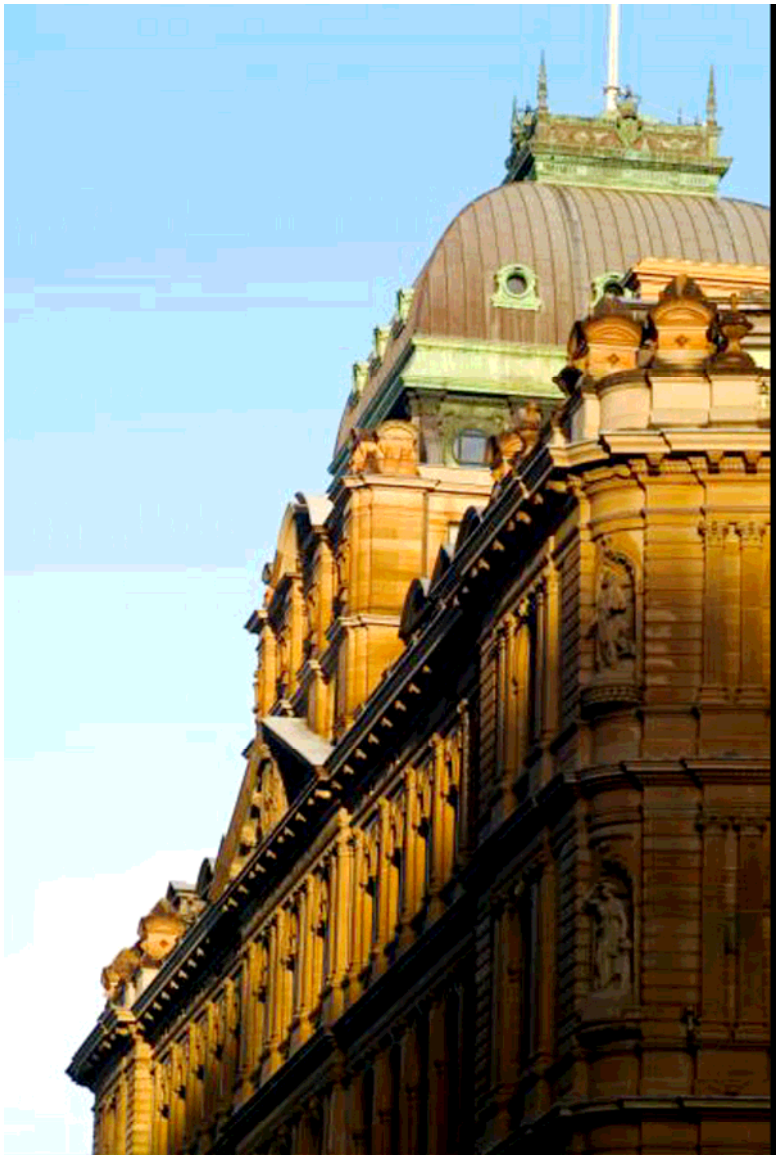
The Industrial Relations Commission

of

New South Wales

Annual Report



Year Ended 31 December 2011

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Cover: ***Upper facade and Dome, Chief Secretary's Building***

"The architecture, decoration and furnishing of the Chief Secretary's Building (known as the Colonial Secretary's Building until 1959) were a collaborative effort between the colonial architect James Barnet and political supremo Sir Henry Parkes. An important example of late 19th-century architecture, the building and its artworks, which include grand statuary, allegorical figures and international decorative arts, are a fitting metaphor for the aspirations of the colonial government"

Extract from *Chief Secretary's Building - A Poem in Stone*
Department of Commerce 2007, page 3.
Photo: Eric Sierins 2005

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.

The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2011

The President

Industrial Relations Commission of New South Wales

47 Bridge Street, Sydney

The Honourable Mr Gregory Pearce MLC
Minister for Finance and Services, and
Minister for Illawarra
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

17 August 2012

Dear Minister,

I have the honour of furnishing to you for presentation to Parliament the Sixteenth 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 2011.

Yours sincerely,

The Honourable Justice R P Boland
President

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INTRODUCTION

The Sixteenth 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 operates at two distinct levels. As an industrial tribunal the Commission seeks to ensure that industrial disputes arising between parties in this State are resolved quickly, in a fair manner and with the minimum of legal technicality. As a superior Court within the New South Wales justice system, the Industrial Court interprets and applies the law with regard to matters, both criminal and civil, filed and the rules of evidence and other formal procedures apply.

I wish to note, with appreciation, the work of two former members of the Commission, Deputy President John Grayson and Commissioner Peter Connor, both of whom reached the statutory retirement age of 65 during the course of the year.

Deputy President John Grayson, who was appointed to this Commission on 29 March 2000, retired with effect on 8 July 2011. While there was no formal farewell ceremony held for him, at an internal function for John I noted:

> "In his 11 years with the Commission his peers came to admire and respect him for his extraordinary capacity to deal with industrial parties across the broad spectrum of disputes that came before him as a senior member of the Commission;
> he won respect of not only his colleagues at the Commission but also that of the bar, solicitors, unions and employers;
> his discharge of the functions of his office, particularly in the Illawarra and in the local government area, was outstanding.
> John brought to the Commission a wealth of experience in industrial relations borne of his time with the union movement, an innate sense of fairness, political nous of a high order and an intelligent, open and friendly manner that even the most cynical were prepared to trust. Few people possess them and, I noted, the Commission was most fortunate that it was able to avail itself of such qualities for the past 11 years"

Commissioner Peter Connor, who was appointed to the Commission on 15 May 1987, retired with effect on 14 November 2011, after nearly 25 years as a Commissioner having discharged the functions of his office under three Acts (1940, 1991 and 1996). In my tribute to the Commissioner I noted:

> "Peter Connor has seen it all: the very best of industrial behaviour and the very worst. He has conciliated and arbitrated in countless disputes, unfair dismissal claims, wage claims and claims relating to all manner of employment conditions. He has had to deal with complex jurisdictional questions, statutory interpretation, contract determination issues, demarcation issues, victimisation claims, underpayment of wages and the list goes on.
>
> Dealing with these matters requires patience, a strong sense of fairness, an unbiased but inquiring mind, a touch of humanity and a good dose of scepticism, because once the chaff is sorted from the grain not all dismissals are unfair.
>
> Peter has an innate sense of fairness as well as the other qualities I have mentioned. He also has a well-tuned sense of what will work and what won't in an industrial context. Those characteristics have been honed to a fine edge over the many years he has served as a member of this Commission.
>
> Peter has strived to do his best over nearly a quarter of a century as a member of this venerable institution. He has made a marvellous contribution to its work and he will be remembered for it".

On behalf of the Members and staff of this Commission, I wish them both all the best for the future.

During the year the Government made a number of significant pronouncements that have impacted or will impact on the Court and the Commission. Whilst I readily accept that policy is a matter for the Government of the day, during the year I expressed my surprise and disappointment that decisions to remove work from the Court and the limits imposed on the Commission in terms of discharging its role in providing a framework that is reasonable and fair in relation to wages and conditions of public sector employees, appeared contrary to previously stated policy or information conveyed to me and was not, in accordance with long-standing protocols, communicated or discussed with me prior to being announced.

Throughout the course of the year I have met with the Attorney General, who has portfolio responsibility for the Industrial Court and with the Minister for Finance and Services, who has responsibility for the remainder of the Act. Those discussions were similar to those held with the previous Government, that is, they related to proposals by me for the transfer of suitable work to the institution and the consolidation of various functions under the Commission's umbrella to the benefit of the citizens of the State. None of those discussions have thus far proved fruitful. I make further mention of these discussions in the conclusion to this Report.

I note with appreciation the work of the staff in the Registry who have greatly assisted the Members of the Commission in meeting the demands made during the year. Their dedication is greatly appreciated by the Commission.

I would also take this opportunity to thank Ms Lisa Thomas, my Principal Associate together with Ms Monique Brady and Ms Lydia D'Souza, who job-share the position of second Associate, for the skill and professionalism with which they dealt with matters passing through my Chambers. I also commend the work of my Tipstaff, Mr John Maloney, who provides invaluable assistance.

I also express my thanks to my Research Associates during the course of the year, Ms Anne-Marie Fensom, Simon Daniels and Alexandria Staff. Each displayed thoroughness and consistency of approach in the discharge of the duties of the position.

During the year every effort was made to ensure that the Commission remained focussed and continued to meet the objectives of the *Industrial Relations Act*, particularly in making sure 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.

WHAT WE DO[1]

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;

[1] For a brief history of the Commission see Appendix 9

- 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
- various proceedings relating to promotional and disciplinary actions under the *Industrial Relations Act* 1996 (Chapter 2, Part 7) and the *Transport Appeal Boards Act* 1980.

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 Court (including proceedings for contempt). The major area of jurisdiction exercised in this area relates to breaches of the *Occupational Health and Safety Act* 2000;
- proceedings for declarations of right under s 154;
- proceedings for unfair contract (Part 9 of Chapter 2);
- proceedings under s 139 for contravention of dispute orders;

- proceedings under Parts 3, 4 and 5 of Chapter 5 – Registration and regulation of industrial organisations;
- proceedings for breach of an industrial instrument;
- proceedings for the recovery of money payable under an industrial instrument other than small claims under s 380 (which are dealt with by the Chief Industrial Magistrate or an Industrial Magistrate);
- superannuation appeals under s 40 or s 88 of the *Superannuation Administration Act* 1996;
- proceedings on appeal from a Member of the Commission exercising the functions of the Industrial Court; and
- proceedings on appeal from an Industrial Magistrate or any other court
- proceedings on appeal from a decision of a Member of the Commission exercising functions under Chapter 2, Part 7 of the *Industrial Relations Act* 1996 or from a Board Member exercising functions under the *Transport Appeal Boards Act* 1980, restricted to a point or points of law.

MEMBERSHIP OF THE COMMISSION

JUDGES AND PRESIDENTIAL MEMBERS

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

President

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

Vice-President

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

Presidential Members

The Honourable Justice Francis Marks, appointed 15 February 1993;

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

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

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

Deputy President John Patrick Grayson, appointed 29 March 2000; retired 8 July 2011;

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

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; retired 14 November 2011;

Commissioner Inaam Tabbaa AM, appointed 25 February 1991;

Commissioner Donna Sarah McKenna, appointed 16 April 1992;

Commissioner Elizabeth Ann Rosemary Bishop, appointed 9 April 1997;

Commissioner Alastair William Macdonald, appointed 4 February 2002;

Commissioner David Wallace Ritchie, appointed 6 September 2002;

Commissioner John David Stanton, appointed 23 May 2005;

Acting Commissioner Patricia Ann Lynch, appointed 1 July 2010; appointment expired 30 June 2011;

Acting Commissioner Mark Francis Oakman, appointed 1 July 2010; appointment expired 30 June 2011.

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 Department of Attorney General and Justice.

Mr George Michael Grimson held office as Industrial Registrar and Principal Courts Administrator of the Industrial Relations Commission from 26 August 2002 to 12 December 2008. He was reappointed as Industrial Registrar from 2 February 2009.

DUAL APPOINTMENTS

The following Members of the Commission also held dual appointments as members of the federal tribunal - *Fair Work Australia:*

Deputy President Rodney William Harrison;

Deputy President Peter John Andrew Sams AM;

Commissioner Donna Sarah McKenna;

Commissioner Alastair William Macdonald; and

Commissioner John David Stanton[2].

ANCILLARY APPOINTMENTS

The Honourable Justice Wayne Roger Haylen has held an appointment as Deputy President of the Administrative Decisions Tribunal and as Divisional Head of the Legal Services Division of that Tribunal since 9 June 2008. His Honour also held an appointment as Deputy Chairperson of the Racing Appeals Tribunal since 2003 and was Head of that Tribunal from 2008 to the non-renewal of his appointment during 2011.

The Honourable Justice Conrad Gerard Staff has constituted the Parliamentary Remuneration Tribunal since 28 August 2008.

Sams DP and McKenna C work full-time at *Fair Work Australia* premises at 80 William Street SYDNEY.

The Honourable Justices Francis Marks, Tricia Marie Kavanagh, Conrad Gerard Staff and Anna Frances Backman hold appointments as Deputy Chairpersons of the Medical Tribunal of New South Wales. Their Honours, Staff and Backman JJ since 24 September 2008. Their Honours, Marks and Kavanagh JJ since 7 March 2011.

The Honourable Tricia Marie Kavanagh was appointed as a Deputy Chairperson of the Racing Appeals Tribunal for a period of 12 months from 3 March 2011.

HOW THE COMMISSION OPERATES

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 and have been reviewed regularly since that time to ensure that panels reflect and are able to respond to the ongoing needs of the community. Consequent upon the transfer of the jurisdiction of the former *Government and Related Employees Appeals Tribunal* and an alteration to the manner in which *Transport Appeal Boards* are constituted, two new panels were created with effect from 1 July 2010. Six 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 or oversees the allocation of 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 together with disciplinary and promotional appeals brought by public sector employees (both general public sector and transport public sector employees).

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

The membership of the 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 Commission also has 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.

The policy of the Commission in relation to unfair dismissal applications (s 84) and rural and regional industries is to sit in the country centre at or near where the events have occurred. 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 373 (349)[3] sitting days in a wide range of country courts and other country locations during 2011. There are two regional Members based permanently in Newcastle - Deputy President Harrison and Commissioner Stanton. The Commission sat in Newcastle for 155 (208) sitting days during 2011 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 158 (138) sitting days in Wollongong during 2011.

The Commission convened in over 28 other regional locations in 2011 including Armidale, Ballina, Bathurst, Coffs Harbour, Dubbo, Grafton, Griffith, Lismore, Murwillumbah, Tamworth, Taree, and Tweed Heads.

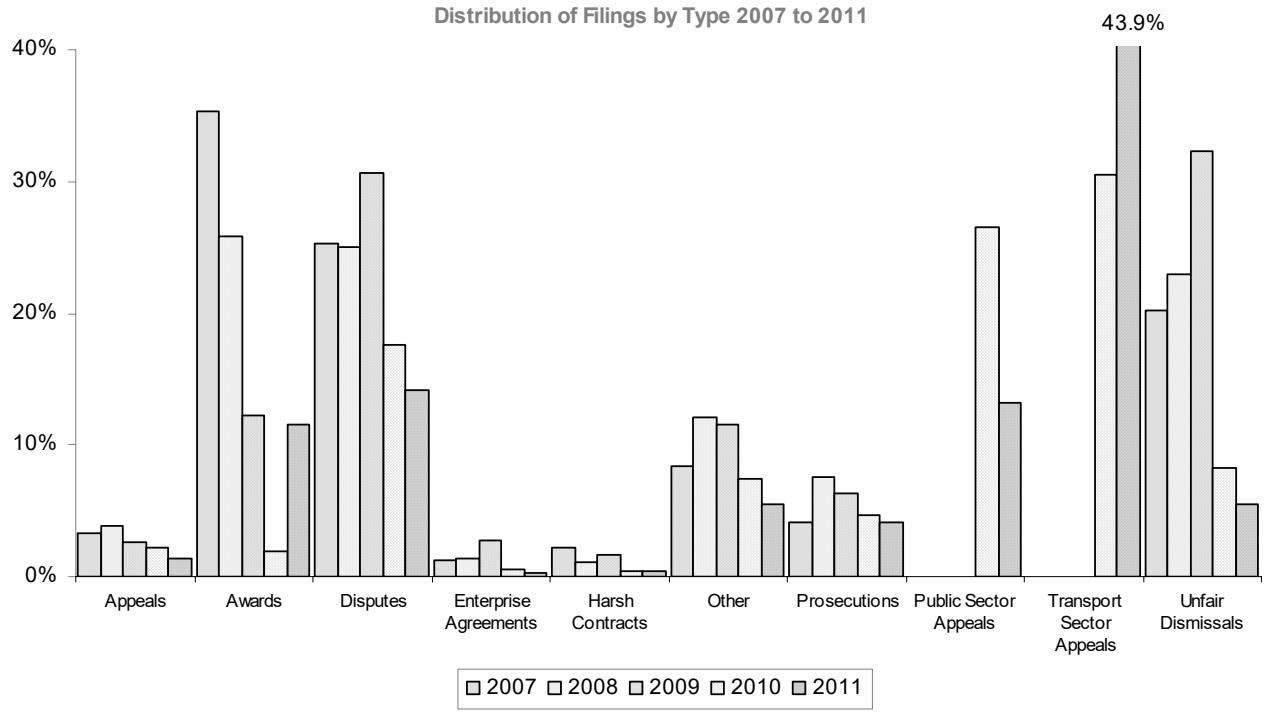
[3] Numbers in brackets are figures from 2010

MAJOR JURISDICTIONAL AREAS OF THE COURT AND THE COMMISSION

THE CHANGING NATURE OF OUR WORK

With the introduction of the *Work Choices* legislation[4] in March 2006 the nature of the work undertaken by the Commission and the Court commenced to change. As will be seen from previous *Annual Reports*, there was a significant decrease in what had been until then the Commission's largest jurisdictional area, unfair dismissals, together with a marked fall in the unfair contract areas, in the period 2005-2006. Unfair dismissal work steadily increased from a low in 2007. However, this work fell away as a consequence of the transfer to the federal jurisdiction of the balance of the private sector from 1 January 2010. A significant area of the Commission's work now arises from appeals brought against disciplinary and promotional decisions by public sector (including transport public sector) employees.

FIGURE A



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

UNFAIR DISMISSALS

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 graphs following show matters filed and disposed of in the past five years (Figure B); the method of disposal in 2009 (Figure C); and median listing times (Figure D).

FIGURE B

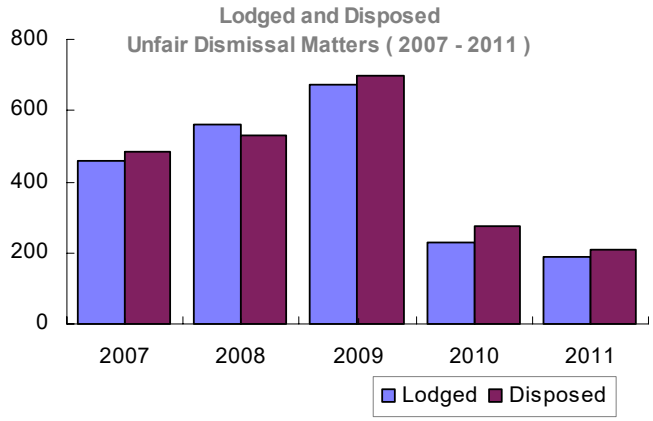


FIGURE C

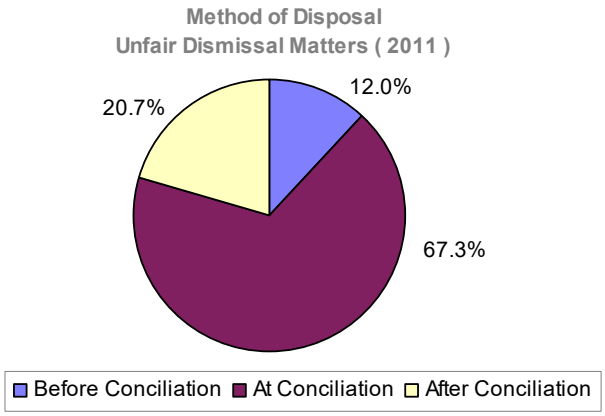
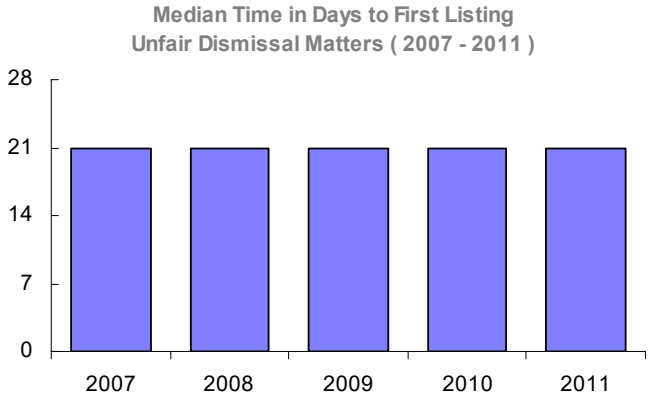
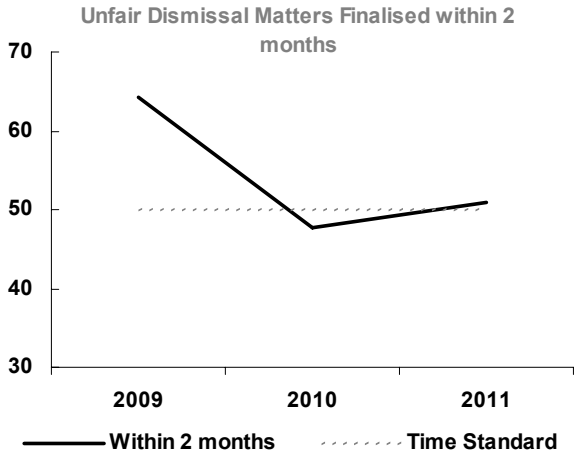


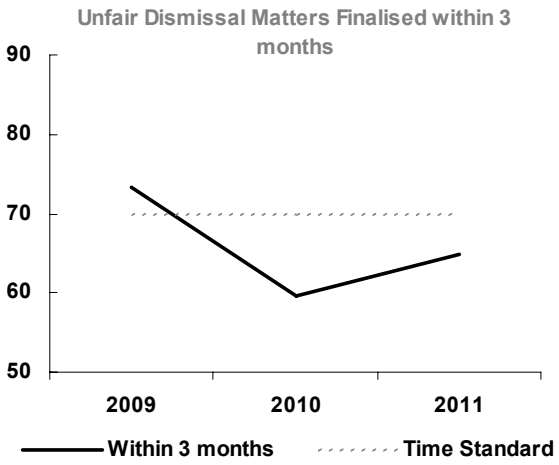
FIGURE D



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 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 returned to pre-*Work Choices* clearance rates during 2009, however, again slowed through 2010 and slightly improved this year (see graphs in Figure E). This would appear to be as a result of the matters being filed having significantly lower prospects of settlement and, when matters proceed to a hearing, are quite protracted.

FIGURE E





INDUSTRIAL DISPUTES

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

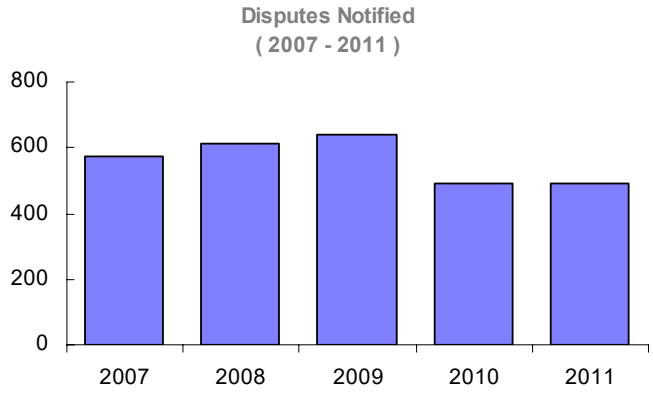
"Industrial dispute" is a broadly defined term linked, as it is, to the definition of "industrial matter" in s 6 of the *Industrial Relations Act* and this area of the Commission's jurisdiction remains significant.

The *Industrial Relations Act* was amended in 2009 to repeal s 146A, which provided that the Commission may assist parties who wished to refer disputes to the Commission where there is an agreement between the parties for this to occur. This was consequent upon the transfer of the balance of the private sector from the State system to the federal system.

However, at the same time s 146B was amended to ensure that parties who had previously agreed could continue to nominate members of the Commission to perform dispute resolution services.

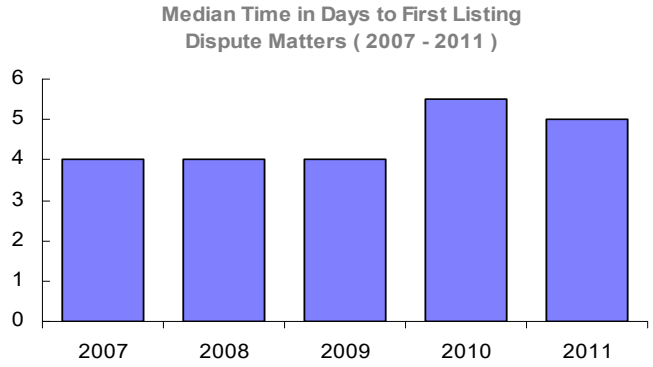
Members of the Commission have extensive experience in the wide range of alternative dispute resolution practices. Over many years the members have developed the skills necessary to help employers and employees resolve their differences drawing, as they do, on both their industrial and legal knowledge. Widely recognised as an 'independent umpire' that can achieve a fair and reasonable result, the Commission has always indicated a preparedness to move quickly to determine any application brought under this or any other provision of the Act. The graph below shows disputes filed in the last five years:

FIGURE F



The Commission responds in a timely way when an industrial dispute is lodged. The time frame is highlighted by Figure G[5] below, which shows the median times from lodgement to first listing.

FIGURE G



[5] The listing of a dispute is often influenced by indications by the notifier of availability of parties to attend a compulsory conference.

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 last triennial Award Review process was effectively completed during 2008. As part of the process leading to the next Award Review in 2011 and having regard to the *Industrial Relations Amendment (Non-operative Awards) Act* 2010 the Commission took submissions from various parties involved in the *State Wage Case* 2010 and conducted further hearings in 2011. Arising out of those processes the Commission made certain Orders and the Registry commenced action late in 2011 to list Awards falling for review for determination in the early part of 2012.

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

Figure H provides details of filings in the award and enterprise agreement areas in the last five years.

FIGURE H

Awards and Enterprise Agreements	2007	2008	2009	2010	2011
Awards					
Application to make award	22	64	34	13	31
Application to vary award	201	252	216	37	61
Enterprise Agreements					
Application enterprise agreement	28	35	57	16	10
Terminated enterprise agreement	19	12	30	4	4
Review of Awards					
Notice of Review issued	572	308	0	0	306
Awards reviewed	431	374	47	5	1
Awards rescinded	5	12	3	0	0
Awards determined to have effect as enterprise agreements	173	169	3	0	6

STATE WAGE CASE

The 2010 State Wage Case decision was the first made following the referral of power to legislate over the industrial conditions of the private sector to the Commonwealth.

As part of their submissions Unions NSW proposed new Wage Fixing principles. These were considered necessary in light of recent national industrial legislative changes. The Minister, the Director of Public Employment, the Local Government and Shires Association, and the Australian Federation of Employers and Industry on the basis of historical significance/development, opposed such proposal.

The Full Bench stated that new principles were necessary in light of the contemporary industrial relations context. The Full Bench proposed new principles drawing on the submissions of each of the parties and stood the matter over to a date early in 2011 to hear parties' replies to each of the proposals.

On 25 March 2011 the Commission in *State Wage Case 2010 (No 2)* [2011] NSWIRComm 29; (2011) 206 IR 218 pursuant to section 51(1) of the *Industrial Relations Act* 1996 fixed new principles noting:

> These principles have been developed to accommodate the changing nature of the jurisdiction of the Industrial Relations Commission of New South Wales under the *Industrial Relations Act* 1996 ("the Act") in light of the creation of a national system of private sector employment regulation, relevantly established by the *Industrial Relations (Commonwealth*

Powers) Act 2009, the *Industrial Relations Amendment (Consequential Provisions) Act* 2010, the *Fair Work Act* 2009 (Cth) and the *Fair Work (State Referral and Consequential and Other Amendments) Act* 2009 (Cth).

On 3 June 2011 the federal tribunal, *Fair Work Australia*, issued a decision with the effect of increasing all modern award minimum wages by $19.40 per week with a National Minimum Wage of $589.30 per week.

Pursuant to the provisions of Part 3 of the *Industrial Relations Act*, it was open to the Commission to issue a Summons to Show Cause why it should not act on the *Annual Wage Review* decision[6] of the *Minimum Wage Panel*, however, took the view, given the changing nature of the industrial landscape, that this was a matter best left to the parties.

At the time of finalising this Report no application had been brought.

UNFAIR CONTRACTS

Under s 106 of the *Industrial Relations Act* 1996 the Court is granted power to declare contracts, whereby a person performs work in any industry, either wholly or partly void, or to vary any such contract, if satisfied that the contract is unfair. As with the unfair dismissal jurisdiction, the introduction of the *Work Choices* legislation in 2006 significantly impacted on filings with the Commission in this area with filings falling by 75%. Figure I shows that trend continues:

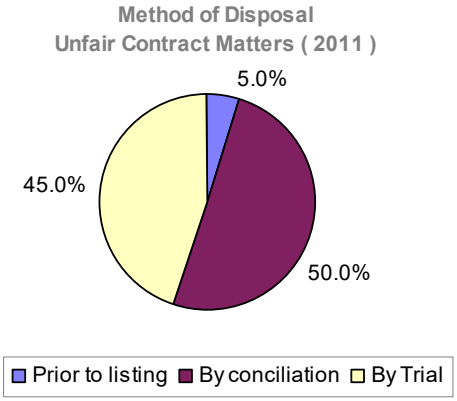
FIGURE I

Unfair Contracts	2007	2008	2009	2010	2011
Filings	51	27	35	13	12

The graph below shows the breakdown in the method of disposal.

[6] *Annual Wage Review 2010-11* [2011] FWAFB 3400;

FIGURE J



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.

The majority of prosecutions brought before the Industrial Court are initiated by the WorkCover Authority of New South Wales. 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.

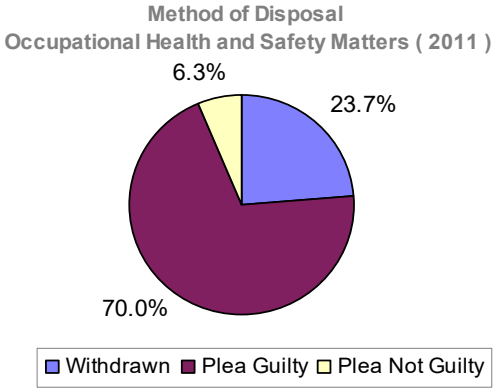
In 2011 this remained a significant area of the Commission's workload given the complexity and seriousness of the matters that fall for determination.

FIGURE K

Occupational Health and Safety Prosecutions	2007	2008	2009	2010	2011
Filings	93	185	131	131	144

The graph below shows the breakdown of how matters finalised during 2011 were determined:

FIGURE L



Upon commencement of the *Work Health and Safety Act* 2011 prosecutions relating to offences arising under that legislation and serious offences arising under the *Occupational Health and Safety Act* 2000 that have not been filed in the Industrial Court prior to the commencement date, will no longer be prosecuted in the Industrial Court but before either the Supreme Court (the most serious offences - Category 1[7]) or the District Court (Category 2[8]).

The Industrial Court will retain jurisdiction to deal with prosecutions filed prior to the commencement of the new legislation including jurisdiction to determine appeals arising from conviction or acquittal.

PUBLIC SECTOR AND TRANSPORT SECTOR APPEALS

On 1 July 2010 the *Government and Related Employees Appeal Tribunal (GREAT)* was abolished and the jurisdiction of that Tribunal was ceded to the Commission with the essential provisions incorporated in a new Part 7 of the *Industrial Relations Act* 1996. At

[7] s 31 *Work Health and Safety Act* 2011
[8] s 32 *Work Health and Safety Act* 2011

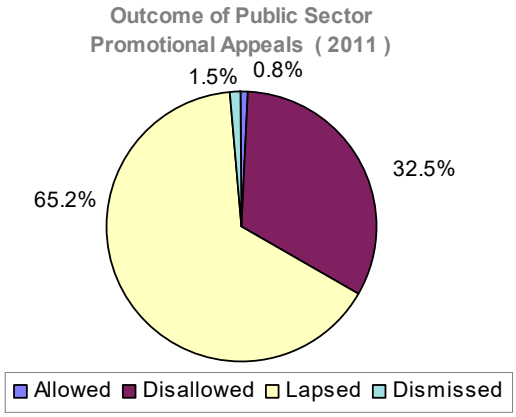
the same time, the constitution of the *Transport Appeal Boards* was altered to provide that a Board was constituted by the President of the IRC or his delegate[9].

Two Panels were established to deal with the new jurisdictions - the *Public Sector Appeals Panel* (PSA) and the *Transport Appeal Boards Panel* (TAB) and two Presidential Members were appointed as head of each Panel with a number of Commissioner Members appointed to each panel. The Senior Chairperson and a Chairperson from *GREAT* were given acting Commissioner appointments for a period of 12 months to ensure a smooth transition of the jurisdictions and also to provide an educative resource for those Members of the Commission assigned to the respective panels.

Those two persons, Patricia Lynch and Mark Oakman, did not have their acting appointments extended and completed duties with the Commission on 30 June 2011. The Commission notes with thanks their willingness to share their knowledge and expertise with the other Members of the Commission, their active participation in ensuring that the policies and procedures the Commission designed were consistent with past practices before the former tribunals and their professional discharge of the functions of their office.

The charts below show how the matters filed in 2011 were disposed of by the Commission and the Board:

FIGURE M Promotional Appeals



[9] s5 *Transport Appeal Boards Act* 1980

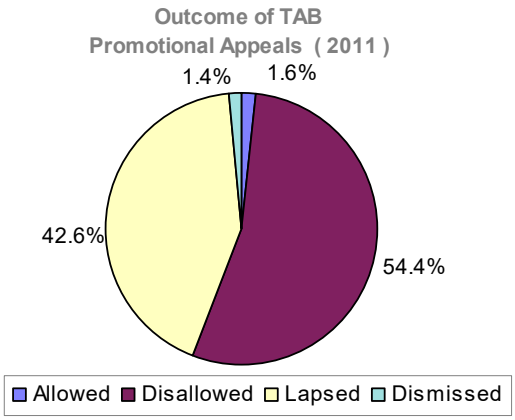
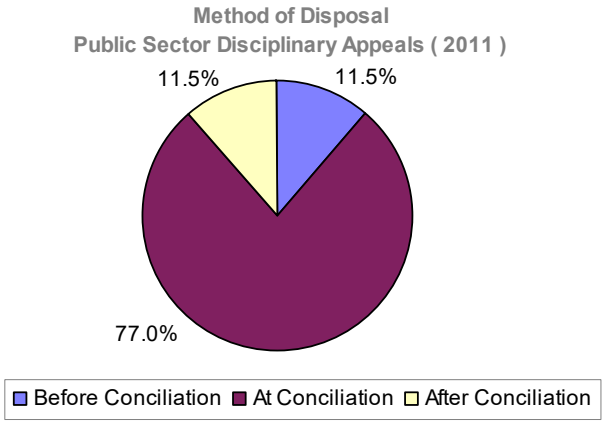
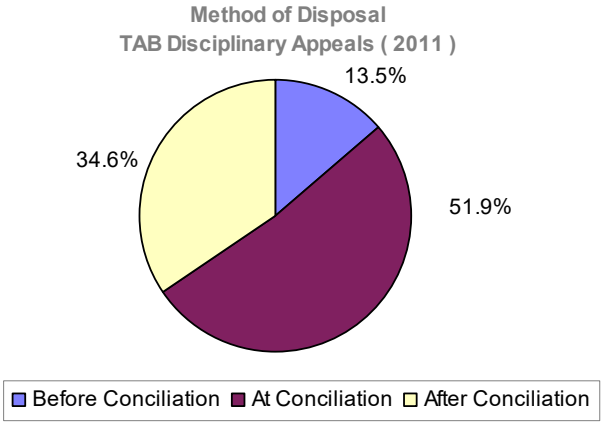


FIGURE N Disciplinary Appeals





SECTION 146B

As mentioned earlier, s 146B of the *Industrial Relations Act* operates to permit industrial parties in the federal system to nominate the Industrial Relations Commission of New South Wales as the dispute resolution provider.

Section 186(b) of the *Fair Work Act* 2009 (Cth) requires an enterprise agreement to include a term that provides a procedure that requires or allows Fair Work Australia or another person who is independent of the employer, employees or employee organisation covered by the agreement, to resolve disputes.

An agreement applies at Bluescope Steel's operations in Port Kembla that nominates the NSW Commission as the dispute resolution provider. In August 2011, Bluescope Steel announced to the Australian Stock Exchange its decision to undertake an extraordinary restructure of its steelmaking operations. The company confirmed it would close one of its two blast furnaces and abandon its export business with the loss of 1000 jobs. The potential for major industrial disruption at the plants was very high.

With the Commission assuming powers under the referral agreement, the matter was allocated to the Vice-President of the Commission, Justice Walton. There followed an exhaustive conciliation process punctuated by issues requiring arbitration concerning such matters as manning (department by department), redundancies, severance payments, rostering issues and the like. In a Statement issued by the Vice-President on 7 December 2011 (*BlueScope Steel (AIS) Pty Ltd and The Australian Workers' Union, New South Wales* [2011] NSWIRComm 162), his Honour stated:

> [5] In terms of the overall restructuring, I should record my congratulations to the parties on ultimately effecting the restructure within a very short timeframe and without industrial disruption. This is not to depreciate the hardships caused by the withdrawal of the company from the export market but to recognise the significant effort and mature judgment exercised by the parties in managing the difficulties arising from the changes to the operations.

The Commission’s involvement was critical to the success of the outcome and the handling of the dispute stands in stark contrast to the 2011 Qantas dispute. Undoubtedly, Bluescope’s Port Kembla plants have a far more volatile industrial history than Qantas.

In the current year 64 dispute notifications were received pursuant to s 146B. This does not represent all of the agreements that rely on s 146B. It would appear there are no records kept of the agreements that nominate the Commission as the dispute resolution provider. In many cases the Commission will not be aware of such an arrangement

between the parties in agreements approved by Fair Work Australia until a dispute arises and the assistance of the Commission is sought.

Many parties to s 146B agreements seek the assistance of the Commission to facilitate work practice change leading to improved efficiency and productivity. This is reflected in the significant use of s 146B in the Hunter Valley construction industry, the electricity industry and other industries. There are some 120 agreements covering several billion dollars of infrastructure construction in the Hunter Valley Coal Chain which have adopted or adapted the model s 146B settlement procedure found on the Commission's website.

The Commission has conducted a number of site inspections and conferences on sites contributing to the success of those projects measured in safety and productivity outcomes. A number of proceedings of this type have taken place in the NSW Power Generation sector.

The largest ongoing project using s 146B in the Hunter Valley is the Newcastle Coal Infrastructure Group (NCIG). In 2008, the parties, while not in dispute, relied upon the broader definition of that term (which includes a question, difficulty or situation that is likely to give rise to an industrial dispute if preventative action is not taken) to seek assistance in facilitation of the communication process prescribed by their industrial agreement.

Deputy President Harrison or, alternatively, Commissioner Stanton, conduct periodic conferences and site inspections at the invitation of the parties to hear progress reports on implementation of the site agreements and achievements of the parties, particularly with respect to productivity and safety. Both members are available for quick response to issues as they arise. There are currently over 90 enterprise agreements approved by Fair Work Australia (FWA) for the Project which, when completed, will be in the order of $2.5 billion.

A further example of the Commission's close involvement is the Bengalla Wilpinjong Expansion Project. The estimated contract value of this project is $65,998,081 and will add two million tonnes to the current twelve million tonnes per annum of production.

Industrial regulation on the Project is in accordance with the *Taggart Global Australia Pty Ltd Wilpinjong CHPP Expansion Project Union Greenfield Agreement 2010-2012* (AE883115 PR515368) ("the Agreement"). Clause 30, Settlement of Disputes of the Agreement is the model s 146B dispute resolution process found in the *Industrial Relations Act*.

FULL BENCH

Full Benches of the Commission and of the Court are constituted by the President usually pursuant to s 156 or s 193 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 2011 Full Benches finalised in excess of 40 matters the majority of which involved appeals. A "snapshot" of those decisions is provided hereunder. All decisions may be accessed from the Commission's *Caselaw* website.

Inspector Fraser v Karabelas [2011] NSWIRComm 56; (2011) 207 IR 228

The appellant appealed against penalties imposed at first instance upon the respondent in three matters arising under s 8(1) by operation of s 26(1) of the *Occupational Health and Safety Act* 2000.

The three prosecutions concerned separate incidents that took place at a construction site in Wollongong in 2006. The first incident involved an employee falling from a 3.35 metres formwork deck onto a concrete floor. There were no handrails, no temporary catch platform and no ladder to the deck upon which the employee was working. The employee was not wearing a safety harness and there was no other fall protection provided to him and hence suffered a severe head injury. The second incident occured one day after the first incident and involved an employee (who was not wearing a harness) constructing formwork for a new formwork deck where there was no handrail or scaffolding at the leading edge of the deck. There was also an incomplete temporary catch platform located

approximately 3.6 metres below the formwork. The employee was at serious risk if he had fallen from the formwork deck. The third incident arose two weeks later where another employee was constructing a formwork column while standing on a work platform supported by formwork frames. There was no temporary catch platform immediately below the edge of the work platform. The employee was not wearing a harness or other fall protection equipment and was therefore placed at risk of serious injury. The respondent entered a guilty plea to the three charges brought against him.

The appellant accepted the primary penalties found at first instance were appropriate, but submitted that the final penalties imposed were manifestly inadequate in all the circumstances and that the primary judge had erred in the application of the principle of totality. The error was said to be particularly demonstrated by the fact that the aggregate fine ordered to be paid by the respondent for the three offences was less than the individual fine deemed appropriate for the third offence alone. It was also submitted that the first instance judge's application of the totality principle had the effect of providing the respondent with a discount for multiple offences, contrary to sentencing principle. The appellant contended this approach failed to impose a sentence properly reflecting the objective seriousness of each of the three offences. Further, the judge at first instance had failed to provide any or adequate reasons in respect of the application of the principle of totality.

The Full Bench found the judge at first instance had given consideration to the principle of totality, but apart from stating that she took that principle into account, precisely how that principle was applied was not disclosed.

The Court was satisfied that there was a manifest inadequacy resulting from the penalty imposed as representing the total criminality of these offences.

Apart from the significance of the first offence again involving a disregard for the safety of employees working at height, these three offences demonstrated a continued refusal to abide by safety laws. There was a repetition of the same deficiencies over the period of three weeks on what was a large construction site. The catch platform in particular was not set at a proper height even after an employee had been seriously injured. The Inspector had twice warned the respondent about the risk to employees working at heights and had

issued a prohibition notice. The Full Bench found it difficult to understand that one day after the second incident, those deficiencies continued and the respondent had not addressed these obvious risks.

It was because of this special background the Full Bench indicated the need to set a significant penalty for the first breach and to set a higher penalty in relation to the second breach, taking into account both for and against the respondent, that the second offence occurred just one day after the first offence. The third offence in this sequence was appropriately to be treated as a separate and most serious offence. Aggregating the penalties and then subjecting them to further consideration in the application of the totality principle, nevertheless, required the imposition of a total penalty significantly more than the penalty imposed at first instance. The appeal was upheld and the sentence imposed upon the respondent varied.

Western Freight Management Pty Ltd v Inspector Patton [2011] NSWIRComm 68; (2011) 209 IR 391

The Full Bench considered an appeal by the appellant from two decisions at first instance. where the trial judge had convicted and sentenced the appellant for offences under s 8(1) of the *Occupational Health and Safety Act* 2000 (the Act) in relation to an employee being crushed by a reversing truck.

Following the High Court judgment in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 ("*Kirk*"), the appellant amended its grounds of appeal in order to rely on issues considered in *Kirk* relating to the proper construction of s 8(1) of the Act by which the appellant contended that the trial judge had erred in law by failing to find that the charges in the matter were outside the scope of s 8(1) of the Act.

The Full Bench noted the need for the provision of appropriate particulars had its roots in the requirements of procedural fairness. A defendant must be fairly informed of the charge it has to meet. Further, the structure of the Act requires that a defendant knows what measures it is alleged it did not take so that it could properly address available defences.

The Full Bench found no acts or omissions, or set of acts or omissions, necessary to specify the requisite contravention, were identified to the appellant at any point in the proceedings, up to the conviction judgment. Upon the statements of law in *Kirk*, this should result in the appeal being upheld and the convictions of the appellant quashed (along with the penalties imposed upon that conviction).

The Full Bench then considered whether orders should be made for a re-trial. They concluded that there would be no re-trial as:

> a) the offences were proven upon the basis of findings that the appellant had failed to take certain measures (to obviate or avoid an identified risk). These were not, however, measures which were at any relevant time identified to the appellant prior to conviction. Hence, the findings at trial that the offences were proven can offer no proper support for a re-trial;
>
> b) it is not a safe conclusion that the evidence in any further trial would be substantially the same as the trial below, particularly with respect to defences;
>
> c) there would be significant delay between the incident which took place in December 2004 and a further hearing (well over seven years later); and
>
> d) the failure by the prosecutor to address to the appellant the measures which were required to be taken constituted procedural unfairness of such gravity as to point against a re-trial.

The Full Bench upheld the appeal and the conviction of the appellant was quashed.

Commissioner of Police v Lawrance [2011] NSWIRComm 109; (2011) 208 IR 139

The appeal involved, amongst other issues, the question of the Commission's power to order the re-employment of a former Police Officer at a lower rank. That was a matter that had not previously been determined in this jurisdiction at appellate level.

The respondent was removed from the Police Force after his conduct at the Police Christmas Party, where on at least two occasions the respondent exposed his penis (to which a bottle opener was attached by means of a ring), to a small number of people at the function. It was his "party trick".

There were 19 grounds of appeal in the amended application for leave to appeal and appeal, and extensive written submissions that addressed both the question of leave to appeal and the merit issues.

The thrust of the appellant's submissions regarding the seriousness of the misconduct was to attempt to portray that misconduct in the worst possible light. The misconduct was said to be "innately serious", "extremely serious", a "fundamental affront to community values/standards", "criminal conduct", "conduct to be rejected as totally repugnant" and "a deliberate and knowing breach of applicable rules and standards of fundamental importance".

It was submitted for the appellant that it was "obviously the case that any person (let alone a Sergeant of Police) pulling out his penis in a public place is a fundamental affront to community values/standards, criminal conduct and conduct to be rejected as totally repugnant." The Full Bench held that whether that is so or not, the trial judge was not required to determine the matter solely according to what constituted an affront to community values. The Full Bench noted, in any event, some members of the community present on the night did find the misconduct repugnant and removed themselves. Others did not. The Full Bench further found the trial judge had regard to those matters in concluding the misconduct was serious and in that respect there was no error.

Following an exhaustive examination of all the relevant considerations, the trial judge had concluded that whilst the misconduct was serious, removal from the Police Force was too harsh a consequence. His Honour considered that it was impracticable to reinstate the respondent and determined that the respondent should be re-employed as a Senior Constable.

The Full Bench found that it was without doubt that the respondent's conduct fell into the class of serious misconduct. Minds might differ about whether removal was harsh. Even at

first instance the trial judge, could have reached a different conclusion given that it was only by a "fine margin" he decided that the removal was harsh.

The Full Bench also may have come to a different view. However, the authorities made it clear that was not the test; the Full Bench was required to find error and no error existed.

The appeal was dismissed.

Kennedy v Martinez [2011] NSWIRComm 137

This was an application for leave to appeal and appeal from a judgment at first instance where the trial judge dismissed the appellant's application, brought by way of a Summons for Relief under s 106 of the *Industrial Relations Act* 1996 ("the Act").

The appellant was a salaried partner in a firm of solicitors called HWL Ebsworth ("HWLE"). The firm was the result of a merger between two law firms, Ebsworth & Ebsworth ("E&E") and Home Wilkinson Lowry (HWL). Prior to the merger, the appellant had been a fixed profit partner at E&E. The appellant claimed that his contract with the respondents was "unfair, harsh and/or unconscionable under s 105 of the Act".

A primary focus of the appeal concerned the test for bargains freely made. The appellant contended that the trial judge had erroneously applied the test by treating it as determinative and being precluded or constrained from considering other relevant factors when assessing the claim that the contract was unfair because it provided only one month's notice. Other related areas of consideration in which errors by the trial judge were sought to be relied upon concerned the irrelevance of the appellant's capacity at the time he signed the contract; the fairness of the notice period provided in the contract; and the extent to which his Honour took into consideration the terms of the E&E partnership deed in assessing whether the period of notice provided was unfair.

Other grounds of appeal which were relied upon to establish various errors in the judgment concerned the extent to which the respondents had identified or articulated to the appellant what performance criteria were applicable to him (and the extent to which the appellant understood the significance of those criteria); whether the appellant's contract was

terminated contrary to pre-contractual representations made to him; his performance generally during the term of the contract; and, whether the appellant was afforded procedural fairness in the events leading up to and at the time of the termination of the contract.

The Full Bench found there appeared to be no dispute that the "merger" between the two firms was more in the nature of an acquisition. In relation to the procedural fairness issue the Full Bench was in agreeance with the trial judge, that is, the appellant had ample indications and warnings that his partnership might be terminated and he would be offered a consultancy role. The appellant also had sufficient time to act on those indications and warnings but instead chose to do nothing. The Full Bench discerned no error in the findings and conclusions drawn by the trial judge to the effect that the respondents were entitled to proceed as they did, and the process in which this had occurred was not procedurally unfair.

The appellant also contended the trial judge was in error in not finding that the contract was, or became, unfair by allowing, or not preventing, the respondents from acting contrary to, and misleading him in relation to, representations made to him prior to the merger. The Full Bench stated the trial judge's approach to the issue was unattended by error. Further the finding by the trial judge that the appellant had obligations as a partner to build up a practice, formulate a plan, and generally improve his position within the firm, such obligations, were seen by the Full Bench as uncontroversial and entirely consistent with the obligations of partners in a law practice. The appeal was dismissed.

Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment [2011] NSWIRComm 143

By Notice of Motion filed on 20 July 2011, the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales ("the PSA") made an application for a declaration that the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 ("the Amendment Act") (which enacted s 146C of the *Industrial Relations Act* 1996 ("the Act") was invalid and, in the alternative, a declaration that the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 ("the Regulation") was invalid.

In brief, the PSA contended that the Amendment Act was constitutionally invalid because the Act impaired the institutional integrity of the Court by impairing the institutional integrity of the Commission when constituted as the Court. The Amendment Act did so, it was submitted, by destroying the reality and appearance of the independence and impartiality of 'the Commission' and by enlisting 'the Commission' as an instrument for the implementation of government policy.

Notwithstanding that s 146C(5) of the Act expressly excluded the Court from the operation of the Amendment Act, the PSA contended that the requisite impairment, nonetheless, arose because:

> 1. The Commission is created as a single body constituted as either the Commission or the Commission in Court Session for the purposes of exercising different functions conferred on that body;
>
> 2. Alternatively, whether the Commission and the Court should be regarded as distinct tribunals is immaterial because, having regard to the provisions of the Act, it is clear that the composition, operation and function of the Commission and the Court are extremely closely intertwined.

After an extensive review of the case law the Full Bench held (at paragraph 49):

> The Act provides for the creation of two related but distinct bodies. In this light, it is evident that s 146C(5) is a complete answer to the suggestion of constitutional invalidity. The provision does not apply to the Court, which is an entity separate from the Commission. The provisions in the Amendment Act do not confer new functions on members of the Court in their capacity as individuals. Nor do they confer any new functions on members of the Court in that capacity. The fact that "judicial members of the Commission", that is the persons who constitute the Court (s 149(3)), may also sit as members of the Commission, does not alter this conclusion. In contrast to the law in issue in *Wainohu v State of New South Wales [2011] HCA 24; (2011) 278 ALR1*, the functions to which the Amendment Act relates are conferred on the Commission as a whole, not judges *persona designata*. That is, they are not conferred upon a person appointed to carry out a function by reference to his or her judicial office.
>
> We reject the application seeking to have the Amendment Act declared invalid. The primary application brought by the motion is, therefore, dismissed

In relation to the Regulation, it was the PSA's contention that a regulation is only authorised if it is otherwise "not inconsistent with" the Act. A regulation must also comply with the general law to the effect that a regulation will not be valid if it contradicts, or is repugnant to, the statute under which it is made. The PSA's submission was that the Regulation was (in a number of respects) fundamentally inconsistent with and repugnant to the Act both by reason that it contradicts express provisions of the Act and that it runs counter to the general aims of the Act

The Full Bench agreed with the arguments of the respondents and held as follows:

> That it is the Act, by virtue of s 146C, rather than the regulation that directs the Commission to give effect to the government's policy on conditions of employment of public sector employees. The regulation sets out the matters which are, for the purposes of s 146C, to be aspects of government policy that are to given effect by the Commission when making or varying awards or orders on conditions of employment.
>
> Again, it is the Act itself, by virtue of s 146C, that requires the Commission when exercising its award-making functions to give effect to the policies declared by the regulation. That requirement is not mandated by the regulation but by s 146C of the Act.
>
> There is plainly a requisite connection between the subject matter in the regulation and s 146C of the Act. The section prescribes the field of operation of the Act to which the regulation needs to be connected to be valid.
>
> The application for a declaration as to the invalidity of the regulation must be refused and, therefore, the alternative application for a declaration in the motion is dismissed.

The Notice of Motion was dismissed with costs.

McGhee v Commissioner of Police [2011] NSWIRComm 16

The appellant, a former Police Inspector, sought leave to appeal against a decision in which the trial judge found that the appellant's removal from the NSW Police Force was not harsh, unreasonable or unjust.

The Full Bench determined to hear the parties on the question of leave to appeal as a threshold matter. The Commissioner relied upon three grounds as the basis upon which there had been a loss of confidence in the appellant thereby constituting grounds for his

removal under s 181D of the *Police Act* 1990 . The first ground was the appellant's conviction for Driving under the Influence of Alcohol. The second ground was the appellant's breach of the NSW Police Force's Secondary Employment Policy at Adam's Tavern, a licensed premises owned by the appellant. The Commissioner had contended the appellant had failed to declare his involvement in this business; failed to declare his financial interest in the business; and failed to seek or follow-up or renew the necessary secondary employment yearly approval. The final ground related to the appellant's unprofessional conduct and breaches of police procedure.

The appellant contended that leave to appeal should be granted because of the errors primarly relating to the second ground.

The Full Bench found that the trial judge took into account all three breaches in concluding the appellant's removal was not harsh, unreasonable or unjust and that the appellant breached the secondary employment policy in multiple respects.

The appellant further contended that he was not afforded procedural fairness and the trial judge made several factual errors and errors of law.

The Full Bench considered these submissions, but decided there was little substance in them and found that the appellant had failed to make out a case for the grant of leave. This was not a case where the matter was of such importance that, in the public interest, leave must be granted and did not raise factors which, when properly considered, would otherwise warrant the grant of leave. The Full Bench did accept that there were some errors and some shortcomings in the primary judge's treatment of the facts and the application of principle, however, they were not of such nature or magnitude that would cause the Full Bench to grant leave and constitute a basis for upholding the appeal.

The appellant failed in his duty as a senior police officer in three significant respects, the most serious being the breaches of the secondary employment policy and his less than candid disclosures when confronted with these breaches. The appellant always knew he was required to conform strictly to the secondary employment policy. He failed to do so.
The Full Bench reiterated the observations in *Reid-Frost v Commissioner of Police* [2011] NSWIRComm 3; (2011) 206 IR 38 refused leave and dismissed the appeal.

TIME STANDARDS

The Commission formally adopted time standards for the disposition of work in the major areas of the Commission's jurisdiction in 2004. In doing so, the Commission developed standards that 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.

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

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

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

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

THE REGISTRY

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

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

REGISTRY CLIENT SERVICES

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

Client Service staff are situated in 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 electronic 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.

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* 1996 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				
2007	***2008***	***2009***	***2010***	***2011***
189	189	152	53	37

Special Wage Matters - Year End Current Files					
	2007	***2008***	***2009***	***2010***	***2011***
Special Wage Permits	749	502	357	65	32
* SWS - P	214	161	105	9	10
** SWS - MC	243	276	318	0	0
TOTAL	**1206**	**939**	**780**	**74**	**42**

Special Wage Matters - Matters Lodged				
2007	**2008**	**2009**	**2010**	**2011**
1241	868	503	100	51***

*	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.
***	including matters referred to the federal tribunal - *Fair Work Australia*

EXECUTIVE AND LEGAL TEAM

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

OTHER MATTERS

JUDICIAL EDUCATION

The Annual Conference of the Industrial Relations Commission was held from 19 - 21 October 2011. The first day covered a variety of topics with presentations by Ms Karen Howard, Director, NSW Business Chamber, Chair, GP Access and Director, Hunter Development Council and Mr Gary Kennedy, Secretary, Newcastle Trades Hall Council (*The Hunter in Perspective - Consultation and Co-operation*); Dr Shae McCrystal, Senior Lecturer, Faculty of Law, University of Sydney, Mr Nigel Ward, CEO and Director, Australian Business Lawyers & Advisors, and Mr Alex Bukarica, National Legal Officer, CFMEU Mining and Energy Division (*Forum - Fair Work Australia - Q&A - The Academic, the Employer and the Employee*); Mr Russell Skelton, Chief Executive, Macquarie Generation (*The Prospects of Carbon Pricing*); Her Honour Magistrate Daphne Kok and Ludmila Stern, Head of School of Language and Linguistics, University of New South Wales (*Interpreters in Court - a Role Play and analysis of best practice*). On the second day of the conference sessions were given by Dr Richard Kemp, Senior Lecturer in Forensic Psychology, School of Psychology, University of New South Wales and Dr Helen Paterson, Lecturer in Forensic Psychology, School of Psychology, The University of Sydney (*Eyewitness Memory);* the Honourable Justice Michael Adams, Supreme Court of New South Wales (*The Role of the United Nations Internal Justice Council, United Nations Appeal Tribunal and the United Nations Dispute Tribunal*); the Honourable Justice Michael Walton, Vice President (*Workload and Case Management Update & New Directions in Industrial/Employment Law*) and Justice Roger Boland (*The Appellate Jurisdiction of the Court*).

Professional Development is an important facet to ensure that Members stay abreast of changes and the Annual Conference continues to provide an invaluable opportunity for Members of the Commission to discuss matters relevant to their work. The presentations and ensuing discussions were relevant and practical and appreciation is, once again, 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 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 and other NSW Courts and allows judgments to be delivered electronically to a database maintained by the Department of Attorney General and Justice (*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 Department of Attorney General and of Justice's website *(http://www.caselaw.nsw.gov.au/indrel/index.html)* and the *Australian Legal Information Institute website (AustLII)*.

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 and those of the Transport Appeal Boards (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.

The *Caselaw* database was substantially upgraded towards the end of 2010 and the Commission has actively promoted the redevelopment of that system to ensure that decisions of the Commission are more readily available to the community.

COMMITTEES

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

COMMISSION RULES

Pursuant to section 186 of the *Industrial Relations Act*, the Rules of the Commission are to be made by a Rules Committee comprising the President of the Commission and two other Presidential Members appointed by the President. There is also scope for co-option of other Members.

From the commencement of the 2010 Law Term (1 February 2010) the Commission transitioned to the *Uniform Civil Procedure* regime that operates in the Supreme, Land and Environment, District and Local Courts. Essentially, this means that much of the procedure of the Commission is now determined under the *Civil Procedure* Act 2005 and the Uniform Civil Procedure Rules 2005, however, there are 'local rules' that prevail. These local rules are known as the Industrial Relations Commission Rules 2009 and also took effect from 1 February 2010.

There were no changes to the Industrial Relations Commission Rules during 2011.

AMENDMENTS TO LEGISLATION ETC

The legislative amendments enacted during 2011, 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 NOTES

No new *Practice Notes* were issued during 2011.

CONCLUSION

In late 2011 the Government announced a Parliamentary Inquiry that charges the Committee to investigate and report in relation to opportunities to consolidate tribunal operations within New South Wales. Particularly relevant for this Commission is the requirement in the Terms of Reference for the Committee to specifically look at:

> (a) opportunities to reform, consolidate, or transfer functions between tribunals which exercise decision-making, arbitral or similar functions in relation to employment, workplace, occupational, professional or other related disputes or matters, having regard to:
>
> > i. the current and forecast workload for the Industrial Relations Commission (including the Commission in Court Session) as a result of recent changes (such as National OHS legislation and the Commonwealth Fair Work Act);
> > ii. the current and forecast workload of other Tribunals (such as the Administrative Decisions Tribunal and health disciplinary Tribunals);
> > iii. opportunities to make tribunals quicker, cheaper and more effective

and, in terms of the Court:

> (b) options that would be available in relation to the Industrial Relations Commission in Court Session, should the Commissions arbitral functions be consolidated with or transferred to other bodies.

The Committee is due to report at the end of February 2012. I took the view that it was not appropriate for me as a judge and head of this jurisdiction to make a submission to that Inquiry, however, I did respond extensively to a number of questions raised by the Committee and that response is available on the NSW Parliament website[10]. I believe that the expansion of the role of the Commission in the industrial and employment affairs of this State has the potential to ensure that the capacity of this Commission is fully utilised and the experience and expertise of the Members is employed to the maximum extent for the benefit of the people of New South Wales.

[10] Response to request for information on the work and structure of the Industrial Relations Commission of NSW

Regardless of what the future might hold, I would once again publicly acknowledge my confidence in the Members of this Commission and the staff of both Members and the Registrar to continue to provide services in a professional way. Despite the increasing uncertainty that has prevailed in relation to the future of this Commission since 2006, its reputation as a forum for the timely, fair and effective resolution of disputes remains without peer.

2012 is likely to be a watershed year in so far as the future of the Commission is concerned.

ANOTHER ERA:

Wallace Charles WURTH - Industrial Registrar 1932 - 1936[11]

Wallace Charles Wurth (1896 - 1960) was the sixth Industrial Registrar following Alan Mayo Webb who was appointed as a Judge of the Industrial Commission on 20 June 1932.

The following is extracted from the *Australian Dictionary of Biography - Online Edition*[12]*:*

> A protégé of James Williams, later chairman of the [Public Service] Board, Wurth noted that a law degree had helped Williams's advancement and in 1920 enrolled as a part-time student in the faculty of law at the University of Sydney (LLB., 1924). By 1928 he had risen to the position of inspector—not merely as a result of his friendship with Williams, but by ability and hard work. Wurth realized the importance of cultivating powerful patrons, which he did by exercising considerable charm and by completing inquiries and projects promptly and efficiently, not only for his administrative superiors but also for ministers and premiers. At the behest of (Sir) William McKell, then a minister in Jack Lang's government, he headed a small committee to investigate the fraudulent use of food and medical relief funds for the unemployed. McKell later wrote that the excellence of his work 'permanently established him as a public servant of courage and capacity with a very bright future'.
>
> A colleague and friend of Wurth at the board, (Sir) Bertram Stevens, became premier in 1932; he secured Wurth's appointment as industrial registrar and assistant under-secretary of the Department of Labour and Industry that year, then as a member of the Public Service Board in 1936, and finally as chairman of the Board in 1939. While many Labor supporters saw these appointments as strengthening the conservative grip on administration, Wurth's legal qualifications and industrial experience fitted him for the task of dealing with both employers and unions. His return to the board marked its resurgence as the most powerful of the state's central agencies.

[11] by unknown photographer: courtesy of State Library of New South Wales, GPO 2 - 08468
[12] Wurth, Wallace Charles

APPENDIX 1

INDUSTRY PANELS

Metropolitan

PANEL A - Divisional Head: Boland J, President

Members	
Marks J Kavanagh J Backman J Tabbaa C Macdonald C	**Corrections,** **Juvenile Justice** **Education** (includes Dept of Education and Training, Institute of Teachers, Board of Studies and TAFE Commission) **Health** (includes Dept of Health, metropolitan Area Health Services, Ambulance Service, Cancer Institute and Health Care Complaints Commission) **Private Transport** Any private transport matters

PANEL B - Divisional Head: Walton J, Vice President

Members	
Haylen J Staff J Bishop C Ritchie C	**Emergency Services** (Emergency Services includes Dept of Police and Emergency Services, NSW Police, Fire Brigades, Rural Fire Service (metro) including Emergency Management NSW, State Emergency Service and NSW Crime Commission) but excludes Ambulance Service **Local Government** **Other Government/Public Sector** (Other Government is any other government sector that is not separately referred to in this document) **Public Transport** (includes Railcorp, Sydney Ferries, Sydney Buses) **Private** (Private includes any residual private matters remaining within the State system by virtue of new s.146B or similar provisions under federal legislation in the metropolitan area excluding transport)

Industry Specific

Transport Appeal Boards (TAB) Panel - Divisional Head - Staff J

Members
Tabbaa C
Bishop C
Macdonald C
Ritchie C
Stanton C

Public Sector Appeal (PSA) Panel - Divisional Head - Staff J

Members
Tabbaa C
Bishop C
Macdonald C
Ritchie C
Stanton C

Regional

Panel N - Divisional Head - Harrison DP

Members
Macdonald C
Ritchie C
Stanton C

Industries: Relevant geographical areas north of Gosford (excluding Broken Hill)
all Power Industry including County Councils such as they remain within the State system

Panel S - Divisional Head - Walton J, Vice President

Members
Staff J
Tabbaa C
Bishop C

Industries: Relevant geographical areas south of Gosford plus Broken Hill and
all Steel Manufacturing and Allied Industries such as they remain within the State system

APPENDIX 2

TIME STANDARDS

Industrial Relations Commission

Time from commencement to finalisation	Standard for 2010/ Achieved in 2010		Standard for 2011/ Achieved in 2011		
Applications for leave to appeal and appeal					
Within 6 months	50%	75.1%	50%	64.7%	⇧
Within 12 months	90%	100%	90%	94.2%	⇧
Within 18 months	100%	100%	100%	100%	⇧
Award Applications [including Major Industrial Cases]					
Within 2 months	50%	64.0%	50%	95.9%	⇧
Within 3 months	70%	70.0%	70%	97.7%	⇧
Within 6 months	80%	76.0%	80%	98.5%	⇧
Within 12 months	100%	88.0%	100%	99.3%	
Enterprise Agreements					
Within 1 months	75%	62.5%	75%	92.3%	⇧
Within 2 months	85%	87.5%	85%	92.3%	⇧
Within 3 months	100%	87.5%	100%	92.3%	
Time to first listing					
Industrial Disputes					
Within 72 Hours	50%	38.5%	50%	42.6%	
Within 5 Days	70%	55.9%	70%	54.5%	
Within 10 Days	100%	79.8%	100%	78.9%	
Time from commencement to finalisation					
Applications relating to Unfair Dismissal					
Within 2 months	50%	47.8%	50%	51.0%	⇧
Within 3 months	70%	59.6%	70%	64.9%	
Within 6 months	90%	79.8%	90%	79.3%	
Within 9 months	100%	90.5%	100%	86.5%	
Public Sector Promotional Appeals		Jul to Dec			
Within 1 months	30%	35.0%	30%	20.2%	
Within 2 months	60%	71.7%	60%	30.1%	
Within 3 months	90%	77.6%	90%	97.5%	⇧
Within 6 months	100%	100%	100%	99.8%	
Public Sector Disciplinary Appeals		Jul to Dec			
Within 1 months	30%	42.3%	30%	42.3%	⇧
Within 2 months	60%	69.2%	60%	57.7%	
Within 3 months	90%	88.4%	90%	69.2%	
Within 6 months	100%	100%	100%	96.1%	

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

TIME STANDARDS

Industrial Court

Time from commencement to finalisation	Standard for 2010	Achieved in 2010	Standard for 2011	Achieved in 2011	
Applications for leave to appeal and appeal					
Within 9 months	50%	60.0%	50%	63.7%	⇧
Within 12 months	90%	68.0%	90%	72.8%	
Within 18 months	100%	92.0%	100%	84.9%	
Prosecutions under OHS legislation *					
Within 9 months	50%	15.0%	50%	23.7%	
Within 12 months	75%	30.0%	75%	47.5%	
Within 18 months	90%	54.0%	90%	63.1%	
Within 24 months	100%	78.0%	100%	81.9%	
Applications for relief from Harsh/Unjust Contracts					
Within 6 months	30%	31.6%	30%	30.0%	⇧
Within 12 months	60%	45.9%	60%	50.0%	
Within 18 months	80%	54.5%	80%	55.0%	
Within 24 months	100%	63.1%	100%	80.0%	

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

* there was a significant deterioration in disposal times for OHS prosecutions from 2009 to 2010. This is directly attributable to the High Court decision in *Kirk v Industrial Court of NSW* [2010] HCA 1 and matters following from the delivery of that judgment in early 2010. Notably, matter such as *John Holland, Grugeon & Chevally,* and others that were the subject of Full Bench proceedings in this Court, appeals to the Court of Appeal (matters are still pending in the CoA), special leave applications in regards to the matter of *John Holland* (refused); all of which resulted in a significant number of matters being 'parked' while various challenges of an interlocutory nature were determined (see, for example, *State of New South Wales (Department of Education and Training and Department of Juvenile Justice) v Cahill (No. 2)* [2011] NSWIRComm 33 where the decision was deferred pending CoA decision in *Holland* and the parties were invited to provide additional submissions after the delivery of that decision in December 2010).

TIME STANDARDS

Transport Appeal Boards

Time from commencement to finalisation	Standard for 2010/ Achieved in 2010		Standard for 2011/ Achieved in 2011		
Promotional Appeal		Jul to Dec			
Within 1 months	30%	35.7%	30%	10.2%	
Within 2 months	60%	72.2%	60%	39.8%	
Within 3 months	90%	87.4%	90%	65.7%	
Within 6 months	100%	100%	100%	100%	⇧
Disciplinary appeals		Jul to Dec			
Within 1 months	30%	40.7%	30%	29.6%	
Within 2 months	60%	66.6%	60%	42.0%	
Within 3 months	90%	96.2%	90%	58.1%	
Within 6 months	100%	100%	100%	87.7%	

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

APPENDIX 3

COMMITTEES

Library Committee

The Hon. Justice Kavanagh (Chair)
The Hon. Justice Staff
Commissioner Macdonald
Mick Grimson, Industrial Registrar
Linden Fairburn, Director, Library Services
Bhagya Puran, Librarian, IRC of NSW

Education Committee

The Hon. Justice Kavanagh (Chair)
The Hon. Justice Haylen
Commissioner Tabbaa
Mick Grimson, Industrial Registrar
Ruth Windeler, Judicial Commission of NSW
Ruth Sheard, Judicial Commission of NSW

Rules Committee
The Hon. Justice Boland, President (Chair)
The Hon. Justice Walton, Vice-President
The Hon. Justice Marks
Mick Grimson, Industrial Registrar (Secretary)

Section 106 Committee

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

Building Committee

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

APPENDIX 4

LEGISLATIVE AMENDMENTS

Miscellaneous Acts Amendment (Directors' Liability) Act 2011 No 2
This Act was assented to on 10 May 2011 and amended various Acts including the *Industrial Relations Act* 1996 with respect to the imposition of personal liability on directors and other individuals in relation to offences committed by corporations.

Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 No 13
This Act was assented to and commenced on 17 June 2011. The Act amended the *Industrial Relations Act* 1996 to require the Industrial Relations Commission to give effect to certain government policies on public sector conditions of employment and for related purposes.

Public Interest Disclosures Amendment Act 2011 No 37
The Act was assented to on 13 September 2011 and commenced (Schedule 2) on 1 November 2011. It amended the *Industrial Relations Act* 1996 in terms of the definition in section 98 of a 'public interest disclosure'.

Transport Legislation Amendment Act 2011 No 41
The Act was assented to on 13 September 2011 and commenced (Schedule 5.12) on 1 November 2011. The object of the Bill is to amend the *Transport Administration Act* 1988 (the TAA) and other transport legislation to establish new arrangements for the administration of the NSW transport sector. It amends the *Industrial Relations Act* 1996, s 91 in relation to the definition of a public sector employer and public sector employee.

Statute Law (Miscellaneous Provisions) Act (No 2) 2011 No 62
This Act was assented to on 16 November 2011 and commenced (Schedule 3) on 6 January 2012. It amended the *Industrial Relations Act* 1996 by amending references to the *Police Services Act 1990* to the *Police Act* 1990.

Work Health and Safety Legislation Amendment Act 2011 No 67
An Act assented to on 28 November 2011 and commenced on 1 January 2012. It amended the *Industrial Relations Act* 1996 by amending references to the *Occupational Health and Safety Act* 2000 to the *Work Health and Safety Act* 2011, abolished appeals against acquittals and other minor changes consequent upon commencement of the new Act.

Industrial Relations Amendment (Non-operative Awards) Act 2011 No 68
This Act was assented to and commenced on 28 November 2011. It amended the *Industrial Relations Act* 1996 in relation to Variation of Awards (s 17) and Review of Awards (s 19) and Rescission of Awards (s 20) and provided that all 'non-operative' Awards under the Act were rescinded on commencement of the amending provisions.

Police Amendment (Death and Disability) Act 2011 No 73
The Act was assented to on 30 November 2011 and commenced on 9 December 2011 and, inter alia, amended the *Industrial Relations Act 1996* to remove the jurisdiction of the Industrial Relations Commission to make or vary industrial instruments that provide for death and disability payments in respect of police officers.

APPENDIX 5

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (294)
This Regulation commenced on 20 June 2011 (date of publication on Legislation website) and declared the Government's public sector policies for the purposes of section 146C of the *Industrial Relations Act* 1996.

Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (294)
This Regulation commenced on 15 July 2011 increasing certain fees charged by the Industrial Relations Commission.

APPENDIX 6

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

Matters filed during period 1 January 2011 to 31 December 2011 and matters completed and continuing as at 31 December 2011 which were filed under the *Industrial Relations Act* 1996.

Nature of Application	Filed 1.1.2011 – 31.12.2011	Completed 1.1.2011 – 31.12.2011	Continuing as at 31.12.2011
APPEALS	**13**	**14**	**9**
Appeal - from Industrial Registrar	0	1	0
Appeal - from a dispute matter	3	4	2
Appeal - from an unfair dismissal matter	7	7	5
Appeal - other	3	2	2
AWARDS	**401**	**391**	**25**
Application create new Award	32	29	9
Application vary an Award	61	53	15
Application – State Wage Case	0	1	0
Review of Award - incl. Declaration of Non-operative awards	306	307	0
Award - other	2	1	1
DISPUTES	**488**	**505**	**231**
s130 of the Act	392	403	188
s130, s380 of the Act	3	2	2
s332 contract determination	27	24	14
s146A of the Act	2	4	1
s146B of the Act	64	69	24
Dispute - other	0	3	2
ENTERPRISE AGREEMENTS	**10**	**13**	**0**
Approval (Employees)	0	0	0
Approval (Union)	10	13	0
UNFAIR DISMISSALS	**190**	**208**	**68**
Application (by individual only)	43	46	14
Application (representative)	56	59	27
Application (organisation representative)	90	103	26
Application (organisation – multiple)	1	0	1
PUBLIC SECTOR AND POLICE APPEALS	**506**	**482**	**107**
Public Sector Promotional Appeal	431	435	37
Public Sector Disciplinary Appeal	24	26	9
Appeal by Police Officer relating to leave when hurt on duty	51	21	61
OTHER	**113**	**158**	**32**
Contract Agreements	2	3	0
Contract Determinations	8	6	5
Contract of Carriage (claim for compensation)	1	5	2
Registration pursuant to Clothing Trades Award	47	59	4
Application extend duration of Industrial Committee	15	16	0
Application for reinstatement injured employee (by individual)	0	2	1
Application for reinstatement injured employee (by organisation)	4	12	1
Protection of injured workers from dismissal-Workers Compensation Act 1987	4	4	1
Application for Review of Order s181D Police Service Act	8	19	8
Application for Rescission of Order s173 Police Service Act	7	6	5
Application for Relief from Victimisation s213 of the Act	9	11	2
Miscellaneous (not categorised)	8	15	3
SUB-TOTAL	**1721**	**1771**	**472**

APPENDIX 7

MATTERS FILED IN INDUSTRIAL COURT

Matters filed during period 1 January 2011 to 31 December 2011 and matters completed and continuing as at 31 December 2011 which were filed under the *Industrial Relations Act* 1996.

Nature of Application	Filed 1.1.2011 – 31.12.2011	Completed 1.1.2011 – 31.12.2011	Continuing as at 31.12.2011
APPEALS	**34**	**36**	**26**
Appeal from Local Court (Industrial Magistrate)	7	4	6
Appeal – superannuation	11	6	10
Appeal – OHS prosecution	9	17	4
Appeal – s106 matter	3	1	3
Appeal – other	4	8	3
CONTRAVENTION	**3**	**1**	**3**
Contravention of Dispute Order s139 of the Act	3	1	3
HARSH CONTRACTS	**12**	**20**	**24**
Application under s106 of the Act	12	20	24
PROSECUTIONS	**144**	**160**	**220**
Prosecution – s8(1) OHS Act 2000	65	74	107
Prosecution – s8(2) OHS Act 2000	38	50	64
Prosecution – s9 OHS Act 2000	4	0	7
Prosecution – s10(1) OHS Act 2000	16	17	20
Prosecution – s10(2) OHS Act 2000	4	1	4
Prosecution – s11 OHS Act 2000	4	5	4
Prosecution – s20(1) OHS Act 2000	4	1	4
Prosecution – s26(1) OHS Act 2000	3	6	6
Prosecution – s136 OHS Act 2000	1	1	1
Prosecution – other OHS Act 2000	1	0	3
Prosecution – OHS Act 1983	0	1	0
Prosecution – RSAct 2008	4	4	0
OTHER	**26**	**27**	**19**
Declaratory jurisdiction (s154, s248)	4	6	4
Cancellation of registration industrial organisation	3	2	1
Recovery of remuneration and other amounts	13	15	12
Unlawful Dismissal - s23 OHS Act 2000	4	4	0
Miscellaneous (not otherwise categorised)	2	0	2
SUB-TOTAL	**219**	**244**	**292**

APPENDIX 8

MATTERS FILED TO THE TRANSPORT APPEAL BOARD

Matters filed during period 1 January 2011 to 31 December 2011 and matters completed and continuing as at 31 December 2011 which were filed under the *Transport Appeal Boards Act* 1980.

Nature of Application	Filed 1.1.2011 – 31.12.2011	Completed 1.1.2011 – 31.12.2011	Continuing as at 31.12.2011
APPEALS	**1520**	**1323**	**261**
Promotional Appeal	1428	1242	235
Disciplinary Appeal	92	81	26
SUB-TOTAL	**1520**	**1323**	**261**
TOTAL	**3460**	**3338**	**1025**
IRC, IC & TAB Matters			

APPENDIX 9

A BRIEF HISTORY OF THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

The Court of Arbitration, established by the *Industrial Arbitration Act* 1901, was a court of record constituted by a President (a Supreme Court judge) and two members representing employers and employees respectively. The Court came about as a result of the failure of employers and unions to use a system of voluntary arbitration. The Court had jurisdiction to hear and determine any industrial dispute or matter referred to it by an industrial union or the Registrar, prescribe a minimum wage and make orders or awards pursuant to such hearing or determination. This Court and its registry, the Industrial Arbitration Office, came under the administration of the Department of Attorney-General and of Justice from 12 December 1901.

The Industrial Court, established by the *Industrial Disputes Act* 1908, was constituted by a Supreme Court or District Court Judge appointed for a period of seven years. The Court did not require the existence of a dispute to ground its jurisdiction and had power to arbitrate on conditions of employment and could hear prosecutions. Together with its registry, known during 1911 as the Industrial Registrar's Office, the Court remained under the administration of the Department of Attorney-General and of Justice. The Act also established a system of **Industrial Boards** that consisted of representatives of employers and employees sitting under a chairman. The Industrial Court heard appeals from the Industrial Boards.

The Court of Industrial Arbitration was established by the *Industrial Arbitration Act* 1912. It was constituted by judges, not exceeding three, with the status of judges of the District Court. The Court was vested with all the powers conferred on all industrial tribunals and the chairman thereof. The Act empowered the Minister to establish Conciliation Committees with powers of conciliation but not arbitration. They fell into disuse after about twelve months and a Special Commissioner (later known as the Industrial Commissioner) was appointed on 1 July 1912. This Court and its registry were placed under the jurisdiction of the Department of Labour and Industry, which administered the Act from 17 April 1912.

A Royal Commission on Industrial Arbitration in 1913 led to some major changes under the *Industrial Arbitration (Amendment) Act* 1916, which resulted in an increase in the membership of the Court and the transfer of powers of the Industrial Boards to the Court.

The **Board of Trade** was established by the *Industrial Arbitration (Amendment) Act* 1918. It functioned concurrently with the Court of Industrial Arbitration and was constituted by a President (a Judge of the Court), a Vice-President and representatives of employers and employees. The Board's functions were to conduct a public inquiry into the cost of living and declare an adult male and female living wage each year for industry generally and for employees engaged in rural occupations. In addition, it was to investigate and report on conditions in industry and the welfare of workers. The Board was in practice particularly concerned with matters relating to apprenticeships.

The *Industrial Arbitration (Amendment) Act* 1926 abolished the Court of Industrial Arbitration and the Board of Trade and set up an **Industrial Commission** constituted by a Commissioner and a Deputy Commissioner. The Commissioner or Deputy Commissioner sat with employer and employee representatives selected from a panel. On any reference or application to it the Commission could make awards fixing rates of pay and working conditions and determine the standard hours to be worked in industries within its jurisdiction and had power to determine any "industrial matter". The Commission had authority to adjudicate in cases of illegal strikes, lockouts or unlawful dismissals, and could summon persons to a compulsory conference and hear appeals from determinations of the subsidiary industrial tribunals. The former boards, which had not exercised jurisdiction since 1918, continued in existence but as Conciliation Committees with exclusive new jurisdiction in arbitration proceedings.

A number of controversial decisions by the Industrial Commission led to the proclamation of the *Industrial Arbitration (Amendment) Act* 1927, which abolished the position of Industrial Commissioner (but not Deputy Industrial Commissioner) and the constitution of the Commission was altered to that of three members with the status of Supreme Court Judge. The Committees were still the tribunals of first instance and their decisions were to be the majority of members other than the chairman, whose decision could be accepted by

agreement if the members were equally divided. Otherwise the chairman had no vote and no part in the decision. Where a matter remained unresolved in committee it passed to the Commission for determination.

In 1932, under the *Industrial Arbitration (Amendment)* Act, the emphasis fell on conciliation. The offices of Deputy Industrial Commissioner and Chairman of Conciliation Committees were abolished and a Conciliation Commissioner was appointed to fill the latter position. This Act also provided for the appointment of an Apprenticeship Commissioner and for the establishment of Apprenticeship Councils. The Conciliation Commissioner could call compulsory conferences in industrial disputes to effect an agreement between the parties when sitting alone or between the members of the committee when sitting as chairman. Any such agreement, when reduced to writing, took effect as an Award but was subject to appeal to the Industrial Commission. In addition, the Conciliation Commissioner or a conciliation committee could not call witnesses or take evidence except as directed by the Industrial Commission. Unresolved matters were referred to the Commission.

The membership of the Commission was increased to four by the *Industrial Arbitration Act* 1936, and certain provisions regarding appeals were altered under this Act.

The *Industrial Arbitration (Amendment) Act* 1937 repealed the Commission's power of determining a standard of living and living wages and provided for the adoption of the needs basic wage and fixed loadings determined by the Commonwealth Court of Conciliation and Arbitration.

In 1938 the number of members of the Commission was increased to no less than five and no more than six and the Act, the *Industrial Arbitration and Workers Compensation (Amendment) Act,* made provisions regarding investigation of rents and certain price fixing. The Act was again amended in 1939 mainly to address the fixing of maximum prices.

The *Industrial Arbitration Act* 1940 consolidated all previous Acts and an attempt was made to refine and rationalise the procedures and operation of the **Industrial Commission.** The Act provided for the establishment of an Industrial Commission, Conciliation Committees, Conciliation Commissioners, Special Commissioners, Industrial Magistrates Courts and the Industrial Registrar.

The *Industrial Arbitration (Amendment) Act* 1943 empowered the Chairman, with the agreement of the members or by special authorisation of the Industrial Commission, to decide matters where there was division. The number of Commissioners who might be appointed was also increased to five. The *Industrial Arbitration (Amendment) Act* 1948 allowed the Commissioners to decide matters upon which the members were equally divided as well as make an Award where the disputing parties had been called into a compulsory conference.

In 1955 the maximum number of members of the Industrial Commission was increased to 12 and the next raft of significant changes came with the *Industrial Arbitration (Amendment) Act* 1959. These changes included defining the wage fixing powers of industrial committees and appeal provisions were also reformed.

In 1979 the Act was again amended to make provision for the establishment of Contract Regulation Tribunals. Generally, this gave the Commission jurisdiction over contracts for the bailment of taxi cabs and private hire cars and over contracts for the transportation by motor lorry of loads other than passengers.

In 1981 and again in 1989 the Commission’s powers in relation to dealing with apprentices were clarified. In 1989 the *Industrial and Commercial Training Act* was passed and apprentices were treated as other employees for all industrial purposes.

By 1989 the Act provided that the Industrial Commission consisted of not more than 12 members, one of whom was the President and one of whom was the Vice-President. The Act also provided for the appointment of “non judicial” members who did not have to be legally qualified as well as “judicial” members. There were certain jurisdictional limitations for “non judicial” appointees.

In 1988 the then coalition government commissioned a comprehensive review of the State’s industrial laws and procedures. The subsequent report, the Niland Report, had far reaching recommendations and became the basis for the *Industrial Relations Act* 1991. The former Commission was abolished and replaced by the **Industrial Relations Commission** and a separate **Industrial Court**. Two of the key features of the report were the introduction of enterprise bargaining outside the formal industrial relations system with agreements specifically tailored to individual workplaces or businesses and the provisions relating to unfair dismissal.

Individuals could access the Commission if they believed they had been unfairly dismissed. Their remedy was reinstatement and/or compensation.

On 2 September 1996, the *Industrial Relations Act* 1996 came into force. It repealed and replaced the 1991 Act and is an example of plain English statute law. Chapter 4 of the Act established a **new Industrial Relations Commission.** Unlike the federal approach the States have not separated judicial and administrative functions in relation to the Commission's powers. The 1991 Act, for the first time, sought to adopt the federal approach and established the Industrial Relations Commission and the Industrial Relations Court (although the judges' remained members of the Commission at all times). The 1996 Act restored the traditional arrangement by merging these two bodies. When the Commission was dealing with judicial matters it was called the **Industrial Relations Commission of New South Wales in Court Session** and was a superior court of record of equivalent status to the Supreme Court.

On 9 December 2005 the *Industrial Relations Amendment Act* 2005 was proclaimed to commence. This Act enables the Industrial Relations Commission of New South Wales in Court Session to be called the **Industrial Court of New South Wales.**

On 1 January 2010 the *Industrial Relations (Commonwealth Powers) Act* 2009 was proclaimed to commence. This Act referred certain matters relating to industrial relations to the Commonwealth for the purpose of section 51 (37) of the Australian Constitution and to amend the *Industrial Relations Act* 1996. The primary role of the Act was to refer to the Commonwealth sufficient power to enable the creation of a national industrial relations system for the private sector. Essentially, this Act transferred the residue of the private sector to the national industrial relations system and made clear that the Industrial Relations Commission retained jurisdiction in relation to State public sector employees and Local Government employees. Additionally, s 146 of the *Industrial Relations Act* 1996 was amended to make clear Members of the **Industrial Relations Commission of New South Wales** could continue to be nominated as dispute resolution providers in federal enterprise agreements. This was designed to ensure that the many companies who continue to use the expertise of the Industrial Relations Commission would be able to continue those arrangements.

On 17 June 2011, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 commenced. This Act requires the Industrial Relations Commission to give effect to aspects of government policy declared by the regulations relating to public sector conditions of employment (section146C).

APPENDIX 10

THE PRESIDENTS OF THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Name	Held Office		Remarks
	From	To	
Cohen, Henry Emanuel	01 Apr 1902	03 Jul 1905	Died 5 Jan 1912.
Heydon, Charles Gilbert	04 July 1905	Dec 1918	Died 6 Mar 1932.
Edmunds, Walter	Aug 1920	06 Jan 1926	From February 1919 to August 1920 held appointment as Acting President and President of Board of Trade. Died 15 Aug 1932.
Beeby, George Stephenson	Aug 1920	July 1926	President, Board of Trade. Died 18 Jul 1942.
Piddington, Albert Bathurst	July 1926	19 May 1932	Died 5 Jun 1945.
Browne, Joseph Alexander	20 Jun 1932	30 Jun 1942	Died 12 Nov 1946.
Taylor, Stanley Cassin	28 Dec 1942	31 Aug 1966	Died 9 Aug 1982.
Beattie, Alexander Craig	1 Sep 1966	31 Oct 1981	Died 30 Sep 1999.
Fisher, William Kenneth	18 Nov 1981	11 Apr 1998	Died 10 Mar 2010
Wright, Frederick Lance	22 Apr 1998	22 Feb 2008	
Boland, Roger Patrick	9 Apr 2008	Still in office	

APPENDIX 11

THE VICE-PRESIDENTS OF THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

The position of **Vice-President** of the Industrial Relations Commission was created with the assent of the *Industrial Arbitration (Industrial Tribunals) Amendment Act* 1986 on 23 December 1986.

The position was created

> "To achieve a more cohesive single structure. In future, responsibility for assignment of conciliation commissioners to chair conciliation committees and the allocation of disputes to them will reside in a judicial member of the Industrial Commission who will be appointed as Vice-President of the Industrial Commission. This will assist in the achievement of a closer relationship between the separate structures of the Industrial Commission and conciliation commissioners and will allow a more uniform approach to industrial relations issues"[13]

The role of the Vice-President continues to be one which contributes significantly in regard to the formulation of policy and the co-ordination of resources across the Commission.

Name	**Held Office**		**Remarks**
	From	To	
Cahill, John Joseph	19 Feb 1987	10 Dec 1998	Died 21 Aug 2006.
Walton, Michael John	18 Dec 1998	Still in Office	

[13] Hansard, Second Reading Speech, *Legislative Council*, 21 Nov 1986 per The Hon. J R Hallam at p7104

APPENDIX 12

INDUSTRIAL REGISTRARS OF THE INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Name	Held Office		Remarks
	From	To	
Addison, George Campbell	1 Apr 1902	1912	Returned to the Bar. Appt Chief Industrial Magistrate 1917.
Holme, John Barton	1912	9 Feb 1914	Appt first Undersecretary, Department of Labour and Industry 10 Feb 1914.
Payne, Edward John	1914	1918	Retired from the public service in 1939 as Chairman, Public Service Board.
Kitching, Frederick William	12 Jul 1918	30 Jun 1924	Appt Undersecretary, Office of the Minister for Labour and Industry 1 Jul 1924.
Webb, Alan Mayo	1 Sep 1924	19 Jun 1932	Appt Judge of Industrial Commission 20 Jun 1932.
Wurth, Wallace Charles	1932	1936	Appt to Public Service Board; Appt Chairman, PSB in 1939.
Ebsworth, Samuel Wilfred	1936	1947	Retired.
Kelleher, John Albert	1947	13 May 1955	Appt Undersecretary and Industrial Registrar, Dept of Labour and Industry and Social Welfare 1949. Appt Judge of Industrial Commission 16 May 1955.
Kearney, Timothy Joseph	1955	1962	Appt Undersecretary, Department of Labour and Industry.
Whitfield, John Edward	1962	1968	Appt as Commissioner, Water Conservation and Irrigation Commission.
Fetherston, Kevin Roy	3 June 1968	1977	Appt Executive Assistant (Legal) Department of Labour and Industry; later appt as Deputy Undersecretary, Department of Labour and Industry.
Coleman, Maurice Charles Edwin	29 April 1977	1984	Retired.
Buckley, Anthony Kevin	23 Jan 1984	30 Mar 1992	Appt as Commissioner, Industrial Relations Commission 31 Mar 1992.

Walsh, Barry[14]	19 Feb 1992	15 Jul 1994	Appt as Registrar, Australian Industrial Relations Court
Szczygielski, Cathy[15]	18 Jul 1994	4 Nov 1994	Returned to position of Deputy Registrar, Industrial Court.
Williams, Louise[16]	7 Nov 1994	16 Aug 1996	Appt as Registrar, Land & Environment Court.
Robertson, Gregory Keith[17]	31 Mar 1992	26 Oct 1999	To private practice.
McGrath, Timothy Edward	27 Oct 1999	9 Aug 2002	Appt Assistant Director-General, Court and Tribunal Services, Attorney General's Department 12 Aug 2002.
Grimson, George Michael	22 Aug 2002	Still in Office	

[14] Appointed as Acting Registrar and CEO, Industrial Court (under *1991 Act*) 19 Feb 1992, substantively appointed to that position 6 May 1993.
[15] Acting appointment as Registrar and CEO, Industrial Court (under *1991 Act*) pending recruitment
[16] Appointed as Registrar and CEO, Industrial Court (under *1991 Act*)
[17] Held the position of Registrar, Industrial Relations Commission under *1991 Act* - under *1996 Act* became Registrar and Principal Courts Administrator, Industrial Relations Commission and Commission in Court Session (2 September 1996).