18	Application for exemption from whole or any part of award	8	6	3
S19	Notice of award review	0	11	401
S33	Commission to set principles for approval of EAs	1	1	0
S50	Adoption of National decision	1	0	1
S51	Commission to make State decision	1	1	0
S52	Variation of awards/orders on adoption of National decisions	0	0	0
S79	Commission to make State decision - Pt 3 re part-time work	0	0	0
(S246) S84	Application re unfair dismissal	4052	4010	2146
S93	Application for reinstatement of injured employee	18	15	14
S121	Application for an order under s 121	1	0	1
S126	Application for stand down orders	4	2	2
S130 & S332	Notification of industrial dispute to Commission	1191	923	964
S132	Commission may convene compulsory conf re s 130 dispute	0	0	0
S143	Application for payment of strike pay/remuneration	0	0	2
S146	Ministerial Inquiry pursuant to s 146(1)(d) of IR Act 1996	0	0	0
S167	Notification of dispute by Minister for Ind Relations	0	1	0
S175	Interpretation pursuant to s 175 of IR Act 1996	0	0	0
S193	Reference of a matter by Member to Full Bench	0	0	0
S203	Referral of matter by Federal President to State Commission	0	0	0
S204	Referral of matter by State President to Fed. Commission	0	0	0
S205	Joint proceedings State/Federal Commissions	0	0	0
S213	Application for relief from victimisation pursuant to s 213	10	7	10
S216	Application for approval as a State Peak Council	3	3	0
S217	Application for registration of industrial organisation	0	0	0
S252	Application for enquiry re irregularity in election	0	1	0
(S220) S294, 295	Demarcation orders	1	2	6
S311	Contract determinations/contracts of carriage	0	0	0
S314	Reinstatement of contract of carriage	16	13	7
(S697) S346, 348	Comp conference re claims – contract of carriage	2	8	9
C	Referred from Australian IRC under WR Act 1997 (Cth)	7	1	25
IRCAP1	Appeal against decision of Commissioner	30	26	30
IRCAP2	Appeal against Presidential Member	12	13	4
IRCAP3	Other Commission Appeals	2	0	2
VTBAP	Other Commission Appeals	1	0	1
Sub Total		**6259**	**5927**	**4067**

ANNEXURE B

Matters filed during period 1 January 2002 to 31 December 2002 and matters completed and continuing as at 31 December 2002 which were filed under the Industrial Relations Act 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES IN COURT SESSION

(1940 or 1991 Acts) and 1996 Act ABBREVIATIONS	USAGE	FILED 1.1.2002 - 31.12.2002	COMPLETED 1.1.2002 - 31.12.2002	CONTINUING AS AT 31.12.2002 (inc prev. years)
AHA	Application recovery of moneys Annual Holidays Act 1944	0	1	3
DGA S9	Prosecution under s 9(1)(a) of Dangerous Goods Act 1975	0	0	0
FSIA	Appeal pursuant to Factories Shops and Industries Act 1962	0	0	0
LSLA	Application under s 12 of Long Service Leave Act 1955	0	1	0
OHS S15	Prosecution s 15 Occupational Health & Safety Act 1983	81	72	248
OHS S16	Prosecution s 16 Occupational Health & Safety Act 1983	63	38	123
OHS S17	Prosecution s 17 Occupational Health & Safety Act 1983	10	6	37
OHS S18	Prosecution s 18 Occupational Health & Safety Act 1983	9	0	18
OHS S19	Prosecution s 19 Occupational Health & Safety Act 1983	3	0	14
OHS S27	Prosecution s 27 Occupational Health & Safety Act 1983	2	3	2
OHS S31R	Prosecution s 31R Occupational Health & Safety Act 1983	0	0	1
OHS S49	Prosecution s 49 Occupational Health & Safety Act 1983	0	0	2
OHS S50	Prosecution s 50 Occupational Health & Safety Act 1983	12	46	93
WCA S27(1)	Prosecution s 27(1) Workers Compensation Act 1987	0	0	0
S99	Prosecution s 99 Industrial Relations Act 1996	2	3	2
(S275) S106	Application to Commission to declare contracts void/ varied	893	590	1589
S129	Prosecution under s 129(1)	0	0	0
S137 & S139	Application re contravention of a dispute order	3	1	6
S154	Declaratory jurisdiction	11	7	20
S180	Proceedings for Contempt of Commission	1	1	0
S195	Application under s 195 of the Industrial Relations Act 1996	0	0	0
S196	Reference pursuant to s 196 IR Act 1996 to the Full Bench	1	2	0
S225 & S227	Application for cancellation of regstrtn of indstrl organisatn	3	2	3
S247	Orders re rules of State organisation	0	1	0
S248	Application for declarations and orders under s 248 of IR Act	0	0	0
S249, 282	Reference by Dep Ind Reg re industrial organisations	0	0	0
S266	Application for order enforcing provisions of s 266 IR Act	0	0	0
S288	Application for Validation Orders under s 288 IR Act 1996	0	0	1
S298	Application for right of entry under s 298 IR Act 1996	1	0	1
S301	Prosecution under s 301(3)	0	0	1
S343-4, 365,367	Order for recovery of money under s 343, 344, 365 & 367	3	4	44
S357	Civil penalty for breach of industrial instruments	0	0	0
S368	Order for recovery of unpaid superannuation	0	0	0
S369	Application for order for payment of moneys	0	0	0
S379	Application under s 379 of the IR Act 1996	0	0	0
S399	Prosecution under s 399 of the Industrial Relations Act 1996	0	0	1
CTAP1	CICS Appeal against a decision of Member in CICS matter	40	18	63
CTAP2	CICS Appeal against a decision of the F/Bench	0	0	0
CTAP3	Other CICS Appeals	0	0	0
CIM & LOCAL CT	Appeal against a decision of Chief Industrial Magistrate	29	18	26
SASB	Appeal re decision of State Authorities Superannuation Board	6	8	14
Sub Total		**1173**	**822**	**2312**

Total IRC and CICS Matters:	**7432**	**6749**	**6379**