The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2007

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The President

Industrial Relations Commission of New South Wales

47 Bridge Street Sydney

The Honourable J J Della Bosca MLC
Minister for Education and Training, Minister for Industrial Relations,
Minister for the Central Coast and Minister Assisting the Minister for Finance
and Leader of the Government in the Legislative Council
Level 30, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

I have the honour to furnish to you for presentation to Parliament the Twelfth 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 2007.

Yours faithfully,

The Honourable Justice F. L. Wright
President

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Website:	**www.lawlink.nsw.gov.au/irc**
Email:	**nswirc@agd.nsw.gov.au**
Street Address:	**47 Bridge Street, Sydney NSW 2000**
Registry Hours:	**9.00am – 4.00pm Mon – Fri**
Document Exchange:	**DX 874 Sydney**
Postal Address:	**GPO Box 3670 Sydney NSW 2001**
Contact details:	**Telephone: 02 9228 7766**
	Facsimile: 02 9258 0058

Cover: **237 Wharf Road, Newcastle**: *as well as the Principal Registry in Sydney the Commission also maintains premises at two major regional centres - this is an exterior shot of the Newcastle premises which provides accommodation for two members, registry and judicial staff.*

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

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

During the year two members reached a significant milestone in terms of their length of service with the Commission passing the 20 year mark. Both Deputy President Rodney Harrison and Commissioner Peter Connor have worked diligently in that time to serve the community of New South Wales and I acknowledge their efforts in that regard.

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

Ms Lisa Gava, Principal Associate together with Associate, Ms Lydia D'Souza, took on the significant administrative burden of matters passing through the President's Chambers and I commend their efforts. I also commend the work of the President's Tipstaff, Mr John Bignell, whose assistance has been invaluable.

I wish also to express my thanks to the Research Associates to the President, Ms Brigid Maher (until 11 May 2007) and Mr Eugene Schofield-Georgeson for their valuable assistance throughout the year.

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

Throughout 2007, 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 and of its predecessor, the *Occupational Health and Safety Act* 1983;
- proceedings for declarations of right under s 154;
- proceedings for unfair contract (Part 9 of Chapter 2);
- proceedings under s 139 for contravention of dispute orders;
- proceedings under Parts 3, 4 and 5 of Chapter 5 – Registration and regulation of industrial organisations;
- proceedings for breach of an industrial instrument;
- proceedings for the recovery of money payable under an industrial instrument other than small claims under s 380 (which are dealt with by the Chief Industrial Magistrate or an Industrial Magistrate);
- superannuation appeals under s 40 or s 88 of the *Superannuation Administration Act* 1996;
- proceedings on appeal from a Member of the Commission exercising the functions of the Industrial Court; and

- proceedings on appeal from an Industrial Magistrate or any other court.

MEMBERSHIP OF THE COMMISSION

JUDGES AND PRESIDENTIAL MEMBERS

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

President

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

Vice-President

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

Presidential Members

The Honourable Justice Francis Marks, appointed 15 February 1993;

The Honourable Justice Monika Schmidt, appointed 22 July 1993;

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

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

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

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

Deputy President John Patrick Grayson, appointed 29 March 2000;

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

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

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

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

COMMISSIONERS

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

Commissioner 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;

Commissioner Alastair William Macdonald, appointed 4 February 2002;

Commissioner David Wallace Ritchie, appointed 6 September 2002;

Commissioner John David Stanton, appointed 16 June 2005.

INDUSTRIAL REGISTRAR

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

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

DUAL APPOINTMENTS

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

The Honourable Justice Frederick Lance Wright;

The Honourable Justice Francis Marks;

The Honourable Justice Monika Schmidt;

The Honourable Deputy President Rodney William Harrison.

ANCILLARY APPOINTMENT

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

OVERVIEW

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

INDUSTRY PANELS

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

Four panels now deal essentially with metropolitan (or Sydney-based) matters. Three panels specifically deal with applications from regional areas. The panel dealing with applications from the Hunter region and North Coast is chaired by Deputy President Harrison. The panel dealing with applications from the Western area of the State is chaired by Deputy President Sams. The panel dealing with applications from the Illawarra-South Coast region is chaired by Deputy President Grayson 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 502 (603)[1] sitting days in a wide range of country courts and other country locations during 2007. There are two regional Members based permanently in Newcastle - Deputy President Harrison and Commissioner Stanton. The Commission sat in Newcastle for 247 (262) sitting days during 2007 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 163 (169) sitting days in Wollongong during 2007.

The Commission convened in over 40 other regional locations in 2007 including Albury, Armidale, Ballina, Bathurst, Coffs Harbour, Dubbo, Gosford, Goulburn, Griffith, Lismore, Tamworth, Wagga Wagga and Queanbeyan.

[1] Numbers in brackets are figures from 2006

MAJOR JURISDICTIONAL AREAS OF THE COURT AND THE COMMISSION

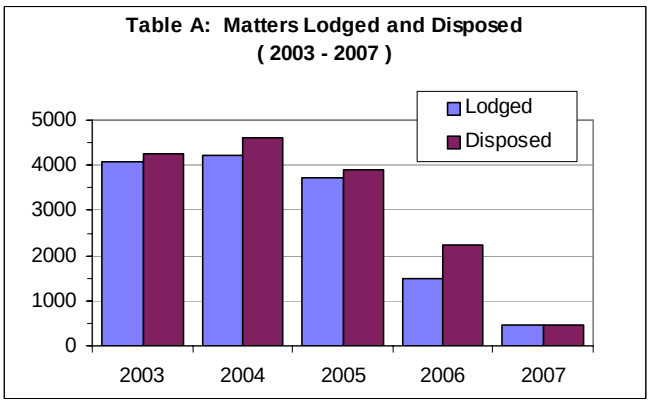
UNFAIR DISMISSALS

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 2007 (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

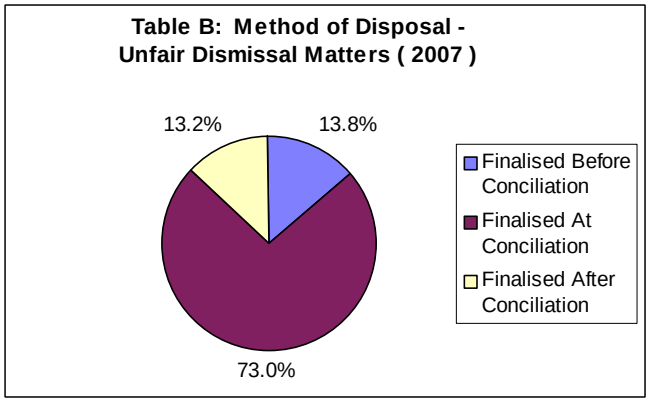
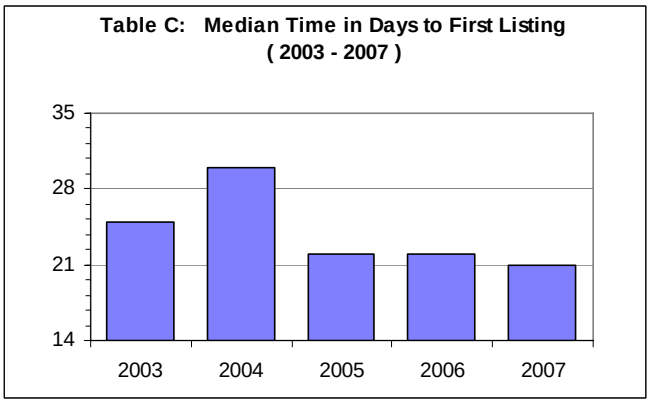
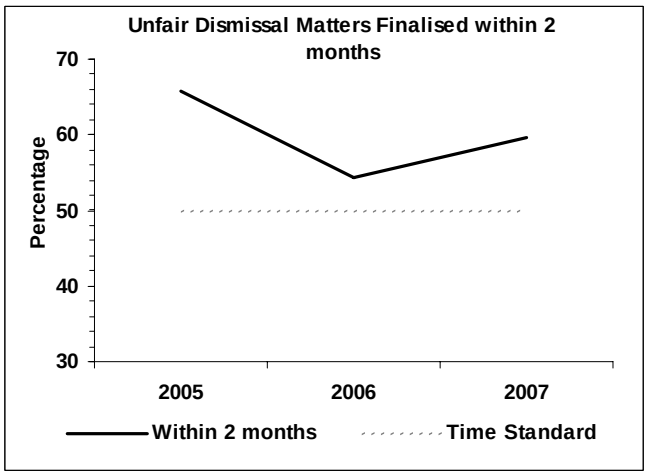


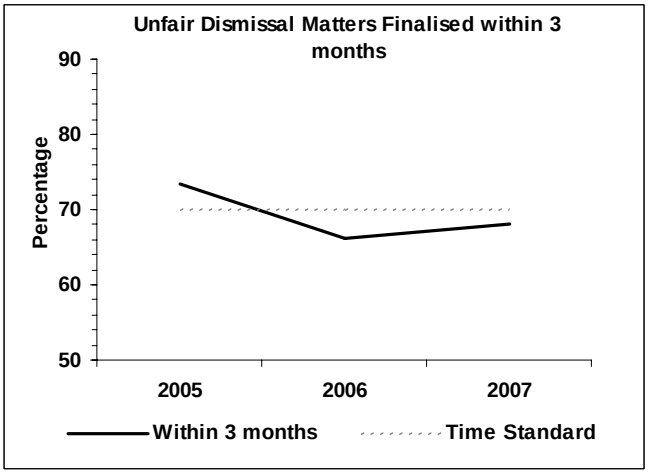
TABLE C



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 Commission has received significant positive feedback in relation to the new system. It will be noted from Table D 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 time for 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-*Workchoices* clearance rates.

TABLE D





INDUSTRIAL DISPUTES

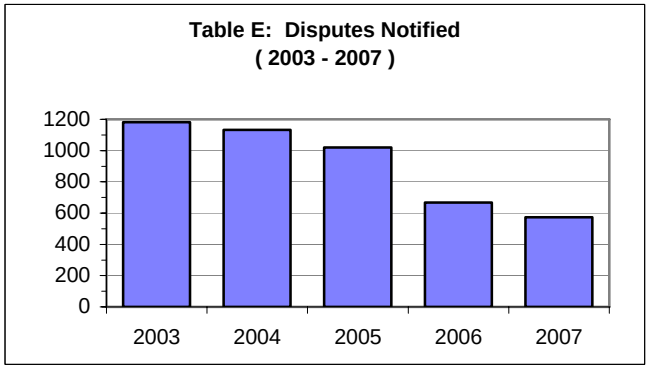
The procedure for dealing with industrial disputes is set out in Chapter 3 of the *Industrial Relations Act* 1996. The allocation of disputes are dealt with under the Industry Panel system referred to earlier in this report. The nature of this area of the Commission's jurisdiction often requires that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

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

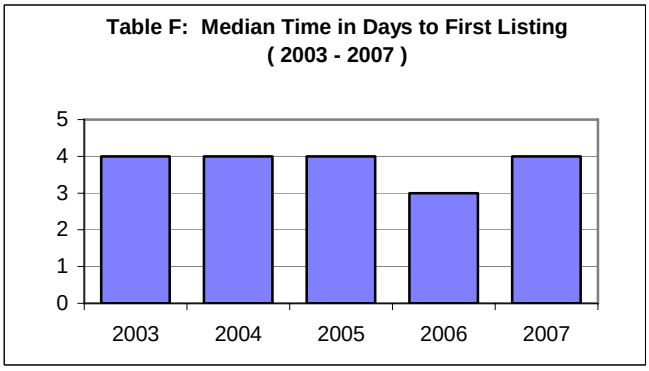
The Commission issued *Practice Direction No. 18* to facilitate the resolution of these types of matters. Whilst there is no requirement to have a referral agreement registered or certified by the Commission, provision was made within the above practice direction for copies of general referral agreements to be filed with the Commission. 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 will continue throughout 2008.

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	2003	2004	2005	2006	2007
Application to make award	108	131	194	62	22
Application to vary award	338	296	332	479	201
Application enterprise agreement	348	336	359	224	28
Terminated enterprise agreement	180	219	173	145*	18
Review of awards (Total) (Notices issued)	233	431	74	0	572
Awards reviewed	97	443	67	5	377
Awards rescinded	15	93	16	0	8
* = data revised since previous report.					

STATE WAGE CASE 2007 [2007] NSWIRCOMM 118; 163 IR 253

On Friday 8 June 2007, a Full Bench of the Commission delivered a new state wage. Wages and salaries were increased by $20 per week. Relevant allowances were increased by 4 per cent and the Award Review Classification Rate (ARCR) increased by $27.00 per week.

The increases were made in response to an application by Unions NSW pursuant to s 51 of the *Industrial Relations Act* 1996 for a general wage increase in awards by 4 per cent. The Commission also heard submissions from the Minister for Industrial Relations and the Catholic Commission for Employment Relations (CCER), regarding the needs of the low paid. It found that there was a necessity to "strike a proper balance between the needs of the low paid and the capacity of the economy of New South Wales to sustain the increase" (at [1]).

Joined to the proceedings was an application by the Liquor, Hospitality and Miscellaneous Union, New South Wales Branch ('LHMU') to vary the Miscellaneous Workers Kindergartens and Child Care Centres (State) Award 2006 to give effect to the *State Wage Case 2006.* This matter was remitted to a Member of the Commission to be dealt with in accordance with further amendments made to Principle 8 of the Commission's Wage Fixing Principles. These revised Principles, set out in Annexure A to the decision, allow increases in rates of pay to be offset against:

> i) any equivalent over award payments, and/or
>
> ii) award state wage increases since 29 May 1991 other than safety net, State Wage Case, and minimum rates adjustments.

This clause replaces the offsetting clause contained in Principle 8 of the *State Wage Case 2006.*

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 *Workchoices* legislation in 2006 has impacted on filings with the Commission in this area. Table H shows the relevant trends:

TABLE H

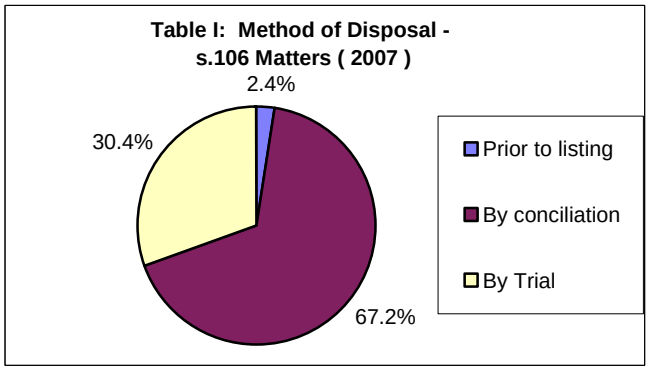
Section 106 Filings

Year	**2003**	**2004**	**2005**	**2006**	**2007**
No.	631	550	473	218	51

In light of the high settlement rate at this stage of proceedings the Commission has, since 2004, diverted resources at particular times during the year to conciliation. This initiative continued in 2007. As in previous years this project was co-ordinated by her Honour Justice Schmidt and again proved highly successful.

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

TABLE I



There was a decrease of approximately 15 per cent of matters being disposed of by way of conciliation compared to 2006 and it is believed this was as a direct result of jurisdictional issues raised by the parties which prevented resolution at this early stage.

Another initiative of the Commission during 2007 was to target for expedited hearing during the later part of the year a number of matters that had not resolved between the parties. This project was co-ordinated by his Honour Justice Staff and will continue in 2008.

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

	2003	2004	2005	2006	2007
No.	152	186	174	193	93

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. 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 2007 Full Benches finalised in excess of 80 matters the majority of which involved appeals. A "snapshot" of the significant decisions are referred to hereunder. Other significant decisions may be found in Appendix 2.

Public Health System Nurses' and Midwives (State) Award [2007] NSWIRComm 36; 160 IR 325

The New South Wales Nurses' Association applied to the Full Bench to vary the current Award by increasing Continuing Education Allowances ("CEA") and extending allowances to other classes of nursing professionals and enrolled nurses. The Commission acknowledged that increased allowances were necessitated by a corresponding increase in the professionalism and tertiary qualifications demanded from nurses by increasingly complex medical procedures that had lead to an expansion in traditional fields of nursing work. Accordingly, the Full Bench extended the CEA from nurses trained in tertiary institutions to include nurses who have acquired hospital-based post-registration qualifications, previously unrecognised by the distribution of the CEA. The

Commission held the existing system to be "inequitable and discriminatory" (at [38]). It specifically ordered that the CEA extend to the following categories of nurse:

> a) Clinical Nurse Specialists/Clinical Midwife Specialists;
> b) "Eligible employees" (see "subclause (i)" of new "Schedule 2");
> c) Nurses who hold hospital certificates;
> d) Enrolled nurses who have completed a course (recognised courses are listed in new "Schedule 3").

The CEA were increased in accordance with the figures listed in "Table 2" of "Clause 13" in the Award. The figures have been designed to implement greater pay equity between nurses while compensating those who have previously been underpaid for their contributions to nursing.

WorkCover Authority of NSW v Denson and Others [2007] NSWIRComm 69; 162 IR 199

A single judge of the Industrial Court remitted a question of law to the Full Bench for determination. The Full Bench was asked to consider the expression "previous offender" for the purposes of statute 4, *Occupational Health and Safety Act* 2000. Sect 89 (4) of that statute defines the phrase "previous offender", to mean:

> "a person who has, at any time before being sentenced for that offence, been convicted of any other offence of any kind against this Act or the *Occupational Health and Safety Act* 1983".

The issue in this matter was whether a defendant who had previously been dealt with by the Chief Industrial Magistrate on a charge under the 1983 Act but was not convicted by reference to s 10 "dismissal of charges", of the *Crimes (Sentencing Procedure) Act* 1999, should be considered a "previous offender". If so considered, the defendant faced an "additional penalty for a further offence against the Act", in accordance with s 51A of the OHS Act.

The Court decided that the defendant had not previously offended in the relevant sense. In reaching this conclusion, the Full Bench interpreted the legislation in "the context of the whole section" and ruled that the construction of the prior court appearance as a "previous conviction" would "strain the language" of the provision. The Court also distinguished the factual circumstances in this case from

that of *Morrison v Powercoal (No 3)* (2005) 147 IR 117, in which a defendant was considered a "previous offender" where they had been charged and convicted, not merely charged and dismissed.

Endeavour Coal and Others v CFMEU [2007] NSWIRComm 70; 161 IR 96

The issue requiring adjudication on this appeal was whether the Commission's accepted jurisdiction to make an award for long service leave, pursuant to ss 10 and 11 of the *Industrial Relations Act* was excluded by the operation of s 16(1) of the *Workplace Relations Act* 1996 (Cth). Crucial to this determination was the question whether long service leave was an "industrial matter" (in terms of s 6 of the *IR Act),* considering that it is an exception to Commonwealth labour law jurisdiction, outlined by ss 16(2)(c) and (3)(f) of the *WRA.*

The Court decided that the Commission did in fact retain the power to make laws "dealing with" long service leave. Consequently, the Full Bench applied its previous decision in *Re Inquiry into matters relating to the availability of work at Tristar Steering and Suspension Australia Ltd* [2007] NSWIRComm 50. It added that the *interpretation* of s 16(3) matters had been left to the discretion of the States: *State of NSW & Ors v Commonwealth of Australia* (2006) 81 ALJR 34 (*WorkChoices* at [12]). Accordingly, the Court opted for a wide reading of s 16(3), finding that it had "broad and beneficial" powers in respect to s 16(3) matters, given the limited subject matter over which States retained power under the *WorkChoices* legislation.

Kirk Group Holdings Pty Ltd and another v WorkCover Authority of New South Wales [2007] NSWIRComm 86; 164 IR 146

The appellant was convicted under ss 15(1) and 16(1) of the *Occupational Health and Safety Act* 1983, in relation to the death of an employee who worked on the appellant's hobby farm. The employment duties of the deceased involved responsibility for OHS procedures on the farm. The appellant argued that the trial judge failed to properly consider the appellant's corporate responsibility for the offences in light of the contributory OHS responsibilities of the deceased.

The Full Bench found that the appellant should have been aware of and able to manage OHS issues on the farm because he was an experienced commercial manager. In circumstances in which the appellant was found to be the controlling mind of the company, the Court found that he was clearly liable for the offences of the company: see *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. The

first instance decision was upheld and the appeal dismissed. The Full Bench restated the following principles of liability for OHS offences in NSW:

1) Liability under ss 15 and 16 is absolute: *Newcastle Wallsend Coal Company Pty Ltd & Ors v Inspector McMartin* [2006] NSWIRComm 339 at [214];

2) The employer's duty to ensure safety may not be delegated: *WorkCover Authority of NSW (Inspector Patton) v Fletcher Constructions Australia Ltd* (2002) 123 IR 121 at [40] to [42] and at [97] to [99];

3) Where an employer relies upon a contractor to perform OHS obligations on the employer's behalf, criminal liability may be avoided where the employer can prove on the balance of probabilities, that its transgression was not reasonably practicable or was due to causes over which they had no control, against which it was impracticable for the employer to make provision: ss 53(a) and (b): *Fletcher Constructions* ;

4) The delegation of an employer's responsibility for OHS policy and its implementation does not lead to a delegation of the employer's duty under ss 15(1) and 16(1) to ensure the health and safety of its employees and others.

Child Employment Principles Case 2007 [2007] NSWIRComm 110; 153 IR 141

This case came before the Commission on its own initiative following the issuing of a summons to show cause pursuant to Part 3 of Chapter 2 of the *Industrial Relations Act* 1996 consequent upon the enactment of the *Industrial Relations (Child Employment) Act* 2006. Section 5 of that Act required a Full Bench of the Commission to set principles (the no net detriment principles) to be followed by an industrial court in determining whether or not an affected employer of a child has provided the child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child.

The Commission held that the Act applied to all employment relationships - "agreements or other arrangements" - involving children under the age of 18 in New South Wales entered into on or after 26 March 2006. Importantly, the Act was held to give the Commission jurisdiction over employment relationships involving children even where the employer is a constitutional

corporation under the *WorkChoices* legislation but is not otherwise bound by a State industrial instrument or valid State award covering employees performing similar work.

"Net Detriment" Test

In explaining this test, the Full Bench held that:

> "if a child is paid less than total remuneration under his or her conditions of employment, than would be payable under the comparable award and industrial legislation, then the child suffers a detriment. Whether or not there is a "net detriment" to a child in a particular case, will depend upon an assessment of all the child's conditions of employment and whether or not the child is worse off under the agreed conditions of employment than under the comparable award or industrial legislation" [at 290].

In determining "net detriment", the Full Bench determined that an industrial court must specifically consider the following matters:

i) hours of work (including maximum and minimum hours)
ii) spread of hours of work
iii) minimum breaks between shifts and split shifts
iv) overtime
v) meal breaks, crib breaks and rest breaks
vi) notification of whether the employment is full-time, part-time or casual
vii) the right to elect the fund into which the child's superannuation benefits will be paid

Additionally, the industrial court must also have regard but is not limited to considering the following matters:

i) the child's age;
ii) whether or not the child is engaged in full or part-time education;
iii) the work which the child is employed to perform;
iv) when the work is required to be performed;
v) the circumstances in which the child's conditions of employment were agreed.

The principles determined were to operate from 22 May 2007 until further order.

Newcastle Wallsend Coal Company Pty Ltd and Ors v McMartin (No 2) [2007] NSWIRComm 125; 164 IR 326

The background to these proceedings before a Full Bench of the Commission are set out in the introduction of the majority judgement [at 1]:

> This judgment deals with the question of costs arising from the decision of the Full Bench in *Newcastle Wallsend Coal Company Pty Limited & Ors v Inspector McMartin* (2006) 159 IR 121 ("the Gretley Appeal").
>
> The judgment is given in unusual circumstances. In the Gretley Appeal, the majority reserved on the question of costs, noting that none of the parties had been heard on that issue ([631]). The Full Bench indicated that it would determine the question of costs on the papers unless a party made an application to be otherwise heard. In the minority judgment, the dissenting judge not only dealt with the issues of liability and sentencing, but the dissenting judge also addressed the issue of costs, and in the course of doing so, raised a number of other contentious matters under the rubric 'Conduct of the prosecutions' (the dissenting judge, in fact, treated all matters dealt with under that heading as relevant to the question of costs, although in this judgment we have found it unnecessary to deal with all such matters in reaching our own conclusion on costs).
>
> Not only was the issue of costs not ventilated during the hearing of the appeal but also neither were the contentious matters that the dissenting judge dealt with in his minority judgment under the heading "Conduct of the prosecutions".
>
> This has given rise to a substantial complication. The respondent (prosecutor at first instance), with apparent justification, complained in his written submissions on costs that he had not been heard in relation to the cost issues and the other matters addressed in the minority judgment and sought to respond to the findings (and criticisms) made against him in that respect. To add to the complication, in their reply submissions on costs, which relied heavily on the minority judgment, a number of the appellants claimed that some of the responses by the respondent (all of which were, in fact, directly responsive to the findings or comments made by the dissenting judge) could not be considered by the Full Bench without the matter being re-opened. Those appellants did not, however, seek an oral hearing on the question of costs although as we have noted, they identified that a hearing may be required on the re-opening question if that question arose for determination.
>
> It is unfortunate that we have to take the course that we do. We acknowledge that it is not part of the function of a judge sitting on appeal to provide a critique of the reasons given by members of the Court whose views differ from that of the judge (see, for example, *Evans v Marmont* (1997) 42 NSWLR 70 at 80 per *Gleeson* CJ and *McLelland* CJ in Eq). It is, however, necessary to make certain observations arising from the reasoning of the dissenting judge in the minority judgment because some of the appellants relied on that reasoning in support of their submissions on costs.

The majority of the Full Bench held that while the corporate appellant identified errors at first instance, these were not pressed in submissions as to costs. Further, where the appellants submitted that the prosecutor had wasted time and added unnecessary charges to the case against them at first instance, the majority of the Full Bench found that the appellants had contributed to delayed proceedings by refusing to plead guilty from the outset, despite the Court finding to the contrary. They further found that rather than wasting-time as contended by the appellants, the respondent had raised arguments that illuminated ambiguous propositions of law during the course of the trial and had assisted the Court accordingly. Where the respondents were "overwhelmingly successful on appeal", it was ordered that costs should follow the event.

Valda June Kerrison v NSW Technical and Further Education Commission (TAFE) [2007] NSWIRComm 140; 164 IR 444

The appellant applied to the Full Bench to reopen appeal proceedings after the Court had dismissed an application for declaratory relief, finding that she had not been medically retired from her previous employment. The Court refused the application, in accordance with a long line of well-accepted legal principle that "once a judgment is made, it is final and the respondent should be entitled to rely upon the finality of that judgment" (at [14]). The exceptions to this principle include situations where the forum is a "Court of last resort" and there have been "exceptional circumstances", such as an, "'irremediable injustice', warranting the reopening of the appeal proceedings" referring to *Ove Arup Pty Ltd v WorkCover Authority (NSW) (Inspector Mansell)* (2005) 141 IR 78; *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29. While the Full Bench found itself to be a "Court of last resort", it nevertheless accepted that no exceptional circumstances existed. The application was dismissed.

Garvey v Institute of General Practice Education Incorporated [2007] NSWIRComm 159; 165 IR 62

The respondents made a jurisdictional challenge to a s 84 unfair dismissal claim. They claimed that s 16(1) of the *Workplace Relations Act* 1996 (Cth) operated to remove the Commission's jurisdiction because the respondent was a "trading corporation". This gave rise to two matters: i) the issue of trading activities and; ii) the proper characterisation or extent of those trading activities.

The Court examined the company's objects of incorporation and related documents. The respondent derived income mainly from federal Government grants. There existed only one instance of trading

activity in 2006, to the value of $760.98. Following a comprehensive review of the relevant authorities the Full Bench found the respondent was not a trading corporation finding:

> " ...the respondent cannot properly be characterised as a trading corporation on the basis of its single trading activity. It is sufficient to reach this conclusion by comparing the proportion of revenue arising from its sole trading activity to the respondent's total revenue. Based on this comparison, it cannot be said that such proportion is substantial or even significant. In the context of the total revenue of the respondent, it constitutes a very small amount...akin to the situation in *Australian Red Cross...*" (at 33).

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189

In an unfair contract application brought under s 106 of the *Industrial Relations Act* 1996, the respondents asserted jurisdictional immunity, claiming to be a "constitutional corporation" and thereby protected from State industrial relations law by s 16(1) of the *Workplace Relations Act* 1996 (Cth). The Court examined whether the respondent was a "trading" or "financial" corporation under s 51 (xx) of the *Constitution*, to ascertain whether it was validly excluded from State jurisdiction by s 16(1). The terms, "trading" and "financial", in relation to a designated constitutional corporation, were found to have the same legal meaning and are determined by the same test: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

The Full Bench adopted the approach in *Garvey v Institute of General Practice Education Incorporated* [2007] NSWIRComm 159 ("*Garvey*"). In *Garvey*, the Court rejected the contention of an incorporated business, that it was in fact engaged in trading activities and could properly be characterised as a trading corporation. In so doing, the Court applied the established tests to assess the trading activities of a corporation. It identified the following approaches:

> i) "The current activities test": *R v Judges of the Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; in which *Barwick* CJ found that trading activities must be a "substantial and not merely peripheral activity" of the corporation.
>
> ii) "The primary/dominant undertaking test": *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; where *Mason, Murphy* and *Deane* JJ held that the corporation engages in trading activities if trade is conducted as a "primary or dominant undertaking not described by reference to trade".

It was noted that a trading corporation may exist even though its trading activities do not form the predominant part of the overall activities of the corporation. Neither was it necessary that trading activities be motivated by the hope of private gain. Trading activities are not necessarily profitable activities. Rather, the Full Bench held that the determination of the existence of a trading corporation is a question of fact and degree. In applying the law to the facts of the case, the Full Bench declined to follow the decision of the Full Federal Court in the comparatively similar case of *Quickenden*. There, the Federal Court found that a university, established for the purposes of research nevertheless qualified as a trading corporation. In so deciding, the Full Bench noted the formal submission of the New South Wales Attorney-General who contended that *Quickenden* was wrongly decided, either because the court incorrectly categorised the activities as "commercial" or incorrectly found they were "substantial".

Accordingly, the Full Bench found that the respondent company was neither a trading, nor financial corporation. The trading activities of the respondent were found to be "insubstantial" in comparison with its central activity as a "medical research establishment". Revenue arising from all trading activities undertaken by the respondent amounted to 2.584 per cent of the company's total revenue. The respondent's motion was dismissed.

Bowman v Ricegrowers Limited (formerly Ricegrowers' Co-operative Limited) [2007] NSWIRComm 204;

The employee's contract of employment was found to be unfair under the *Industrial Relations Act* 1996 at first instance and was varied to provide for reasonable notice upon termination. The original matter concerned an unfair contract claim in which an employee - a long serving senior manager - was summarily dismissed for reasons relating to a conflict of interest in contracting out work to his brother's firm. Orders for payment were also made to compensate the employee for 15 weeks' lost pay. An appeal and cross appeal against the decision were filed.

A number of issues were determined by the Full Bench. First, whether the employee's claim should be excluded by virtue of s 109A of the Act. Second, whether the Full Bench lacked jurisdiction because of the decision in *Sydney Water Corporation Ltd v Industrial Relations Commission of New South Wales* (2004) 61 NSWLR 661. Third, whether the trial judge erred in finding the appellant lacked candour in failing to advise his employer of a conflict of interest. And fourth, whether the trial judge erred in taking into account the employee's failure to notify the employer of conflict of interest when determining compensation.

In determining the first issue, the Full Bench held that s 109A relevantly provides that a s 106 unfair contract application cannot be made where an application could have been made under s 83 for unfair dismissal. In interpreting s 109A, the Full Bench adopted the reasoning of the Full Bench in *Beahan v Bush Boake Allen Australia Ltd* (1999) 47 NSWLR 648, where it was held that a claim which challenges the terms or operation of a contract of employment by genuine, not superficial or coloured reasons related to the contract itself, is a claim properly within s 106 and s 109A has no operation in relation to it. The Full Bench also said that s 109A is to be interpreted strictly, so as to remove from s 106 only those contracts which unambiguously fall within the exclusion provided by its provisions. The Full Bench did not consider the "essential nature" of the appellants' claim as being "principally related" to the fact of his dismissal.

The Full Bench dealt with the second issue by finding that the case of *Sydney Water* and the issue of jurisdiction did not apply to a s 106 claim of this nature.

As to the third question, the Court found that it was reasonably open to the trial judge to make the finding that the appellant lacked candour in failing to inform his employer of a possible conflict of interest. The fact that the trial judge had the advantage of hearing witnesses and assessing their demeanour was central to upholding the trial judge's decision on this point.

In determining the fourth issue, the Full Bench decided in favour of the appellant, that there had been a breach of procedural fairness due to the failure of the trial judge to take into account any of the parties' submissions as to the appropriate remedy to be imposed in the circumstances. Of particular concern to the Full Bench was that the trial judge significantly discounted the relief granted to the appellant in response to finding a lack of candour, without having raised this with the parties. The appeal was upheld and the orders of the trial judge varied.

CFMEU (NSW) (o/b of Hemsworth) v Brolrik Pty Ltd t/as Botany Cranes & Forklift Services [2007] NSWIRComm 205

The applicant sought relief from victimisation under ss 210(1)(j) and 213 of the *Industrial Relations Act* 1996. The claim arose from the termination of Mr Hemsworth's employment with the respondent company after he communicated his concern about the laxity of the company's occupational health and safety policy to company managers. The respondent filed a motion raising a jurisdictional challenge to the union's application on the basis that the Commission had no

jurisdiction to hear the application. The respondent claimed that since they were a constitutional corporation, s 16(1) of the *Workplace Relations Act* 1996 (Cth) ("WR Act") operated to remove the Commission's jurisdiction in respect to the respondent.

The Court held that "non-excluded matters" listed under ss 16(2) and (3) of the WR Act, specifically permitted State jurisdiction over matters relating occupational health and safety. It was held that ss 210(1)(j) and 213 of the Act fell directly within the legislative exceptions outlined in s 16 of the WR Act. In making this finding, the Court followed the findings of the Federal Court in *Tristar Steering and Suspension Ltd & Anor v Industrial Relations Commission of NSW & Anor* (2007) 158 FCR 104 and applied its decision in *Endeavour Coal & Ors v CFMEU* (2007) 161 IR 96. The employer's Notice of Motion was dismissed.

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 that significant improvements have been made in a number of areas as compared to 2005.

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

> "The diverse nature of matters that come before the Commission for determination will often result in the decision of a presiding member or Full Bench being reserved. Until recently it was very rare for any decision to be delivered extempore. However, it has now become a common feature of the Commission's work- in appropriate cases – to deliver extempore judgments at the conclusion of a hearing.
>
> The Commission has set a target for the delivery of judgments of three months from the date a judgment is reserved to the date when it should be delivered. Industrial disputes will generally require decision (particularly interim decisions or recommendations), within a shorter time frame, if one is necessary. In respect of unfair dismissal matters the Commission has set a target of 80 per cent of reserved judgments being delivered within two months and 100 per cent within three months. This policy will take effect with respect to decisions or judgments reserved after 30 September 2004.
>
> The capacity for the Commission to achieve this target is dependent on the complexity of the matter for determination and other factors such as the availability of resources in relation to the workload of the Court, leave, timeliness in the replacement of appointments, etc. Because of their size and complexity major industrial cases fall outside the general target, however, every effort has been and is being made to deliver the judgment as soon as possible after the decision has been reserved consistent with the exigencies of the particular proceedings.

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

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

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

THE REGISTRY

The Industrial Registrar, Mr Michael Grimson, has overall administrative responsibility for the operation of the Commission. The Registrar reports to the President of the Commission in terms of the day to day operational procedures and, as a Business Centre Manager within the Attorney General's Department with reporting and budgetary responsibilities, to the Assistant Director-General, Court 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				
2003	***2004***	***2005***	***2006***	***2007***
199	191	175	179	189

Special Wage Matters - Year End Current Files					
	2003	***2004***	***2005***	***2006***	***2007***
Special Wage Permits	765	1213	1110	991	749
* SWS - P	212	262	246	219	214
** SWP - MC	244	269	300	189	243
TOTAL	**1201**	**1744**	**1656**	**1399**	**1206**

Special Wage Matters - Matters Lodged				
2003	**2004**	**2005**	**2006**	**2007**
1281	1786	1734	1433	1241

* 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.

THE ATTORNEY GENERAL'S DEPARTMENT

The Commission and the Industrial Registrar acknowledge the continuing assistance of the Attorney General's Department and, in particular, the assistance of Mr T E McGrath, Assistant Director

General, Courts Services (until his resignation in July 2007) and Mr M Talbot who has assumed the duties of that position.

OTHER MATTERS

ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 26 - 28 September 2007. The first day covered a variety of topics with presentations by Chief Commissioner Tony Beech, West Australian Industrial Relations Commission (*A view from the West*); Mr Ross Gittins, Economics Editor, The Sydney Morning Herald (*Economics for Judges*); Professor Gordon Parker, Executive Director, Black Dog Institute (*Dealing with Depression*); Professor David Kinley, University of Sydney (*Corporate Social Responsibility*) and Ms Chris Ronalds AM SC (*Anti-Discrimination in the Workplace*). On the second day of the conference sessions were given by the Mr Julian Claxton, Managing Director, Risq Security Management (*Covert Workplace Surveillance, Use and Abuse);* his Honour Justice Michael Walton, Vice-President (*Review of the Commission's Work 2004 - 2007*); Deputy President Rodney Harrison (*Experience of Referral Agreements)*; and Ms Lorraine Lopich, Lopich Lawyers (*Collaborative Practice*). 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

COURT USERS' GROUP

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

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

For a number of reasons the Commission did not convene a meeting of the Court User's Group in 2007.

COMMITTEES

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

COMMISSION RULES

Pursuant to section 186 of the *Industrial Relations Act*, the rules of the Commission are to be made by a Rule Committee comprising the President of the Commission and two other Presidential Members appointed by the President. There is also scope for co-option of other Members. There were no amendments to the rules of the Commission in 2007.

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 have completed a comprehensive review of the Commission's Rules with a view to ensuring that the Rules provide the proper mechanism for matters before the Commission to be dealt with in a timely and appropriate manner, particularly having regard to the recent introduction of the *Uniform Civil Procedure* Act and Rules. It is likely that significant amendments to the Rules will occur in 2008.

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 to finally occur.

AMENDMENTS TO LEGISLATION ETC

The legislative amendments enacted during 2007 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

Practice Directions published during 2007 are referred to elsewhere in this Report.

CONCLUSION

Since the introduction of the *Workchoices* legislation in March 2006 this Commission has been faced with a number of challenges not the least of which has been the perception that such legislation had created a national industrial relations system in which State industrial tribunals had a limited role.

That legislation might be best characterised as both confusing and frustrating. Confusing in that the complexity of the legislation left both employees and employers in a quandary as to their rights and responsibilities. Frustrating in the sense that the legislation created so many grey areas that the availability of clear and concise advice was the exception rather than the norm.

With the result of the federal election in November 2007 it would appear that the possibility of moving to a national industrial relation system is high. The challenge for those who seek to bring this system to fruition will be garnering 'true' co-operation between governments at both the federal and state levels to build a fair system that will meet the needs of employers and employees well into the future.

The ultimate outcome is one in which I will be an interested observer but have no direct role to play as I will be retiring as President of the Commission in early 2008.

However, as these matters of policy progress I think 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'.

As far as this Commission is concerned I believe it is well placed to have a continuing and important role in any national industrial relations system. A process of ongoing reform has left this Commission well placed to deliver timely, efficient and fair services to citizens throughout the State, be that under enhanced State legislation, new federal legislation or a combination of both.

In concluding my final report, I would like to record that it has been a singular honour to serve as the tenth President of the Industrial Relations Commission and Industrial Court of New South Wales. There have been many memorable moments, however, one that will always come to mind will be the coming together of the industrial community of this State in 2002 to celebrate the Centenary of the Commission. My hope is that there will be a similar gathering in 2102 to celebrate the bi-centenary of the Commission.

I thank you and your Ministerial colleagues for your assistance over the last 10 years. I also thank the Members of their Commission both past and present for their support (particularly the Vice-President, Justice Michael Walton) and wish them and my successor all the best for the future.

APPENDIX 1

INDUSTRY PANELS

PANEL A

Industries

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

PANEL B/C

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

PANEL D

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

PANEL E

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

APPENDIX 2

OTHER SIGNIFICANT FULL BENCH DECISIONS

Skilltech Consulting Services Pty Ltd and The Australian Workers' Union, New South Wales [2007] NSWIRComm 6; 160 IR 73

An employer appealed the outcome of an industrial dispute. It argued that first instance proceedings were a nullity as the *Workplace Relations Amendment (WorkChoices) Act* 2005 (WRA) came into effect shortly before the decision was delivered. The appellant argued that s 16(1) of the WRA excluded the operation of the *Industrial Relations Act* 1996. The Full Bench held that the power to make orders under s 302 of the *Industrial Relations Act* 1996 was not extinguished by s 16 of the WRA in circumstances where some employees continued to be engaged under the relevant State award *at the time* the industrial dispute arose. The appeal was accordingly dismissed. The Full Bench noted that the union had a right of entry to the workplace under NSW legislation so long as at the time of disputation, at least one employment relationship was governed by the relevant award.

Kim Hollingsworth v Commissioner of Police [2007] NSWIRComm 7; 160 IR 456

This matter involved an application to vary reinstatement orders made following unfair dismissal proceedings at first instance. A notice of motion was filed seeking to strike out the application. The issue on appeal was whether the Industrial Court has power to vary reinstatement orders. A further issue was whether s 43 of the *Interpretation Act* 1987 provides express power to vary reinstatement orders and, whether the Full Bench possesses implied power to re-open reinstatement orders. The Full Bench held that s 43 did not provide power to vary reinstatement orders and that there is no express nor implied power to re-open the reinstatement order. The Full Bench noted that the privative clause pursuant to s 179 of the *Industrial Relations Act* 1996 renders orders and decisions of the Commission final.

NSW Attorney General's Department v Miller [2007] NSWIRComm 33; 160 IR 185

These proceedings involved an appeal against a decision which had resulted in an order for reinstatement. The employee was in a senior position within the public sector and was dismissed for harassment and sexual harassment of fellow employees. An appeal was lodged by the employer against the decision at first instance and a cross appeal was lodged by the appellant regarding refusal of costs in his favour. The Full Bench considered the meaning of harassment and sexual harassment, and found both were made out in part. Errors were identified at first instance, and the primary issue for Full Bench determination was whether the dismissal was harsh, unreasonable or unjust. It was held that dismissal was harsh and re-employment was ordered on conditions. Leave to appeal on the cross appeal was refused.

St Hilliers Contracting Pty Ltd v WorkCover Authority of NSW [2007] NSWIRComm 39; 162 IR 241

The appellant applied to overturn a conviction and sentence after having been found guilty by an Industrial Magistrate, pursuant to under s8(2) of the *Occupational Health and Safety Act* 2000. The Full Bench granted leave to appeal on the basis that the Magistrate denied the defendant procedural fairness at first instance by failing to consider a defence to the charge under s28(a) of the Act.

The Full Bench held that for a s28(a) defence to succeed, a three-stage test must be applied. The first limb of this test examines the "causative facts" that lead to the committing of the offence: see *McMartin v BHP* (1988) 100 IR 241 at 245-246; *Rodney Dale Morrison v Coal Operations Australia Limited* [2004] NSWIRComm 239. If these facts show that the defendant has not complied with the relevant section of the Act, an offence has been committed. In the instant case, an offence was found to have been committed.

The second limb involves the concept of "reasonable foresight": *WorkCover Authority of NSW (Inspector Byer) Cleary Brothers (Bombo) Pty Ltd* (2001) 110 IR 182 at 204. More specifically, the Court must ask whether the accident was "reasonably foreseeable" given the subjective circumstances of the particular case at hand. As the Full Bench explained;

> ... if there is the potential for serious injury, this factor becomes of greater weight and significance; on the other hand, if the happening of an event is not reasonably foreseeable then it will not generally be reasonably practicable to make provision against that event (at [28]).

The third limb involves a consideration of "reasonable practicability", defined by the Full Bench as, "making provision against the happening of the event" (at [37]). Factors to be taken into account in such a determination include "the costs, difficulty and trouble necessary to avert the risk". These matters should then be assessed according to the balance of probabilities.

On the second limb, the defence succeeded. The Full Bench accepted that the matter involved a similar factual scenario to that outlined by the Full Bench in *WorkCover Authority of NSW (Inspector Childs) v Kirk Group Holdings Pty Ltd and Anor* (2004) 135 IR 166 at [134]-[137]. However, the defence failed the third stage of the test, with the Full Bench finding that, on the facts, there were a number of accident management strategies available to the defendant that had not been properly implemented. Consequently, the appeal was dismissed.

New South Wales Nurse's Association on behalf of Rudder v Booroongen Djugen Aboriginal Corporation [2007] NSWIRComm 89

This was an appeal against a decision at first instance to dismiss an application for unfair dismissal under s 84 of the *Industrial Relations Act* 1996. At first instance it was found that the appellant had displayed insubordinate behaviour towards management, a dereliction of duty and intimidated other staff. On appeal the Full Bench held that there was insufficient evidence to reach these conclusions. The Full Bench reiterated the requirement that if an employer is to succeed in justifying the summary dismissal of an employee, especially where there are allegations that may amount to criminal conduct, the evidence must be clear and cogent: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; *Briginshaw v Briginshaw* (1938) 60 CLR 336. The Full Bench found that the dismissal was harsh, unjust and unreasonable in accordance with the Act and ordered reinstatement and ordered an appropriate amount of remuneration in back-pay.

Attorney General's Department of NSW v Dafkovski [2007] NSWIRComm 94; 164 IR 268

This was an appeal against a decision at first instance that the respondent, a Deputy Registrar at the Downing Centre Local Court, was unfairly dismissed on the basis of sexual harassment allegations. While leave to appeal was granted, the appeal was dismissed. The Full Bench found that the appeal involved "a mixed question of fact and law". In those circumstances, "an appellate court will substitute its own judgments only if the trial judge has fallen into error of law or has made a finding of fact that is clearly wrong or is not reasonably open on the evidence". In this case, there was no demonstrable error of law. There was also a "compelling" factual basis to the trial judge's findings. Consequently, the Full Bench decided not to intervene.

Small v Tyco Projects (Australia) Pty Ltd [2007] NSWIRComm 97; 162 IR 222

This case involved an appeal arising from an unfair contract claim under s 106 of the *Industrial Relations Act* 1996. The contract involved a Deed of Release. At first instance, the contract was found not to be unfair because the applicant chose to sign it under her own volition.

The Full Bench granted leave to appeal on public interest grounds and upheld the appeal. The Deed of Release was found to constitute an unfair contract for three main reasons. First, it imposed conditions to pay fringe benefits tax on the applicant which were in fact payable by the respondent, in accordance with s 66(1) of the *Fringe Benefit Tax Assessment Act.* Second, the relevant test, applied in conjunction with s 106 from *Westfield Holdings v Adams* (2001) 114 IR 241, was found to have been misapplied by the trial judge. The Full Bench held that the test involved an application of the principles outlined in s 105 which included a decision as to whether the Deed was "unfair, harsh or unconscionable". It distinguished between a finding that the "contract is not unconscionable" and that it is "nevertheless harsh or unfair". Mere "unfairness", which did not have the same strength of meaning as "unconscionability", was said to suffice under the s 105 test and the contract was deemed "unfair". In deciding what constituted "unfairness", primacy was to be given to the "particular circumstances of the individual contract concerned", as held by the Court in *Westfield.* Accordingly, the Full Bench varied the Deed only so much as was necessary to right the wrong, and set aside the first instance decision to that extent.

Holburn & Anor v Shig Pty Ltd & Ors [2007] NSWIRComm 104; 163 IR 457

The respondent filed an interlocutory motion in an unfair contract matter. The respondent argued that the Commission lacked jurisdiction to hear the matter because the plaintiff relied upon federal instruments - in this case, s 51AEA of the *Trade Practices Act* 1975 (Cth). It contended that the appropriate forum was the Federal Court. The Full Bench examined the respondents' contentions in connection with s 109 of the *Constitution*. It found no direct, nor indirect

inconsistency between Commonwealth and State laws. Both systems of law were read as having different applications and purposes. The motion was dismissed.

Golden Swan Investments (Australia) Pty Ltd v WorkCover Authority of NSW (Inspector Pryor) (No 2) [2007] NSWIRComm 144; 164 IR 194

This matter concerned a severity appeal against a sentence imposed by the Chief Industrial Magistrate for a breach of s 8(2) of the *Occupational Health and Safety Act* 2000. The Full Bench granted leave to appeal and explained the position on issues of "parity" which the appellant relied on as a central ground of appeal. The appellant claimed that the sentence was manifestly excessive because in the same first instance matter, the trial judge imposed a comparatively lesser sentence upon a co-defendant company.

The Full Bench acknowledged that the corporate defendants had "concurrent and overlapping responsibilities" under the Act, but it nevertheless decided that the appellant retained "overall control of the plant and equipment ... its use and its maintenance". It was held that these factors made the appellant "more culpable" than its co-defendant, who bore responsibility for the duties to "put in place systems of inspections and training to ensure tasks were performed safely". The appeal was dismissed

South Eastern Sydney and Illawarra Area Health Service (formerly Illawarra Area Health Service) v Health Services Union (on behalf of Peisley) [2007] NSWIRComm 157; 165 IR 43

This matter concerned an industrial dispute brought under s 130 of the *Industrial Relations Act* 1996 by security officers at hospitals in the Illawarra area. The officers claimed payment of an allowance for "ancillary fire duties". At first instance the member granted the claim under s 365 of the Act.

The Full Bench granted leave to appeal on public interest grounds, citing a failure by the member at first instance to give adequate reasons for the decision. The Full Bench considered that the decision should have turned on the interpretation of the term, "ancillary" in respect to "fire duties".

After examining these terms, it became clear that they did not appear in the relevant award. Consequently, the Full Bench examined extrinsic materials to assist in its interpretation, consistent with *Kingmill Australia Pty Ltd t/a Thrifty Car Rental v Federated Clerks' Union of Australia, NSW Branch* (2001) 106 IR 217. The Full Bench was unable to discern any entitlement to an allowance by the officers. The Full Bench concluded that:

> ... it was not their responsibility to ensure that written fire procedures were available in a general sense, but that they were accessible in their office. In the same vein, there was no overall responsibility to ensure staffs' participation in training, but merely to participate and assist staff in any training organised by others. The same situation prevailed with respect to the maintenance of records. Again, there was a direct duty to ensure that security officers kept and maintained records of such matters referred to in the circular as directly impacted upon their own specific activities, but not an overall responsibility to ensure that such records involving all employees at the hospital and the totality of the hospital operations were maintained or recorded.

Accordingly, the Full Bench upheld the appeal and ordered that no allowance was payable.

New South Wales Nurses' Association (on behalf of Prior) and South Eastern Sydney and Illawarra Area Health Service [2007] NSWIRComm 164; 164 IR 225

This was an appeal against a first instance decision dismissing an unfair dismissal application in circumstances in which it was alleged that the employee, a registered nurse, had assaulted a resident at an aged care facility. The member at first instance held that an assault did in fact occur which substantiated summary dismissal. On appeal, the Full Bench found that the key question to be decided was whether the Commission erred in making this finding by "mechanically applying a mere preponderance of probabilities, or, did it reach a state of reasonable satisfaction, bearing in mind the seriousness of the matters alleged?". In formulating this question, the Full Bench cited the reasoning of *Dixon* J in *Briginshaw v Briginshaw* (1938) 60 CLR 336:

The Full Bench re-examined the evidence and found that the member at first instance had made an error of fact in determining that an assault had been committed. Evidential inconsistencies and insufficient attention paid to certain condemnatory facts meant that an assault was not be established. Properly considered, the evidence lead to the conclusion that the dismissal of the nurse was harsh, unjust and unreasonable in the circumstances. The Full Bench went further, stating that even if the employee was guilty of a "momentary lapse, responsive to some level of

aggression" from the resident, the fact of the employee's "unblemished employment record", should have provided reasonable security from summary dismissal (at [67]).

Bros Bins Systems Pty Ltd v Inspector Ching (No. 2) [2007] NSWIRComm 184

The appellant claimed that a conviction under Occupational Health and Safety legislation at first instance was invalid due to the exercise of remitter by the Full Bench to the trial judge under s 197A(7) of the *Industrial Relations Act* 1996. It was argued that this section of the Act did not empower the Full Bench to remit proceedings.

In determining the matter the Full Bench held that there is a reasonable basis to conclude that powers given to the Full Bench under s 197A(7) are sufficiently wide to empower it to remit proceedings. The Full Bench stated that the legislature expressly conferred on the Full Bench power to convict and sentence a defendant. Further, this did not detract from the power of the Full Bench to "make a decision in the matter in accordance with the law", as provided by the legislation.

Yarramul Pty Ltd t/as La Porchetta Mulwala and Mulwala Golden Inn Restaurant Pty Ltd v Office of Industrial Relations [2007] NSWIRComm 230

This was a severity appeal against a series of maximum penalties imposed upon the appellants at first instance by an industrial magistrate for a number of minor breaches of ss 387(2) and 357 of the Act. The Full Bench accepted the appellants' contention that the penalties were manifestly harsh and excessive and did not reflect a number of significant mitigating factors, unchallenged by the prosecutor at first instance.

The Full Bench varied the sentences pursuant to s 55(2)(b) of the *Crimes (Appeal and Review) Act* 2001. Upon re-sentencing the appellants, the Full Bench considered the principles of general and specific deterrence, noting that the breaches had already been rectified and that principles of specific deterrence had only moderate application. Further, the Full Bench had regard to the principle of totality which it said was the central omission and error of the industrial magistrate at first instance. Taken together in the full context of the offences and the subjective mitigating factors pertaining to the appellant, the Full Bench ordered a significant reduction in the penalty that reflected the minor nature of the breach.

SSWAHS v Kim and Ors [2007] NSWIRComm 241

These proceedings involved an application for leave to appeal and an appeal against the decision of the Chief Industrial Magistrate in proceedings brought by 21 respondents against the Sydney South West Area Health Service (SSWAHS). The respondents were all employed as Nurses at the Royal Prince Alfred Hospital in Camperdown, an inner city suburb of Sydney. The hospital was operated by the appellant.

During the appeal two important issues were identified. The first issue was that the proceedings at first instance were essentially a test case (or perhaps a series of cases which would result in a test case decision) in respect of clause 10(v) of the Public Hospital Nurses' (State) Interim Award which relates to payment of an in-charge allowance for performance of the work of Nursing Unit Managers. Related to this aspect was the fact that the claims were brought pursuant to the small claims procedure provided by s 379 of the *Industrial Relations Act* 1996. The second issue was that, notwithstanding the requirements of s 371 of the Act which applied to the proceedings at first instance, there was no attempt by his Honour to comply with the obligation on him to conciliate the proceedings before him.

The Full Bench held it inappropriate for a magistrate to hear a test case under the jurisdiction of the small claims division. The Full Bench held that there was a failure at first instance to have regard to the mandatory conciliation provision under s 371 of the Act. Failure to do so meant that leave to appeal was granted and the appeal was upheld. The matter was remitted to the Chief Industrial Magistrate for determination.

Industrial Registrar v Matters [2007] NSWIRComm 250

These proceedings were commenced by notice of motion when the Industrial Registrar sought declarations that Paul Raymond Matters, the respondent, had been guilty of contempt of the Industrial Relations Commission of New South Wales, in the terms set out in an application for orders filed with the notice of motion. This was consequent upon an order of a member of the Court directing the Industrial Registrar to commence such proceedings.

The proceedings were dismissed by a Full Bench of the Industrial Court as being statute barred.

In the reasons for decision the Full Bench dealt with the law of contempt before the Industrial Court noting that an offence of contempt before the Court is premised upon ss 164(2), 398 and 399 of the Act, confirming the approach in *Crewdson v DG NSW DADHC (No 2)* [2006] NSWIRComm 336 that the Commission possesses power to order contempt proceedings. Further, it was held that unlike contempt proceedings at common law, contempt proceedings under the *Industrial Relations Act* are constrained by time limits.

New South Wales Fire Brigade Employees' Union v New South Wales Fire Brigades [2007] NSWIRComm 265

At first instance, a senior fire-fighter was refused payment of a "Hazmat allowance" after he had suffered workplace injury and had returned to work on restricted duties. This was appealed by the officer's union. The Full Bench characterised the matter as one of interpretation. In deciphering the relevant terms of the award, the Full Bench observed that the purpose of these terms should be assessed by reading the whole of the instrument in the context of the operations for which the instrument was conceived. It held that the factors prescribed by the award for a successful claim to the said allowance did not resemble the conditions under which the fire-fighter was employed. These conditions required that the employee be "engaged in an outduty". The Full Bench held that rehabilitation was not an "outduty". The appeal was dismissed.

Auscare Corporation Pty Ltd v New South Wales Department of Commerce [2007] NSWIRComm 271

The defendant was a self-represented litigant who appealed a sentence resulting from a conviction for breach of an award. The Full Bench assessed whether the appellant had been denied the requisite standard of procedural fairness required to be applied to matters involving an unrepresented litigant. Procedural fairness was found to have been denied to the appellant in circumstances where sentences were imposed by the Chief Industrial Magistrate at first instance, in excess of jurisdiction.

A majority of the Full Bench found that the main question requiring the Court's consideration was whether the sentence could be altered after a rehearing of the evidence by the appeal Court, rather than remitting the matter to the Court at first instance. It was held that the Full Bench did possess this power, derived from s 191(2) of the *Crimes (Local Courts Appeal and Review) Act* 2001. The appeal was upheld. The orders and sentence of the magistrate were quashed and the matter set down for rehearing.

Notification under Section 130 by the PSA of a dispute with Department of Education and Training re loss of hours, Re [2007] NSWIRComm 284

The Department of Education and Training filed a strike out application against an unfair dismissal claim brought by the Union. That matter and a dispute filed by the Union were referred to the Full Bench for consideration.

The Full Bench held that the Union could succeed in its challenge to the Department's application if it could demonstrate that the Commission has the power to grant relief under dispute proceedings, in accordance with the principle in *Virtue v NSW Department of Education* (1999) 92 IR 428. The Full Bench stated that, "dispute proceedings should not be diverted nor should the Commission's dispute resolution functions and powers be depreciated by reference to more specific powers available to the Commission under the Act which may intersect with part of the subject matter of those proceedings". The Department's motion was dismissed and the matter was remitted to the Commission at first instance

APPENDIX 3

TIME STANDARDS

Industrial Relations Commission

Applications for leave to appeal and appeal

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 6 months	50%	**67.5%**	50%	**50.0%**
Within 12 months	90%	**87.5%**	90%	**78.2%**
Within 18 months	100%	**95.0%**	100%	**87.6%**

Award Applications [including Major Industrial Cases]

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 2 months	50%	**85.0%**	50%	**66.5%**
Within 3 months	70%	**87.7%**	70%	**90.2%**
Within 6 months	80%	**90.4%**	80%	**97.6%**
Within 12 months	100%	**94.0%**	100%	**98.6%**

Enterprise Agreements

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 1 month	75%	**86.4%**	75%	**78.6%**
Within 2 months	85%	**93.2%**	85%	**89.3%**
Within 3 months	100%	**96.4%**	100%	**82.9%**

Industrial Disputes

Time to first listing	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 72 Hours	50%	**51.8%**	50%	**47.1%**
Within 5 Days	70%	**66.3%**	70%	**67.5%**
Within 10 Days	100%	**83.8%**	100%	**88.4%**

Applications relating to Unfair Dismissal

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 2 months	50%	**54.3%**	50%	**59.6%**
Within 3 months	70%	**66.1%**	70%	**68.0%**
Within 6 months	90%	**82.0%**	90%	**83.5%**
Within 9 months	100%	**94.5%**	100%	**90.8%**

Time Standards

Industrial Court

Applications for leave to appeal

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 9 months	50%	**60.1%**	50%	**70.6%**
Within 12 months	90%	**78.9%**	90%	**76.5%**
Within 18 months	100%	**94.2%**	100%	**84.3%**

Prosecutions under OHS legislation

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 9 months	50%	**26.2%**	50%	**21.4%**
Within 12 months	75%	**43.8%**	75%	**35.3%**
Within 18 months	90%	**68.4%**	90%	**61.3%**
Within 24 months	100%	**82.8%**	100%	**84.4%**

Applications for relief from Harsh/Unjust Contracts

Time from commencement to finalisation	Standard for 2006/ Achieved in 2006		Standard for 2007/ Achieved in 2007	
Within 6 months	30%	**19.3%**	30%	**10.6%**
Within 12 months	60%	**59.8%**	60%	**26.1%**
Within 18 months	80%	**73.4%**	80%	**41.6%**
Within 24 months	100%	**80.4%**	100%	**54.2%**

APPENDIX 4

COMMITTEES

Library Committee

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

Education Committee

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

Section 106 Committee

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

Award Review Committee

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

Building Committee

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

APPENDIX 5

LEGISLATIVE AMENDMENTS

***Industrial and Other Legislation Amendment (APEC Public Holiday) Act* 2007 No 15**

This Act commenced on 4 July 2007. It clarified the interpretation of the public holiday appointed on 7 September 2007 in metropolitan Sydney to facilitate the holding of an *Asia Pacific Economic Conference* meeting on that day.

***Police Superannuation Legislation Amendment Act* 2007 No 25**

This Act commenced on 4 July 2007. It provides greater flexibility to the manner in which payment is made of compulsory employee superannuation contributions by way of salary sacrifice arrangements. Provision is also made to clarify the payment of incapacity benefits and expand the categories of incapacities that qualify for the payment of benefits.

***Superannuation Legislation Amendment Act* 2007 No 28**

This Act commenced on 4 July 2007. It provides greater flexibility to the manner in which payment is made of compulsory employee superannuation contributions by way of salary sacrifice arrangements.

***Partnership Amendment (Venture Capital) Act* 2007 No 43**

This Act commenced on 1 November 2007. It enables early stage venture capital limited partnerships, which are currently within the jurisdiction of the Industrial Relations Commission of New South Wales, to be registered as incorporated limited partnerships, pursuant to the *Partnership Act.*

Evidence Amendment Act 2007 No 46

This Act was assented to on 1 November 2007 and is yet to commence. The amendment makes miscellaneous alterations to the *Evidence Act* 1995*, Civil Procedure Act* 2005 and the *Criminal Procedure Act* 1986.

***Crimes (Sentencing Procedure) Amendment Act* 2007 No 50**

This Act was assented to 1 November 2007 and has yet to commence. It makes provision to take into account further aggravating and mitigating factors during sentencing. A number of provisions will affect sentencing for offences against the *Occupational Health and Safety Act* 2000.

***Police Amendment Act* 2007 No 68**

This Act was assented to on 1 November 2007 and has not yet commenced. The amendment stipulates new terms for the appointment and termination of certain categories of police officers. It specifies a maximum period of employment of 3 years for all employees under this Part. Further, all selections and decisions to maintain employment are required to be made on merit and only after all complaints against officers are investigated by the Commissioner of Police or the Ombudsman.

***Evidence (Audio and Audio Visual Links) Amendment Act* 2007 No 75**

This Act received assent on 1 November 2007 and is yet to commence. The provisions facilitate the giving and receiving of evidence, and the making of submissions, in proceedings in NSW courts, by audio and audio visual links from places other than the places where the courts are sitting and makes provision with respect to appearances.

APPENDIX 6

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

***Mine Health and Safety Regulation* 2007**

This regulation commenced 1 September 2007. It prescribes rules that assist the operation of the *Mine Health and Safety Act* 2004 in order to secure the health, safety and welfare of persons in connection with certain mines (but not coal operations). The amendment provides detailed specifications about the classification of mines, safety management plans, management safety responsibilities, risk assessments and control measures, working arrangements, mine plans, competence standards, as well as notifications, records and reporting.

***Mine Subsidence Compensation Regulation* 2007**

This regulation commenced 1 September 2007. It prescribes a number of rules relating to the payment of contributions to and from the Mine Subsidence Compensation Fund by proprietors of colliery holdings.

***Passenger Transport Regulation* 2007**

This regulation commenced on 1 September 2007. It prescribes the use of driver authority cards and general obligations of drivers of public passenger vehicles other than ferries. The amendment also establishes rules for passenger conduct and the contractual obligations of transport operators which, by proxy, provide industrial rights to drivers of public passenger vehicles.

***Shops and Industries Regulation* 2007**

This regulation commenced on 1 September 2007. It clarifies and establishes further rules with which businesses must comply in order to open on weekends or obtain exemptions from opening and closing hour restrictions under the *Shops and Industries Act* 1962. The amendment also prescribes new classifications of shops that fall within the purview of the Act.

***Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation* 2007**

This regulation commenced on 1 September 2007. The substantive effect of the amendment is that it prescribes that emergency service workers injured outside NSW (but within the Commonwealth of Australia) are covered by workers compensation provisions under the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987.

APPENDIX 7

MATTERS FILED IN INDUSTRIAL RELATIONS COMMISSION (other than in the Industrial Court)

Matters filed during period 1 January 2007 to 31 December 2007 and matters completed and continuing as at 31 December 2007 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 1.1.2007 – 31.12.2007	Completed 1.1.2007 – 31.12.2007	Continuing as at 31.12.07 (including previous years)
APPEALS	20	31	14
Appeal - from Industrial Registrar	1	1	0
Appeal - from an Award matter	1	0	1
Appeal - from a Child Protection matter	0	0	0
Appeal - from a dispute matter	6	6	3
Appeal - from an unfair dismissal matter	11	20	6
Appeal - other	1	4	4
AWARDS	802	659	176
Application create new Award	22	30	6
Application vary an Award	201	197	20
Application – State Wage Case	0	1	1
Review of Award	572	423	149
Application for exemption (s.18)	0	0	0
Award - other	7	8	0
DISPUTES	574	535	248
s130 of the Act	524	492	229
s130, s380 of the Act	3	3	1
s332 contract determination	15	13	8
s332, s380 of the Act	1	2	0
s146A of the Act	29	24	9
s146Bof the Act	2	1	1
ENTERPRISE AGREEMENTS	28	28	1
Approval (Employees and Union)	1	1	0
Approval (Employees)	4	4	0
Approval (Union)	22	22	1
Other	1	1	0
UNFAIR DISMISSALS	458	478	134
Application (by individual only)	185	198	33
Application (representative)	126	143	43
Application (organisation representative)	147	137	58
OTHER	159	175	72
Contract Agreements	0	0	0
Contract Determinations	4	7	3
Contract of Carriage (claim for compensation)	3	25	4
Application under Child Protection (Prohibited Employment) Act	0	2	1
Application under Commission for Children and Young People Act	1	0	1
Application for Demarcation Order	0	6	2
Registration pursuant to Clothing Trades Award	39	37	4
Application extend duration of Industrial Committee	6	1	6
Application for reinstatement injured employee (by individual)	5	3	3
Application for reinstatement injured employee (by organisation)	6	7	4
Protection of injured workers from dismissal - Workers Compensation Act 1987	1	0	1
Application for Review of Order under s181D *Police Service Act*	40	31	21
Application for Rescission of Order under s173 *Police Service Act*	18	18	5
Application for Relief from Victimisation s213 of the Act	19	22	10
Child Employment Principles Case	0	1	0
Arbitrations concerning certain service contracts in the public health system generally	1	0	1
Miscellaneous (not categorised)	16	15	6
SUB-TOTAL	**2041**	**1906**	**644**

APPENDIX 8

MATTERS FILED IN INDUSTRIAL COURT

Matters filed during period 1 January 2007 to 31 December 2007 and matters completed and continuing as at 31 December 2007 which were filed under the *Industrial Relations Act* 1996.

INDUSTRIAL COURT OF NEW SOUTH WALES

Nature of Application	Filed 1.1.2007 – 31.12.2007	Completed 1.1.2007 – 31.12.2007	Continuing as at 31.12.07 (including previous years)
APPEALS	55	52	40
Appeal from Local Court (Industrial Magistrate)	14	12	7
Appeal – superannuation	10	4	10
Appeal – OHS prosecution	14	12	11
Appeal – against decision of VETAB	1	3	0
Appeal – s106 matter	16	19	12
Appeal – other	0	2	0
CONTRAVENTION	0	2	0
Contravention of Dispute Order s139 of the Act	0	2	0
HARSH CONTRACTS	51	207	178
Application under s106 of the Act	51	207	178
PROSECUTIONS	93	173	187
Offences under *Industrial Relations Act* or *Regulations* (s.397)	0	0	0
Prosecution – s8(1) *OHS Act* 2000	37	63	64
Prosecution – s8(2) *OHS Act* 2000	25	54	41
Prosecution – s9 *OHS Act* 2000	1	4	1
Prosecution – s10(1) *OHS Act* 2000	6	9	11
Prosecution – s10(2) *OHS Act* 2000	2	7	4
Prosecution – s11 *OHS Act* 2000	0	3	1
Prosecution – s13 *OHS Act* 2000	0	0	0
Prosecution – s20(1) *OHS Act* 2000	0	1	2
Prosecution – s26(1) *OHS Act* 2000	14	20	49
Prosecution – s81(1) *OHS Act* 2000	0	2	2
Prosecution – s92 *OHS Act* 2000	0	0	0
Prosecution – s94 *OHS Act* 2000	0	0	0
Prosecution – s15(1) *OHS Act* 1983	0	2	1
Prosecution – s16 *OHS Act* 1983	0	0	0
Prosecution – s16(1) *OHS Act* 1983	0	2	0
Prosecution – s16(2) *OHS Act* 1983	0	0	0
Prosecution – s17(1) *OHS Act* 1983	0	6	0
Prosecution – s18(1) *OHS Act* 1983	8	0	9
Prosecution – s18(2)(a) *OHS Act* 1983	0	0	0
Prosecution – s19(a) *OHS Act* 1983	0	0	0
Prosecution – s27(1) *OHS Act* 1983	0	0	0
Prosecution – s50(1) *OHS Act* 1983	0	0	2
Prosecution –not categorised *OHS Act* 2000	0	0	0
OTHER	33	51	31
Declaratory jurisdiction (s154, s248)	9	7	9
Cancellation of registration industrial organisation	8	5	3
Civil Penalty for breach of industrial instrument	1	20	2
Monetary claim s357 of the Act	0	0	1
Monetary claim s365 of the Act	1	2	6
Monetary claim under *Long Service Leave Act* 1955	0	0	0
Unlawful Dismissal - s23 OHS Act 2000	3	2	1
Miscellaneous (not otherwise categorised)	11	15	9
SUB-TOTAL	**232**	**485**	**436**

TOTAL (IRC & IC MATTERS)	**2273**	**2391**	**1080**