The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 1999

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I have the honour to furnish to the Minister for presentation to Parliament the fourth Annual Report of the Industrial Relations Commission of New South Wales made pursuant to section 161 of the Industrial Relations Act 1996 for the year ended 31 December 1999.

PRESIDENT

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INTRODUCTION

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

The Commission is constituted by the President, Vice-President, Judicial Members, Deputy Presidents and Commissioners. The Commission has nine Judges, two Deputy Presidents and 14 Commissioners.

During the year Mr T E McGrath was appointed Industrial Registrar and Principal Court Administrator effective from 27 October 1999. The Commission is greatly indebted to the previous Registrar, Mr G K Robertson for his dedication and fine work since his appointment as Registrar in 1992 and previously as Deputy Industrial Registrar.

I note with appreciation the work of the staff of the Registry who have greatly assisted the Members of the Commission and the Chief Industrial Magistrate (for whom they also perform a greatly expanding registry function) in meeting the demands made in 1999. The dedication of the present and former Industrial Registrars, the Deputy Industrial Registrar and the staff of the Registry is greatly appreciated by the Commission. The significant burden carried by them is not assisted by the difficult conditions under which they work. It is hoped that further alleviation of this situation will occur in the near future.

I also commend the work of my Principal Associate, Ms Dorothy Martin, and Associate, Ms Philippa Ryan, who have assumed the major responsibility of the significant administrative burden of matters passing through the President's Chambers. We have been ably assisted by the President's Tipstaff, Mr John Bignell. I wish also to express my appreciation to the Research

Associates to the President, Mark Gibian, Jane Doolan and Michael Nightingale for their valuable assistance throughout the year, often providing research assistance at very short notice.

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

The work of the Commission has increased significantly over recent years resulting in Members of the Commission dealing with extended lists. The increase in the applications filed in the Commission is revealed by a comparison of applications made in the years 1990 and 1999. In 1990, the Commission was comprised of eight Judges and two Deputy Presidents (one appointed late in the year) compared to nine Judges and two Deputy Presidents as at the end of 1999.

The following table compares the years 1990 and 1999:

MATTERS FILED

	1990	**1999**
TOTAL	1,495	7,081
Dispute notifications	438	926
Unfair Dismissals	2 *(s.95)	3,243
Award/EA applications	506	1,925
Unfair Contract applications	165	310
OHS prosecutions	13	315
Appeals	83	112

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

The dramatic increase in applications filed in the Commission experienced during 1996 and 1997 has generally levelled off in 1999. However, the above comparison of the number of applications received in 1990 and 1999 reveals the historical increase in the workload of the Commission.

The following table displays a comparison of the number of applications filed from January to December 1999 as compared to the same period for 1998:

NEW MATTERS FILED

Calendar Years 1998 and 1999

FILED	Jan - Dec 1998	Jan - Dec 1999	Percentage change
Awards/Agreements	996	1,925	↑ 93 %
Unfair dismissals	4,048	3,243	↓ 20 %
Disputes	949	926	↓ 2 %
OH&S prosecutions	222	315	↑ 42 %
Unfair contracts	465	310	↓ 33 %
Appeals	91	112	↑ 23 %
All others	169	250	↑ 48 %
TOTALS	**6,940**	**7,081**	**↑ 2 %**

ABOUT THE COMMISSION

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

The Commission is established by and operates under the *Industrial Relations Act* 1996. An arbitration court (subsequently renamed and re-established as the Industrial Commission of New South Wales) was first established in New South Wales in 1901. The present Commission is the legal and functional successor of the Industrial Commission and also of the Industrial Court and Industrial Relations Commission which existed between 1992 and 1996.

The work of the Commission includes:

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

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

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

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

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

- dealing with matters including the registration, recognition and regulation of industrial organisations;

- dealing with major industrial proceedings, such as State Wage Cases.

When sitting in Court Session, the Commission has jurisdiction to hear a range of civil matters arising under legislation as well as criminal proceedings

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

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

MEMBERSHIP OF THE COMMISSION

Judges and Presidential Members

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

President

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

Vice-President

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

Presidential Members

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

The Honourable Mr Justice Gregory Ian Maidment, appointed 1 August 1988;

The Honourable Mr Justice Barrie Clive Hungerford, appointed 13 July 1989;

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

The Honourable Justice Francis Marks, appointed 15 February 1993;

The Honourable Justice Monika Schmidt, appointed 22 July 1993;

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; and

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

Commissioners

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

Commissioner Raymond John Patterson, appointed 12 May 1980;

Commissioner Peter John Connor, appointed 15 May 1987;

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

Commissioner James Neil Redman, appointed 3 February 1986;

Commissioner Anthony Kevin Buckley, appointed 7 February 1991;

Commissioner Paul Bennett Kelly, appointed 7 February 1991;

Commissioner Inaam Tabbaa, appointed 25 February 1991;

Commissioner Donna Sarah McKenna, appointed 16 April 1992;

Commissioner John Patrick Murphy, appointed 21 September 1993;

Commissioner Ian Reeve Neal, appointed 2 September 1996;

Commissioner Ian Walter Cambridge, appointed 20 November 1996;

Commissioner Elizabeth Anne Rosemary Bishop, appointed 9 April 1997;

Commissioner John Richard Elder, appointed 2 February 1998; and

Commissioner Janice Margaret McLeay, appointed 2 February 1998.

Industrial Registrar

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

Mr Gregory Keith Robertson was appointed as Industrial Registrar and Chief Executive Officer of the Industrial Relations Commission of New South Wales on 31 March 1992. Mr Robertson was succeeded as Industrial Registrar by Mr Timothy Edward McGrath on 27 October 1999.

Dual Appointees

At 31 December 1999, the following members of the Commission also held dual appointments as Deputy Presidents of the Australian Industrial Relations Commission:

The Honourable Justice Federick Lance Wright

The Honourable Mr Justice Russell John Peterson

The Honourable Justice Francis Marks

The Honourable Justice Monika Schmidt

The Honourable Deputy President Rodney William Harrison

ACTIVITY OF THE COMMISSION

Figures relating to the period 1 January to 31 December 1998 appear in brackets after the 1999 figures.

Members Sitting Alone

Matters filed and concluded

For the period 1 January to 31 December 1999, 7,081 (6,940) matters were filed in the Industrial Relations Commission of New South Wales, 6,251 (6,404) matters were concluded and 4,637 (4,198) matters were continuing as at 31 December 1999 (see *Annexures A & B).*

For the period from 1 January to 31 December 1999, there were 511 (609) applications for the making, variation or rescission of an award, 1084 (5) award reviews, 330 (382) applications for the approval of an enterprise agreement, and 926 (949) notifications of an industrial dispute *(Annexure A).*

During the year, 782 (779) matters were filed in the Commission in Court Session, 731 (649) were concluded and, as at 31 December 1999, 1,040 (1,098) were continuing. There were 310 (465) applications filed to declare contracts void or varied pursuant to section 106 of the Act (*Annexure B).*

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

A large and continuing volume of work lies in the area of unfair dismissal applications under section 84 of the *Industrial Relations Act* 1996. These matters are allocated to Commissioners on a daily basis.

A total of 3,243 (4,048) applications under section 84 were filed during 1999, with 3,240 (3,866) being concluded *(Annexure A).* While the figures for 1999

represent a reduction from the high number of applications received in 1997 and 1998, the general trend over the last few years discloses a steady increase in the number of unfair dismissal matters filed in the Commission. This increase has had a substantial impact on the work load of the Commission with a particular burden falling upon the Commissioners.

Appeals to the Commission

For the period 1 January to 31 December 1999, 42 (43) appeals were lodged in the Commission (other than in Court Session). Of these, 32 (32) were appeals against a decision of a Commissioner; 9 (10) were against a decision of a Presidential Member; one appeal was filed against a decision of the Deputy Industrial Registrar; and although one appeal was filed in 1998 from the Vocational Training Board, no similar appeals were filed in the current year. During 1999, 33 (57) appeals were concluded and, as at 31 December 1999, 26 (28) appeals remained active (*Annexure A).*

A total of 70 (48) appeals were lodged in the Commission in Court Session for the period 1 January to 31 December 1999. These include 45 (26) appeals lodged against a decision of a Judicial Member of the Commission sitting alone; 16 (13) appeals lodged against a decision of the Chief Industrial Magistrate or other Magistrates; and 9 (9) appeals lodged against a decision of the State Authorities Superannuation Board. During 1999, 64 (70) appeals were concluded and, as at 31 December 1999, 61 (61) appeals remained active (*Annexure B).*

Regional and Country Sittings

There is a substantial workload in Newcastle and Wollongong in heavy industry, serviced by Presidential Members and Commissioners, and a

considerable workload in the area of unfair dismissals for Commissioners in country sittings.

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

There were a total of 601 (455) sitting days in a wide range of Country Courts and other country locations during 1999 with one regional Member sitting permanently in Newcastle (Deputy President Harrison). Commissioner Redman and Commissioner Cambridge now also sit regularly in Newcastle. The Commission sat there for 292 (203) days during 1999. Deputy President Harrison deals with a wide range of industrial matters mostly of a regional nature in Newcastle and the Hunter district. The significant pressure because of major extensions to the list has to an extent been alleviated by Commissioners Redman and Cambridge regularly sitting in this area this year.

The regional Member for Wollongong, formerly The Honourable Mr Justice Hungerford and now the Honourable Justice Walton, Vice-President, handles most Port Kembla steel matters. Commissioner Murphy and Commissioner Connor now also sit regularly in Wollongong. There were a total of 137 (93) sitting days in Wollongong during 1999.

Occupational Health and Safety

The number of prosecutions filed with the Commission in Court Session pursuant to the *Occupational Health & Safety Act* 1983, for the period from 1 January to 31 December 1999, was 315 (222). A total of 170 (154) prosecutions were commenced in relation to an offence under section 15 of that Act as to the failure to ensure the health, safety and welfare of employees at work; 63 (26) prosecutions under section 16 in relation to the safety of non-employees; and 33 (24) prosecutions were commenced against the directors or managers of corporations under section 50.

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

STATE WAGE CASE

The Commission initiated proceedings of its own motion to consider the decision of the Australian Industrial Relations Commission in the *Safety Net Review - Wages - April 1999* (1999) 87 IR 190. The hearing of the State Wage Case was held for the first time at the Commission premises in Newcastle. The decision to hold the proceedings in Newcastle reflected the significant contribution of the people and enterprises of Newcastle and the Hunter Valley to the State and national economy and to the development of industrial relations in New South Wales and Australia.

The Australian Commission awarded wage increases of $12 in award rates up to $510 per week and of $10 in award rates above that amount to be inserted into federal awards on specified conditions upon application. The federal minimum wage was also increased by $12 to $385.40. The Full Bench of the Commission decided to award the same increases for New South Wales awards and to continue the concept of the award review classification rate, also increased by $12 to $385.40. The Full Bench concluded that the wage increases were warranted having regard to the circumstances of the New South Wales economy and the position of low paid employees in this State. The increases were also made available on application, rather than by general order.

The wage increases were made available for only twelve months after the increases available under the *State Wage Case - June 1998* (1998) 79 IR 416 were inserted into the award. Specific provision was, however, made for the position of awards which have not been varied to give effect to increases available under the *State Wage Case - June 1998*, together with a mechanism in future State Wages Cases to address the position of awards found to be lagging.

The Full Bench of the Commission also considered the application of a standard anti-discrimination clause in all New South Wales awards together with the State Wage Case proceedings. The Commission decided to insert an anti-discrimination clause into all awards by way of general order, but made some alterations to the clause proposed by the parties to the proceedings. The changes were made to the agreed clause to ensure that the clause accorded with the relevant objects of the Act and to give effect to the stated intentions of the parties.

OTHER SIGNIFICANT FULL BENCH DECISIONS

A number of significant decisions of Full Benches of the Commission in 1999 are briefly referred to in this section.

Federated Municipal and Shire Employees' Union of Australia, New South Wales Division v Energy Australia

On 17 May 1999, in *Federated Municipal and Shire Employees' Union of Australia, New South Wales Division v Energy Australia* (1999) 90 IR 311, the Full Bench considered a number of questions concerning the jurisdiction of the Commission in the exercise of it arbitral powers to make an award or order relating to the terms and conditions of individual employees, particularly where the making of the award or order is said to require the adjudication of existing legal rights.

The Federated Municipal and Shire Employees' Union notified the Commission of a dispute relating to the alleged failure of Energy Australia to honour a contract of employment of a number of workers by refusing to treat them as permanent, full time employees. The primary judge upheld a notice of motion filed by Energy Australia on the basis that the substance of the Union's application sought an adjudication of existing legal rights which should properly be made by way of declaration.

The Full Bench noted that this case again revealed the difficulties which commonly arise when attempting to determine jurisdictional issues at a preliminary stage. Following the approach in *Nagle v Tilburg* (1993) 51 IR 8, the Full Bench determined that a motion seeking the preliminary dismissal of an application for want of jurisdiction could only succeed if the Commission is satisfied that no relevant award or order could be made in the circumstances of the case.

The fact that the Commission, when not in Court Session, lacks power to grant declaratory relief does not mean that the Commission may not in an appropriate case make an award regulating the rights and obligations of the parties to an industrial dispute. It may be open to the Commission to make an award that individual employees be treated as, or remunerated as if there were, full time employees. Furthermore, the Full Bench concluded that the lack of a so-called "collective element" to an industrial dispute did not necessarily provide a jurisdictional impediment to the making of an award under New South Wales legislation. The appeal was upheld.

Nutshack Franchise Pty Limited v Smith

In *Nutshack Franchise Pty Ltd v Smith* (1999) 90 IR 355, the Full Bench considered the appropriateness of hearing an application for leave to appeal and appeal where the appellant has not complied with the orders made below and has refrained from seeking a stay of those orders. The appellants lodged an appeal against a decision ordering them to pay to the respondents the sum of $176,691.95, but did not seek a stay of the order or pay the sum the subject of the order.

The Full Bench upheld a notice of motion filed by the respondents seeking orders that the appeal proceedings be stayed until further order. The Bench observed that a decision of a single member, once made, is final. Until leave to appeal is sought and granted, the decision appealed against remains in full force unless the decision is stayed by order of the Court pending the appeal.

In the view of the Full Bench, where an unsuccessful party at first instance has sought to further utilise the jurisdiction of the Court by way of appeal but expressly eschews its ability to obtain a stay of the challenged order, it may be considered an abuse of the process of the Court. Where such a situation

occurs, the proper course to be adopted is to stay the proceedings until the appellant complies with its obligations.

Hollingsworth v Commissioner of Police

On 21 May 1999, the Full Bench of the Court handed down its decision in *Hollingsworth v Commissioner of Police (No 2)* (1999) 88 IR 282. This matter was an appeal, on questions of law, by Ms Hollingsworth against a previous decision of the Full Bench given in 1997 (*Commissioner of Police v Hollingsworth* (1997) 77 IR 339). That decision was itself an appeal from two decisions of Commissioner Connor arising from the dismissal of the appellant as a student police officer in July 1995, and who was reinstated by Commissioner Connor. An appeal by the Police Service was upheld by a Full Bench and her claim dismissed.

The competency of the subsequent appeal was upheld by the Court of Appeal on the basis that the 1996 Act preserved the right found in the 1991 Act to appeal on a question of law from the Full Bench of the Commission to the Full Bench of the Commission in Court Session (*Commissioner of Police v Hollingsworth (No 2)* (1998) 84 IR 192).

The Full Bench upheld the appeal by majority. It was held that the previous Full Bench had erred in law in finding that the appellant was obliged to disclose her background in the employment application form or at the selection interview. The earlier Full Bench was not entitled to overturn crucial findings of fact made by the Commissioner which were reasonably open on the evidence. The majority also concluded that there was no basis upon which the previous Full Bench could substitute its view for that of the Commissioner concerning the practicality of reinstating the appellant.

Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority of New South Wales

In *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority of New South Wales* (1999) 90 IR 432, the Full Bench heard an appeal against a conviction recorded and penalty imposed by decision of the Chief Industrial Magistrate in relation to an offence under the *Occupational Health and Safety Act* 1983. The appellant was a labour hire company which was prosecuted in relation to an injury received by one of its employees when she was working at a factory operated by another employer.

The appeal required the determination of a number of issues relating to the nature of an appeal from the Local Court to the Full Bench, the principles to be applied when hearing the appeal and whether leave is required to bring such an appeal. The Full Bench concluded that an appellant seeking to appeal from a judgment of the Local Court is required to obtain the leave of the Full Bench pursuant to section 188 of the *Industrial Relations Act* 1996. The Full Bench further determined that such an appeal is not to be heard as a hearing *de novo*, but must be governed by the principles applicable to appeals generally brought under the Act.

The Full Bench granted leave to appeal in this case, but dismissed the appeal. It rejected the submission that the risks to safety in this case were not reasonably foreseeable and emphasised that an offence was constituted by the failure to ensure that employees were not exposed to risks, rather than the failure to prevent a particular accident. It was also observed that the concept of "reasonable foreseeability" is not apt to be applied in relation to the duties owed under the *Occupational Health and Safety Act* which imposes strict or absolute liability.

Further observations were made in relation to the obligations of a labour hire company under the *Occupational Health and Safety Act*. The Full Bench noted that the circumstances of an employee of a labour hire company differ from the conventional employer/employee relationship, particularly because he or she customarily works in the workplace of another employer. However, this circumstance does not obviate or diminish the obligation of a labour hire company to ensure the health, safety and welfare of its employees. A labour hire company is required to take positive steps to ensure that the premises to which its employees are sent and work performed do not present risks to health and safety.

Lawrenson Diecasting Pty Limited v WorkCover Authority of New South Wales

Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (1999) 90 IR 464 was an appeal against the severity of a sentence imposed by the Chief Industrial Magistrate in relation to an offence under the *Occupational Health and Safety Act* 1983. The appellant alleged that the Magistrate had erred in applying the new maximum penalty which came into effect on 1 February 1996 and failed to give adequate weight to a series of mitigating factors.

In relation to the maximum penalty applicable to the case, the Full Bench noted that the *WorkCover Legislation Amendment Act* 1995 increased the penalty applicable to this case from $10,000 to $50,000 and expressly applied to proceedings commenced on or after the commencement of the amendment (1 February 1996). Thus, although the offence took place prior to that date, since the proceedings were commenced after that date Parliament clearly intended the higher penalty to apply.

The Full Bench observed that the primary factor to look at in relation to the penalty to be imposed is the objective seriousness of the offence. Particularly in cases involving a serious breach of the *Occupational Health and Safety Act*, subjective factors, such as a plea of guilty, co-operation with the investigation and subsequent measures taken to improve safety, must play a subsidiary role in the determination of penalty to the gravity of the offence itself. In the circumstances of the case, the Full Bench decided to grant leave to appeal, but dismissed the appeal.

Fletcher Construction Australia Limited v WorkCover Authority of New South Wales

Fletcher Construction Australia Limited v WorkCover Authority of New South Wales (1999) 91 IR 66 was also an appeal concerning the severity of a penalty imposed in relation to a prosecution under *Occupational Health and Safety Act* 1983.

The Full Bench considered the nature of such appeals under section 5AA of the *Criminal Appeal Act* 1912. The Full Bench held that it must determine for itself the question of sentence, but adopted the approach of the Court of Criminal Appeal (in *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661) in calling for legislative reconsideration of such appeals, describing the incorporation of appeals by way of re-hearing as anomalous.

The Full Bench affirmed the primacy of the objective gravity of the offence in the sentencing process and upheld the primary judge's decision.

Beahan v Bush Boake Allen Australia Limited

In *Beahan v Bush Boake Allen Australia Limited* (1999) 93 IR 1, the Full Bench (following a reference by Hungerford J) considered the scope of the recent amendments to the unfair contracts jurisdiction contained in section 109A of the *Industrial Relations Act* 1996. The respondent filed a notice of motion seeking to have the summons struck out arguing that the effect of section 109A was to preclude the Court from having jurisdiction.

The Full Bench held that the language of the new section should be construed so as to remove from section 106 only those contracts which unambiguously fall within the exclusion provided by section 109A. The provisions dealing with unfair contracts are remedial in nature and should be construed beneficially.

The Full Bench noted the difficulty in construing section 109A arises because it excludes a contract of employment from relief under section 106 by reference to the statutory scheme for unfair dismissals. The respective schemes for unfair contracts and unfair dismissals are disparate in terms of both the entitlement and remedy. The key difference being that for unfair dismissal claims the focus is on the dismissal itself as distinct from the terms of the contract of employment and what those terms permitted at the time of dismissal.

In this case there was no allegation that the dismissal was unfair. Rather, the summons alleged that the terms of the contract were unfair. In dismissing the notice of motion the Full Bench stated that section 109A would operate where the unfair contract claim is an unfair dismissal claim in disguise and where it is essentially of the nature of an unfair dismissal. Where a claim challenges the terms of a contract of employment by genuine, not superficial or coloured

reasons relating to the contract itself, section 109A did not operate in relation to it.

Bell v Macquarie Bank Limited

In *Bell v Macquarie Bank Limited* (1999) 93 IR 191, the Full Bench heard an appeal from an interlocutory judgment concerning leave to proceed against a respondent served outside Australia. Proceedings were commenced by the appellants against two respondents, one of which was a company incorporated and conducting business in Sydney, the other a wholly owned subsidiary incorporated in Hong Kong. Following service in Hong Kong, the primary judge refused leave to proceed against the company incorporated in Hong Kong.

Under Rule 112 of the *Industrial Relations Commission Rules* 1996, process may be served on the respondent outside Australia, but if no appearance is entered by the foreign respondent the applicant may proceed only with leave of the Commission. The Full Bench determined that an applicant seeking leave to proceed against a respondent served outside Australia must establish, to the standard of a "good arguable case", that the relevant jurisdictional nexus exists for the Court to deal with the claim.

In case of an application under section 106 of the *Industrial Relations Act* 1996, what needs to be shown is that there is a contract or arrangement, or a related condition or collateral arrangement, involving the applicant and the foreign respondent, under which work is performed in an industry "in and of" New South Wales. Ordinarily, it will also be sufficient if the applicant demonstrates the existence of an arrangement which is collateral to another contract or arrangement whereby work is performed in an industry "in and of" New South Wales.

Bankstown City Council v Paris

In *Bankstown City Council v Paris (No 2)* (1999) 93 IR 209, the Full Bench considered the circumstances in which costs orders might be made, including costs orders on an indemnity basis, in unfair dismissal proceedings at first instance and on appeal. The respondent to the appeal successfully brought proceedings under Part 6 of Chapter 2 (Unfair dismissals) of the *Industrial Relations Act* 1996. Upon the Full Bench dismissing the appeal, the respondent sought orders for costs both at first instance and on appeal on the ground that the appellant had unreasonably failed to agree to a settlement of the claim pursuant to section 181(2)(c) of the Act.

The Full Bench noted that while costs will generally not be ordered in unfair dismissal proceedings, the evident purpose of section 181(2)(c) was to encourage the settlement of proceedings. A costs order may be available if a party rejects a proposal which could be described as a reasonable settlement or where the course of conduct of a party could be said to amount to conduct inconsistent with an intention to settle the proceedings on any basis that could be considered reasonable. If either of these criteria is satisfied, the Commission has a broad discretion as to costs and can properly, in the exercise of its discretion, make an order for indemnity costs where such an order is justified.

In the result, the Commission ordered the appellant pay the respondent's costs of the proceedings at first instance and on appeal. Further, the Commission ordered that the appellant pay the respondent's costs on an indemnity basis from the date on which the respondent had made a further attempt to settle the proceedings after the filing of the notice of appeal.

LEGISLATIVE AMENDMENTS

Industrial Relations Act 1996

The legislative amendments enacted during 1999 affecting the operations and functions of the Commission include:

The *Road Transport Legislation Amendment Act* 1999 No 19 which commenced 1 December 1999, makes amendments to definitions in Schedule 1 and the Dictionary of the *Industrial Relations Act* 1996 consequent on the enactment of the *Road Transport (Safety and Traffic Management) Act* 1999 No 20.

The *Statute Law (Miscellaneous Provisions) Act* 1999 No 31 commenced 7 July 1999. The Act amended section 379 (6) (b) of the *Industrial Relations Act* 1996 deals with representation in small claims procedures, as part of ongoing statute law revision.

The *Courts Legislation Amendment Act* 1999 No 39 commenced on 1 September 1999, and updated section 19 of the *Industrial Relations Act* 1996 dealing with the review of awards by inserting a new section 19(1). The amended section requires the Commission to complete its review of all awards before September 2001 and subsequently undertake review of all awards at least once in every three year period.

The *Local Courts Amendment (Part Time Magistrates) Act* 1999 No 69 commenced 17 December 1999. The *Local Courts Amendment (Part Time Magistrates) Act* 1999 amended the *Local Courts Act* 1982 to allow for the appointment of part-time Magistrates, and inserted section 381(5) into the *Industrial Relations Act* 1996 allowing the appointment

of part-time Industrial Magistrates. Schedule 4 Part 7 of the *Industrial Relations Act* 1996 was amended to allow for the remuneration of part-time Magistrates.

The *Crimes Legislation Amendment (Sentencing) Act* 1999 No 94, to commence on 1 January 2000, amended section 272 of the *Industrial Relations Act* 1996 to omit a reference to "penal servitude". This change was consequent upon amendments made to the *Crimes Act* 1900 by the *Crimes Legislation Amendment (Sentencing) Act* 1999 No 94 abolishing penal servitude.

Legislative amendments which were enacted in previous years but commenced during 1999 included:

The *Justices Legislation Amendment (Appeals) Act* 1998 No 137, commenced 1 March 1999, amended section 197 of the *Industrial Relations Act* 1996 to remove reference to the procedure under the *Justices Act* 1902 for a party to apply for a Local Court to state a case for the opinion of the Full Bench of the Commission in Court Session. It also affected the provisions of the Act which related to the hearing of appeals by the Commission from the Chief Industrial Magistrate and other magistrates.

The *Courts Legislation Further Amendment Act* 1998 No 172, commenced 1 January 1999, inserted a new section 190A in the *Industrial Relations Act* 1996 to enable a single member of the Commission (either the President or a Member nominated by the President) to deal with interlocutory applications in relation to appeals to the Full Bench of the Commission. It also enables a single member to make consent orders and to grant leave to withdraw or discontinue an appeal.

The *Industrial Relations Amendment (Federal Award Employees) Act* 1998, commenced 12 February 1999 and inserted new section 90A and section 90B into the *Industrial Relations Act* 1996. The new section 90A applies the provisions of Subdivision B of Division 3 of Part VIA of the *Workplace Relations Act* 1996 (Cth) (Termination of Employment) as a law of the State to Federal Award employees whose employment has been terminated, but who are not within the scope of section 170CB(1)(a)-(d) of the *Workplace Relations Act*. The amendment enables the Australian Industrial Relations Commission to exercise functions with respect to the termination of employment of such employees and confers consequential powers on the Federal Court of Australia. Section 90B provides a mechanism for the termination of the operation of section 90A.

Occupational Health and Safety Act 1983

The legislative changes in 1999 affecting the *Occupational Health and Safety Act* 1983, were as follows:

The *Statute Law (Miscellaneous) Provisions Act (No 2)* 1999 No 85 commenced on 3 December 1999. The Act repealed sections 36, 38, 40, 42 and 44, and schedules 2 to 7 of the *Occupational Health and Safety Act* 1983, as part of ongoing statute law revision. The repealed sections and schedules amended other Acts upon the introduction of the *Occupational Health and Safety Act* 1983.

Legislative amendments which were enacted in previous years but commenced during 1999 included:

The *Justices Legislation Amendment (Appeals) Act* 1998 No 137, commenced 1 March 1999 removed reference in section 47(4) to the

procedure for the stating of a case by a Local Court to the Industrial Relations Commission in Court Session in relation to offences under the *Occupational Health and Safety Act* 1983.

The *Administrative Decisions Tribunal Legislation Amendment Act* 1998 No 48, commenced 1 January 1999. The Act enabled regulations made under the *Occupational Health and Safety Act* 1983 to provide for applications to be made to the Administrative Decisions Tribunal for reviews of certain kinds of decisions made under the regulations.

Child Protection (Prohibited Employment) Act 1998

Three connected pieces of legislation relating to child protection were passed in late 1998 in response to the Royal Commission into the New South Wales Police Service. The three pieces of legislation were the *Commission for Children and Young People Act* 1998 No 146; the *Child Protection (Prohibited Employment) Act* 1998 No 147; and the *Ombudsman Amendment (Child Protection and Community Services) Act* 1998 No 148.

The *Child Protection (Prohibited Employment) Act* 1998 aims to prohibit persons with convictions for serious sexual offences from working in child-related employment. Among other things, the Act provides that a person who has been convicted of a "serious sex offence" is prohibited from applying for, or continuing to work in, positions involving direct contact with children.

The Act confers jurisdiction on the Commission and on the Administrative Decisions Tribunal to hear an application by a "prohibited person". After taking into account a series of factors prescribed by the legislation, the Commission may make an order declaring that the Act does not apply to that person.

PRACTICE DIRECTIONS

Pursuant to Rule 89 of the *Industrial Relations Commission Rules* 1996, the President may, by Practice Direction, determine or change any practice, procedure or usage of the Commission where the Act or Regulations do not make adequate provision, a difficulty arises as to the procedure to be followed or the Commission desires to change an established practice.

Three Practice Directions were published in late 1998 to provide for usual appeals directions (Practice Note No.1); lists of authorities and legislation both for matters at first instance and on appeal (Practice Note No.2); and for certification of enterprise agreements and the provision on request for certified copies (Practice Note No.3). These Practice Directions have generally been complied with by parties and their representatives and have greatly aided the orderly disposition of proceedings before the Commission.

One additional Practice Direction was published during 1999. Practice Direction No.4 (Telephone Conciliation Conferences) was published in the Industrial Gazette on 4 June 1999. The purpose of the Practice Direction is:

> ... to allow the parties the opportunity to seek to have certain conferences conducted by way of telephone conference where appropriate circumstances are shown to exist to justify the Industrial Relations Commission taking that step.

The Practice Direction applies to conciliation conferences held in proceedings relating to alleged unfair dismissals, alleged unfair contracts, notifications relating to industrial disputes, an inquiry into an industrial matter and pre-hearing conferences before the Commission in Court Session.

A party to such proceedings may ask the Commission to conduct a conference by way of telephone conference where it is not practicable for a party to attend

a conference by reason of costs, distance, physical or other disability or the nature of the relationship between the parties. The Commission may agree to the request if it thinks it appropriate and shall notify the parties of the result of the application.

It is hoped that this procedure will, where appropriate, allow the conduct of the Commission's conciliation functions to proceed in a manner which is both just and speedy and which prevents unnecessary expense or inconvenience to the parties.

AMENDMENTS TO THE COMMISSION'S RULES

Pursuant to section 186 of the Act, the rules of the Commission are to be made by a Rule Committee comprising the President of the Commission and two other Presidential Members appointed by the President.

On 18 November 1999 the Rule Committee inserted a new Rule 18A into the Commission's Rules setting down a new procedure for applications under section 106 of the Act (Unfair Contracts). The new procedure requires an application to be made in the specified form, in particular indicating in summary form the matters of fact and law which form the basis of the application and containing sufficient information to allow the Commission to carry out its duty to conciliate.

The Rule also requires the respondent to answer each of the matters raised in the application and to specify the matters of fact and law on which they will rely in opposition to the application. The applicant must subsequently file a response to the matters raised by the respondent.

The new Rule will allow proceedings to be brought to hearing with minimum delay and should ensure that the conciliation process can be conducted in a productive manner. The new procedure is being phased in over a period of time, with all new applications made after 6 October 2000 required to be in the new form.

INDUSTRY PANELS

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

Two of the panels specifically deal with applications from regional areas. The panel dealing with applications from the Hunter region is chaired by Deputy President Harrison. The panel dealing with applications from the Illawarra-South Coast region was chaired by the Hon. Mr Justice Hungerford until the position was assumed by the Hon. Justice Walton, Vice-President on 29 October 1999.

ANNUAL CONFERENCE

The Annual Conference of the Industrial Relations Commission was held from 28 April to 30 April 1999. Presentations covered a range of topics. The first day focussed significantly on access and equity issues. Representatives of the Moslem Women's Association attended to discuss aspects of the Moslem Culture. Ms Julia Haraksin (Disability Strategic Plan, Attorney General's Department) gave a paper entitled *Access and Equity: Recent Developments in Disability Support* while His Honour Judge Harvey Cooper (District Court of New South Wales) and Magistrate Robert Abood presented papers relating to unrepresented litigants.

A number of papers addressed questions relating to the conduct of proceedings before the Commission. Professor Margaret Allars (Professor of Public Law, University of Sydney) presented a paper concerning *Procedural Fairness/ Natural Justice*; Barrister Mr Derek Minus a paper entitled *Mediation as Related to Martial Art Principles*; and the Honourable Dennis Mahoney AO QC (former President of the New South Wales Court of Appeal) a paper entitled *Courtroom Issues - Judicial Conduct.* A paper entitled *Employer Liability in Tort Law* was presented by His Honour Judge Colin Phegan (District Court of New South Wales and formerly Professor of Law at the University of Sydney) examining recent developments in that field.

The conference was well attended and provided an invaluable opportunity for members of the Commission to discuss matters relevant to their work. The presentations, forums and discussions proved relevant and practical and appreciation should be expressed to the eminent presenters and to all those who contributed as participants.

The development of the Annual Conference, substantially assisted by the Judicial Commission of New South Wales exercising its mandate to advance

judicial education, has proved to be a most successful initiative with the potential to add to the professionalism which the Commission seeks to advance in all its work.

TECHNOLOGY

Medium Neutral Citation

From 29 February 2000, the Commission will implement the use of an electronic judgments database and a system of court designated medium neutral citation. The system is similar to that currently in use in the Supreme Court and the Land and Environment Court and allows judgments to be delivered electronically to a database maintained by the Attorney General's Department. The judgment database allocates a unique number to each judgment and provides for the inclusion of certain standard information on the judgment cover page.

The adoption of the system for the electronic delivery of judgments will present a number of advantages to the Commission, the legal profession and other users of the Commission. The system allows unreported judgments to be identified by means of the unique judgment number and paragraph numbers within the body of the judgment. Furthermore, the judgments will in future be available shortly after they are handed down through both the Attorney General's Department web site (Lawlink) and the Australian Legal Information Institute (AustLII) site.

The introduction of the system has only been possible with the co-operation of members of the Commission and their staff and with the assistance of the Executive and Strategic Services Division of the Attorney General's

Department. Invaluable training and ongoing support was also provided by staff of the Judicial Commission of New South Wales.

Training and Computer Equipment

I am pleased to report that a number of programs were implemented throughout the year to improve the computer resources and equipment available to members of the Commission. Notably, all members of the Commission, including those members located at 815 George Street and in Newcastle, are now connected to the Attorney General's Department network, including access to the Department's intranet, e-mail and network based internet services. Members have also been provided with laptop computers which are compatible with the Department's network and intranet/internet services. These resources provide valuable assistance to members of the Commission in the performance of their duties.

A number of additional projects have assisted the work of the Commission's Registry. The Registry's case load database system, CITIS, was extended to cover the Commission's site at 815 George Street and the cable infrastructure was upgraded. The Registry has overseen the creation of an Awards Review Database used to administer and update award reviews. The Commission's security system was also upgraded to cater for Y2K related issues. I thank all staff involved in the successful implementation of these projects.

USERS' GROUP

The Industrial Relations Commission Users' Group was established in late 1998 in order to provide a forum for the major industrial parties and others who regularly appear before the Commission to provide feedback on the

performance of the Commission and allow input into the Commission's practice and procedure. The first meeting was held in November 1998 and meetings were held quarterly throughout 1999.

A feature of the Users' Group has been the establishment of sub-committees for the purpose of investigating particular issues affecting "users" of the Commission. During 1999, sub-committees were convened to consider issues including the certification of enterprise agreements, the information required for enterprise agreement applications, changes to procedures for section 106 applications, changes to procedures relating to the processing of unfair dismissal claims, the possible introduction of a reserve matters list, recovery of small money claims and the introduction of telephone conferencing.

Major contributions of the Users' Group during the year have included the gazetting of the various Practice Directions and substantial changes to the Commission Rules relating to applications brought under section 106 of the Act (Unfair Contracts). Other issues discussed by the Users' Group included the effect of the Sydney 2000 Olympics on the operations of the Commission, possible sittings of the Commission at Parramatta and the convening of the Full Bench of the Commission in Newcastle for the purpose of hearing the State Wage Case.

The Users' Group has proved an extremely useful mechanism to discuss issues affecting those who frequently appear before the Commission and to canvas possible improvements to the Commission's practice and procedure. I look forward to working with the industrial parties, members of the legal profession, representatives of government and others who have so constructively contributed to the forum thus far.

COMMISSION PREMISES

I have earlier reported that little discernible progress had been made with respect to the co-location of Judges and Commissioners in the premises at 50 Phillip Street. This remains an important goal of the Commission and would greatly enhance the efficiency and co-ordination of its activities. However, during the year with the assistance of the Director General and senior officers of the Attorney General's Department some positive developments have occurred in this area. I am pleased also to note that refurbishment of the Building at 50 Phillip Street has continued with, I might add, great efforts having been made by all staff involved to ensure that minimal inconvenience was experienced by Judges, Deputy Presidents, Commissioners, staff and parties attending the Commission. The significant efforts of staff members of the Industrial Registry and the Attorney General's Department in this project are much appreciated.

The refurbishment of the premises at 50 Phillip Street was undertaken in part to accommodate the amalgamation of the former Industrial Court Registry with the Commission Registry. The merger of the two Registries conforms with the structure set down by the 1996 Act and ensures that there is one focal point for the Registry's public functions. The merger has also allowed the development of uniform and improved procedures for the provision of services to the public and parties to proceedings.

I am pleased with the manner in which the refurbishment and amalgamation of the Registry was undertaken and thank all staff for their co-operation. I look forward to reporting further on these matters in subsequent reports.

ANNEXURES

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

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

ANNEXURE A

Matters filed during period 1 January 1999 to 31 December 1999 and matters completed and continuing as at 31 December 1999 which were filed under the Industrial Relations Act 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

(other than in Court Session)

(1940 or 1991 Acts) and 1996 Act ABBREVIATIONS	USAGE	FILED 1.1.99 - 31.12.99	COMPLETED 1.1.99 - 31.12.99	CONTINUING AS AT 31.12.99 (inc prev. years)
AW	Application re new award/ variation/rescission of award	511	471	232
CA	Application for approval of a Contract Agreement	6	8	3
CC	Application re Industrial Committees	1	0	2
CD	Application re Contract Determination	9	8	14
CTA C27A	Application pursuant to Cl 27A of Clothing Trades Award	43	43	3
EA	Applications re Enterprise Agreement (s.35), (s.43), (s.44)	330	312	70
EPA	Report under s.11 of the Employment Protection Act	2	2	2
IC	Application to establish Industrial Committee	51	57	4
PSA s181D	Application for review under s181D of Police Service Act	12	2	10
(S14)	Notice to show cause pursuant to section 14 of IR Act 1991	0	0	0
S18	Application for exemption from whole or any part of award	0	0	0
S19	Notice of award review	1,084	369	719
S33	Commission to set principles for approval of Eas.	0	0	0
S50	Adoption of National decision	0	0	0
S51	Commission to make State decision	2	3	1
S52	Variation of awards/orders on adoption of National decisions	0	0	0
S79	Commission to make State decision - Pt 3 re part-time work	0	0	0
(S246) S84	Application re unfair dismissal	3,243	3,240	1,812
S93	Application for reinstatement of injured employee	9	10	7
S126	Application for Stand down orders	0	0	0
(S188, S204) S130	Notification of industrial dispute to Commission	906	888	632
S132	Commission may convene compulsory conf re s.130 dispute	1	1	0
S143	Application for payment of Strike pay/remuneration	1	1	0
S146	Ministerial Inquiry pursuant to s146(1)(d) of IR Act 1996	0	0	1
S175	Interpretation pursuant to section 175 of IR Act 1996	0	1	0
S193	Reference of a matter by Member to Full Bench	0	0	0
S203	Referral of matter by Federal President to State Commission	0	0	0
S204	Referral of matter by State President to Fed. Commission	0	0	0
S205	Joint proceedings State/Federal Commissions	0	0	0
S213	Application for relief from victimisation pursuant to s. 213	8	5	7
S217	Application for registration of industrial organisation	0	0	0
S236	Reinstatement of injured employee	0	0	1
(S220) S294, 295	Demarcation orders	3	3	6
S311	Contract determinations/contracts of carriage	0	0	0
S314	Reinstatement of contract of carriage	4	5	2
S332	Comp conference re contract of carriage/determination	20	18	14
(S697) S346, 348	Comp conference re claims – contract of carriage	5	38	15
(S698)	Compulsory conf re alleged breach of contracts of carriage.	0	1	0
C	Referred from Australian IRC under s.174, IR Act 1988 (Cth)	6	1	14
IRCAP1	Appeal against decision of Commissioner	32	21	19
IRCAP2	Appeal against Presidential Member	9	10	7
IRCAP3	Other Commission Appeals	1	1	0
VTBAP	Other Commission Appeals	0	1	0
Sub Total		**6,299**	**5,520**	**3,597**

ANNEXURE B

Matters filed during period 1 January 1999 to 31 December 1999 and matters completed and continuing as at 31 December 1999 which were filed under the Industrial Relations Act 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES IN COURT SESSION

(1940 or 1991 Acts) and 1996 Act ABBREVIATIONS	USAGE	FILED 1.1.99 - 31.12.99	COMPLETED 1.1.99 - 31.12.99	CONTINUING AS AT 31.12.99 (inc prev. years)
AHA	Application recovery of moneys *Annual Holidays Act* 1944	0	1	2
DGA S9	Prosecution under s.9(1)(a) Dangerous Goods Act 1975.	0	0	0
FSIA	Appeal pursuant to Factories Shops and Industries Act 1962	2	3	0
LSLA	Application under section of 12 Long Service Leave Act 1955	0	1	1
OHS S15	Prosecution: s.15 Occupational Health & Safety Act 1983	170	179	213
OHS S16	Prosecution: s.16 Occupational Health & Safety Act 1983	63	20	78
OHS S17	Prosecution: s.17 Occupational Health & Safety Act 1983	28	7	34
OHS S18	Prosecution: s.18 Occupational Health & Safety Act 1983	11	0	12
OHS S19	Prosecution: s.19 Occupational Health & Safety Act 1983	9	0	13
OHS S27	Prosecution: s.27 Occupational Health & Safety Act 1983	0	3	0
OHS S31R	Prosecution: s.31R Occupational Health & Safety Act 1983	1	0	1
OHS S50	Prosecution: s.50 Occupational Health & Safety Act 1983	33	17	45
WCA S27(1)	Prosecution: s.27(1) Workers Compensation Act 1987	52	52	0
S106	Application to Commission to declare contracts void/ varied	310	339	545
S129	Prosecution under s129(1)	3	1	2
S139	Application re contravention of a dispute order	0	0	0
S154	Declaratory jurisdiction	10	5	8
S180	Proceedings for Contempt of Commission	0	0	0
(S191, 194, 195)	Applications under s191, 194 and s195 of 1991 Act	0	2	1
S196	Reference pursuant to s196 IR Act 1996 to the Full Bench	1	1	0
S197	Application to State a Case	0	2	0
(S198)	Reference under s194 of 1991 Act	0	1	0
S225 & S227	Application for cancellation of regstrtn of indstrl organisatn	0	0	0
S247	Orders re rules of State organisation	0	1	1
S248	Application for declarations and orders under s248 of IR Act	0	1	0
S266	Application for order enforcing provisions of s266 IR Act	0	1	0
S288	Application for Validation Orders under s.288 IR Act 1996	1	1	1
S301	Prosecution under s 301(3)	3	1	2
S343-4, 365,367	Order for recovery of money under ss343, 344, 365 & 367	14	25	18
S357	Civil penalty for breach of industrial instruments	0	1	0
S368	Order for recovery of unpaid Superannuation	1	1	0
S369	Application for order for payment of moneys	0	0	0
S379	Application under s379 of the IR Act 1996	0	0	0
S399	Prosecution under s399 of the Industrial Relations Act 1996	0	1	0
(various)	Applications under ss440, 441, 465 & 497 of IR Act 1991	0	0	2
CTAP1	CICS Appeal against a decision of Member in CICS matter	45	31	33
CTAP2	CICS Appeal against a decision of the F/Bench	0	1	0
CTAP3	Other CICS Appeals	0	0	1
CIM	Appeal against a decision of Chief Industrial Magistrate	16	20	14
LOCAL CT	Appeal against a decision of Local Court Magistrate	0	4	0
SASB	Appeal re decision of State Authorities Superannuation Board	9	8	13
SSIMC	Appeal re decn of State Super Investment & Mangment Corp	0	0	0
Sub Total		**782**	**731**	**1,040**

Total IRC and CICS Matters:	**7,081**	**6,251**	**4,637**