The Industrial Relations Commission

of

New South Wales

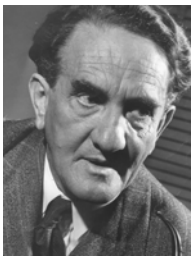
Annual Report

Year Ended 31 December 2009










The Industrial Relations Commission

of

New South Wales

Annual Report

Year Ended 31 December 2009

The President

Industrial Relations Commission of New South Wales

47 Bridge Street, Sydney

The Honourable P Lynch MP
Minister for Industrial Relations,
Minister for Commerce, Minister for Energy,
Minister for Public Sector Reform, and
Minister for Aboriginal Affairs
Level 34, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

10 June 2010

Dear Minister,

I have the honour of furnishing to you for presentation to Parliament the Fourteenth 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 2009.

Yours sincerely,

The Honourable Justice R P Boland
President

ISSN 1832-2093

Website:	**www.lawlink.nsw.gov.au/irc**
Email:	**nswirc@agd.nsw.gov.au**
Street Address:	**47 Bridge Street, Sydney NSW 2000**
Registry Hours:	**9.00am – 4.00pm Mon – Fri**
Document Exchange:	**DX 874 Sydney**
Postal Address:	**GPO Box 3670 Sydney NSW 2001**
Contact details:	**Telephone: 02 9258 0866**
	Facsimile: 02 9258 0058

Cover: **Commission Presidents**: *The collage on the front cover is of the ten former Presidents of the Commission: Henry Emmanuel Cohen(1902-1905), Charles Gilbert Heydon (1905-1918), Walter Edmunds (1920-1926), George Stephenson Beeby (1920-1926), Albert Bathurst Piddington (1926-1932), Joseph Alexander Browne (1932-1942), Stanley Cassin Taylor (1942-1966), Alexander Craig Beattie (1966-1981), William Kenneth Fisher (1981-1998), Frederick Lance Wright (1998-2008).*

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.

TABLE OF CONTENTS

INTRODUCTION

The Fourteenth 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. This duality of approach has proved effective since the inception of the Commission over 100 years ago in ensuring that the citizens of New South Wales are well served in the resolution of all manner of industrial proceedings.

In relation to the delivery of that service, I make note of the significant contribution of three Members who completed duties with the Commission during 2009.

Justice Monika Schmidt, who was appointed as a judge of the Industrial Court and as a Deputy President of the Industrial Relations Commission on 22 July 1993, was appointed as a Judge of the Supreme Court of New South Wales on and from 27 July 2009. I noted at the time of her appointment that in her 16 years with the Commission her Honour had brought her considerable intellect, passion for fair play, extraordinary work ethic and expertise in industrial, commercial and criminal law to bear in all of the matters to come before her, including cases of lasting significance to the jurisprudence of the Commission and the Court. Her contribution was greatly appreciated and will be missed.

Sadly, her Honour Justice Patricia Staunton, AO, was forced into retirement because of illness and completed duties with the Commission as at 31 January 2009. Her Honour had a remarkable career of service in not only the industrial arena, through her lengthy service with the *Nurses Association* (1980-1995 including as General Secretary of that organisation from 1987-1995) but also in government (as a Member of the *Legislative Council,* 1995-97) and to the judiciary (prior to her appointment to the Commission, her

Honour was appointed as a magistrate in 1997 and was the Chief Magistrate from 1999 until her appointment as a judge of this Court in 2002). Her Honour brought her considerable skills to bear on the diverse matters listed before her in her time at the Commission and was particularly renowned for her conciliation skills.

Commissioner John Murphy reached the statutory retirement age during the year and completed his service with the Commission on 27 March 2009. Commissioner Murphy had served as a Commissioner for over 15 years and was well known for his attention to detail, his optimism that any dispute was capable of a satisfactory resolution and his commitment to ensuring that all parties were dealt with fairly.

On behalf of fellow Members and staff I wish the two of them the best for the next stage of their lives.

Justice Monika Schmidt

Justice Patricia Staunton, AO

Commissioner John Murphy

During the year I continued discussions with the Attorney-General and Minister for Industrial Relations about the future of the institution. This continued to be a difficult exercise given that the federal and State governments spent the better part of the year working on an agreement that will see, from 1 January 2010, the transfer of the private sector to the national industrial relations system with consequent impacts on the Commission's resources arising from the dual appointment of seven members to the federal body, *Fair Work Australia*. Until that agreement was finalised it was difficult for any concrete formulisation of proposals. Arrangements were made towards the end of the year for the co-location of the *Government and Related Appeals Tribunal* and the *Transport Appeals Board* to the Commission's premises from early in the new year and a number of other fruitful discussions were held with the Attorney and I expect that 2010 will see a number of steps taken that will consolidate the role of the Commission and Court into the future.

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. Through the efforts of Mr Michael Talbot, Assistant Director General, Courts and Tribunal Services, the Department of Justice and Attorney General were able to re-engage Mr Michael Grimson as Industrial Registrar with effect from 2 February 2009 and the Commission is fortunate that he elected to return. I acknowledge the efforts of Ms Maria Anastasi, Deputy Industrial Registrar, during the period that the Commission was without a Registrar.

I would also take this opportunity to thank Ms Lisa Gava, 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 Associate, Ms Zoe Paleologos who assumed the role following the departure of Ms Emma Starkey early in the year, for her thoroughness and consistency of approach.

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.

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.

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;

The Honourable Justice Monika Schmidt, appointed 22 July 1993; appointed as a Justice of the Supreme Court of NSW 27 July 2009;

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

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

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

Deputy President John Patrick Grayson, appointed 29 March 2000;

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

The Honourable Justice Patricia Jane Staunton AM, appointed 30 August 2002; retired 31 January 2009;

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

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

COMMISSIONERS

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

Commissioner Peter John Connor, appointed 15 May 1987;

Commissioner Inaam Tabbaa, appointed 25 February 1991;

Commissioner Donna Sarah McKenna, appointed 16 April 1992;

Commissioner John Patrick Murphy, appointed 21 September 1993; retired 27 March 2009;

Commissioner Ian Walter Cambridge, appointed 20 November 1996;

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.

INDUSTRIAL REGISTRAR

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

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

DUAL APPOINTMENTS

The following Members of the Commission also held dual appointments as Presidential Members of the Australian Industrial Relations Commission until 31 December 2009[2]:

The Honourable Justice Roger Patrick Boland;

The Honourable Justice Francis Marks;

The Honourable Justice Monika Schmidt;

The Honourable Deputy President Rodney William Harrison.

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.

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

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

[2] excepting Justice Schmidt whose dual appointment ceased on her appointment to the Supreme Court.

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

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

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

REGIONAL AND COUNTRY SITTINGS

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

In July 2004 the Commission entered into an arrangement with the Registrar of the Local Court at Parramatta to provide registry services for clients of the Commission at the Parramatta Court Complex, Cnr George and Marsden Streets, Parramatta. This was initially commenced as a pilot for three months designed, principally, to meet the needs of industrial organisations located in Western Sydney. In short, this initiative allows for any application that may be filed at the Sydney Registry to be filed at Parramatta with the exception of industrial disputes under s 130 of the Act. The Commission acknowledges the contribution of Ms Lin Schipp, a senior officer of the registry, who initially conducted the pilot and continues to maintain the service at Parramatta.

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

There were a total of 463 (536)[3] sitting days in a wide range of country courts and other country locations during 2009. There are two regional Members based permanently in Newcastle - Deputy President Harrison and Commissioner Stanton. The Commission sat in Newcastle for 216 (250) sitting days during 2009 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 134 (178) sitting days in Wollongong during 2009.

The Commission convened in over 23 other regional locations in 2009 including Albury, Ballina, Bathurst, Coffs Harbour, Dubbo, Grafton, Griffith, Kempsey, Lismore, Murwillumbah, Tamworth, Toronto, and Wagga Wagga.

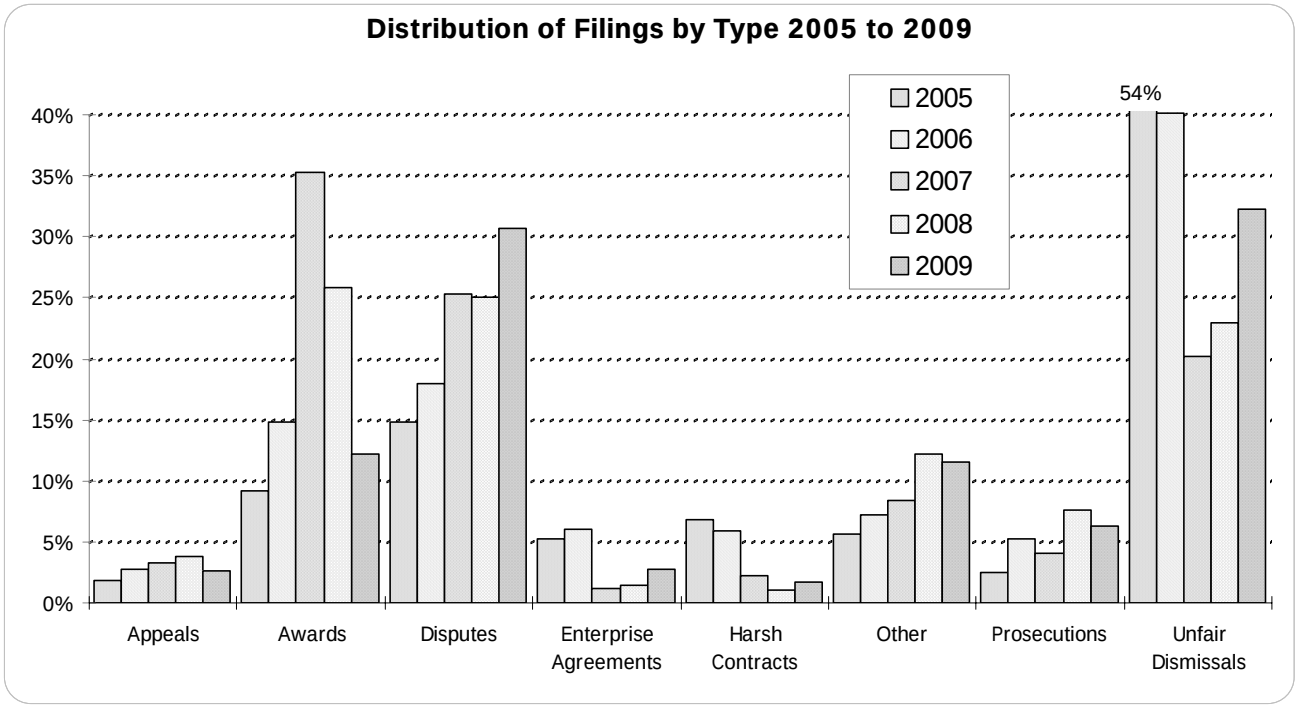
[3] Numbers in brackets are figures from 2008

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 the table below, 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. Interestingly, the unfair dismissal work has steadily increased since a low in 2007 and, anecdotally, this seems attributable to the change of government at a federal level and publicity surrounding the commencement of the *Fair Work Act* 2009 and provision within that legislation restoring rights relating to unfair dismissal. Industrial dispute filings remained strong after an initial falling away and a significant contributing factor in that respect relates to the number of parties who entered into agreements under s 146A of the *Industrial Relations Act* 1996 for the Commission to provide dispute resolution services.

TABLE A



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

UNFAIR DISMISSALS

As will be seen from Table A unfair dismissal applications brought under s 84 of the *Industrial Relations Act* 1996 continue to be a significant area of work.

The Act provides that each matter is initially dealt with by listing for conciliation conference (s 86) with a view to reaching an early settlement between the parties. Where the conciliation is unsuccessful the matter proceeds to an arbitrated hearing.

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

TABLE B

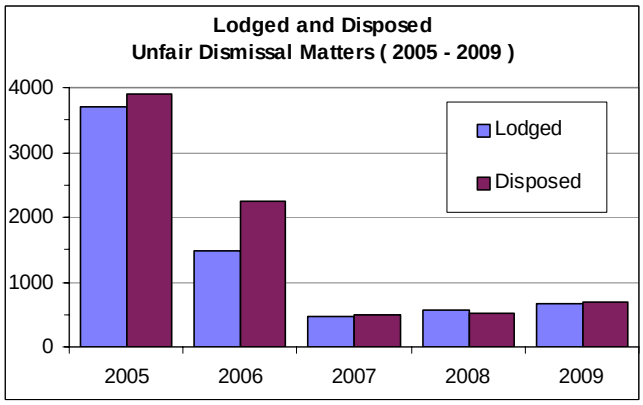


TABLE C

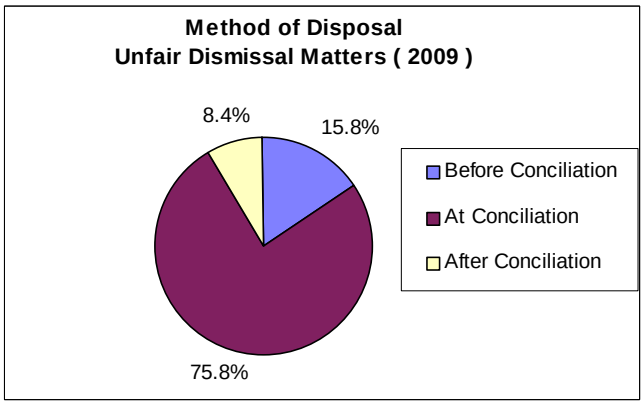
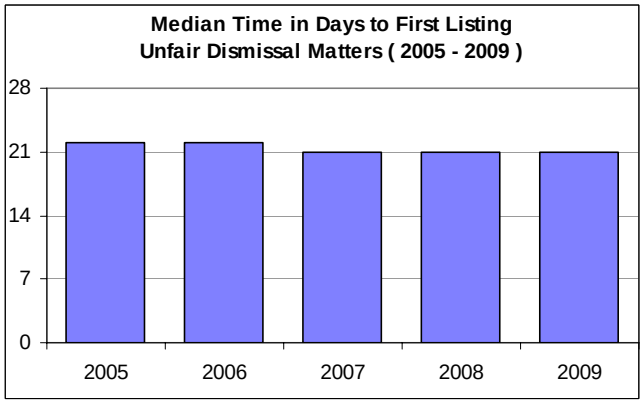
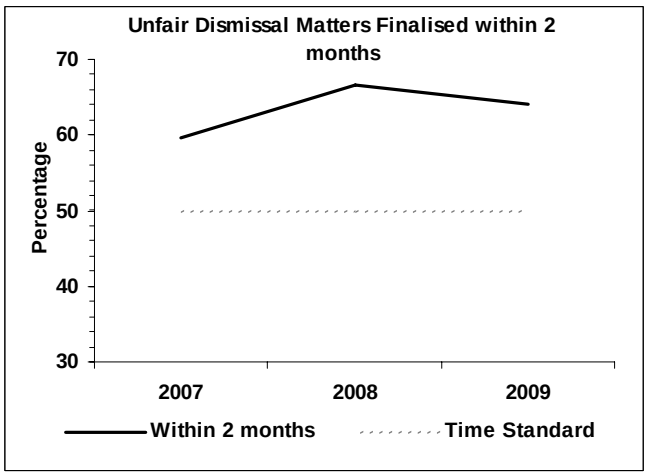


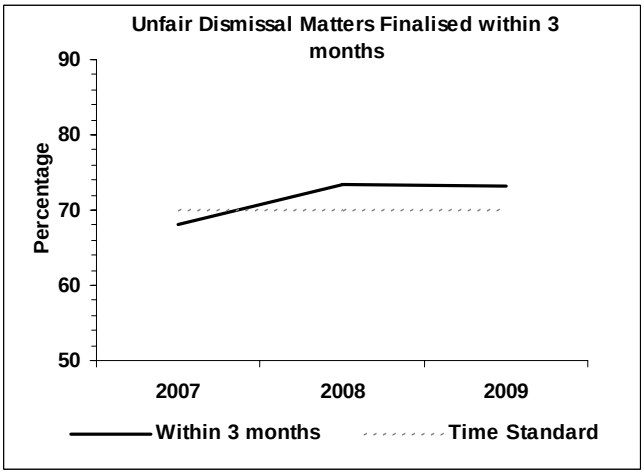
TABLE D



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

TABLE 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.

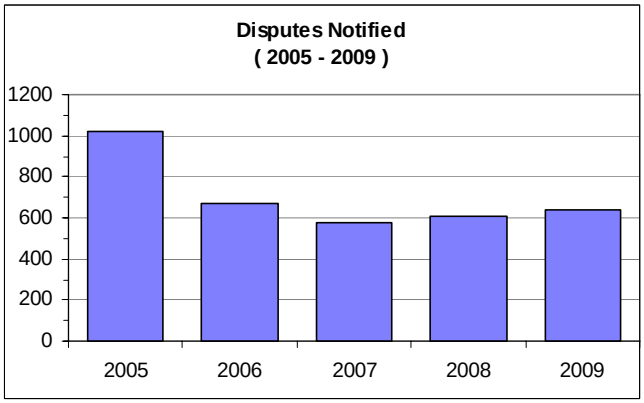
"Industrial dispute" is a broadly defined term linked, as it is, to the definition of "industrial matter" in s 6 of the *Industrial Relations Act* and this area of the Commission's jurisdiction remains significant.

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

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

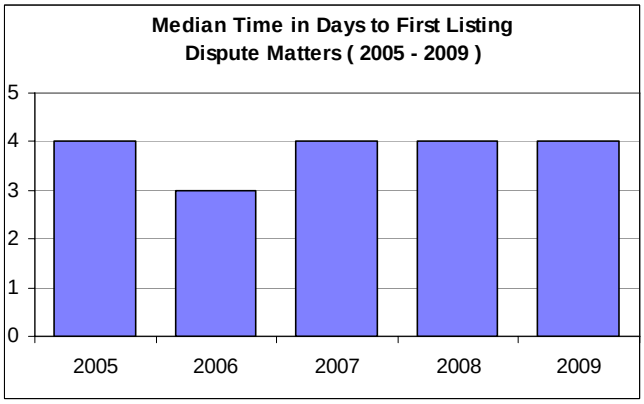
The table below shows disputes filed in the last five years:

TABLE F



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

TABLE G



DETERMINATION OF AWARDS AND APPROVAL OF ENTERPRISE AGREEMENTS

One of the important objects of the *Industrial Relations Act* 1996 is to facilitate the appropriate regulation of employment through awards, enterprise agreements and other industrial instruments.

The Commission is given power to:

- make or vary awards (s 10 and s 17 respectively);
- make or vary enterprise agreements (s 28 and s 43);

- review awards triennially (s 19); and
- consider the adoption of National decisions for the purpose of awards and other matters under the Act (s 50) (for example, the State Wage Case).

AWARD REVIEW

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

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

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

TABLE H

Awards and Enterprise Agreements	2005	2006	2007	2008	2009
Application to make award	194	62	22	64	34
Application to vary award	332	479	201	252	216
Application enterprise agreement	359	224	28	35	57
Terminated enterprise agreement	173	147*	19	12*	30
Review of awards (Total) (Notices issued)	74	0	572	308	0
Review - Awards reviewed	67	5	431	374*	47
Review - Awards rescinded	16	0	5	12	3
Review - Awards determined to have effect as enterprise agreements	n/a	n/a	173	169*	3
* = data revised since previous report.					

STATE WAGE CASE 2009 [2009] NSWIRCOMM 122

On 30 July 2009, following an application by Unions NSW for a State decision pursuant to s 51 of the *Industrial Relations Act* 1996, the Full Bench of the Commission handed down the State Wage decision for 2009. The Commission increased minimum award wages by 2.8 per cent, and relevant allowances by a similar percentage increase. Pursuant to s 52 of the *Industrial Relations Act*, the Award Review Classification Rate (ARCR) was increased by $15.50 from $552.70 to $568.20.

The application by Unions NSW had sought a general wage increase of 3.8 per cent. The general response by the major employer parties to the claim by Unions NSW was that there should be no wage increase awarded or in the alternative consideration of the claim should be deferred until such time as there is clarity as to extent, impact and duration of the economic downturn. The Minister for Industrial Relations and the Director of Public Employment supported an increase of 2.5 per cent and the Local Government Association of New South Wales and the Shires Association of New South Wales supported the position of the Minister. The Catholic Commission for Employment Relations ('CCER') submitted that the minimum wage should be increased by 4.17 per cent in line with inflation figures for those households dependant on the basic wage.

In reaching its determination the Full Bench noted:

> In giving consideration to the claim in these proceedings we have, on the one hand, an economy that has been seriously weakened by the Global Financial Crisis. On the other hand, there is evidence from Unions NSW, the Minister and CCER that the lowest paid workers (about 240,000 employees in New South Wales), which includes those receiving the minimum wage of $552.70 per week, are facing 'housing stress' (spending more than 30 per cent of gross household income on housing costs), are experiencing episodes of financial hardship such as being unable to pay utility bills on time, are unable to pay rent/mortgage on time, are pawning or selling something, are going without meals, are being unable to heat the home, are asking for financial help and are asking for help from welfare organisations.

and gave consideration to a number of factors including the fragility of economic conditions nationally and, in particular, in New South Wales; the parlous state of employment; and other factors such as stimulus packages, tax cuts, interest rate cuts and lower inflation.

The Full Bench concluded that whilst there is a tension between the undoubted need for wage restraint brought about by a weakened economy and the needs of the low-paid, it would be inconceivable that a tribunal charged with the obligation to set fair and reasonable wages and to protect low-paid employees would award a nil increase in the circumstances as highlighted by the evidence. Therefore, the judgment to be made was the appropriate amount of the increase given the state of the economy - particularly those industries that would be most affected - and the needs of the low paid.

UNFAIR CONTRACTS

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

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

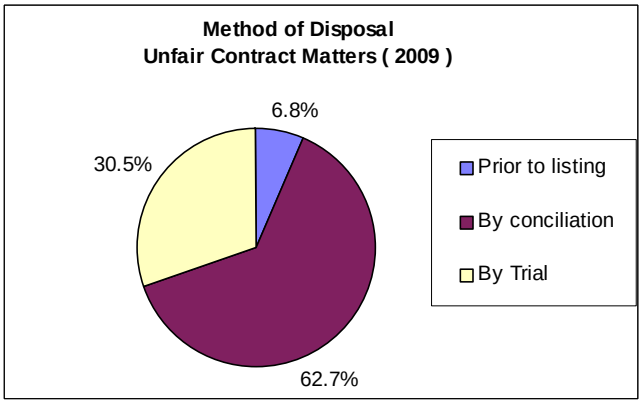
TABLE I

Section 106 Filings

Year	**2005**	**2006**	**2007**	**2008**	**2009**
No.	473	218	51	27	35

In the period from January 2007 to December 2009 the pending caseload in this area has fallen by 580 per cent, from 341 matters to 59. The table below shows the breakdown in the method of disposal.

TABLE 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. Prosecutions for breach of the relevant provisions may be brought before the Industrial Court for determination.

The majority of prosecutions brought before the Industrial Court are initiated by the WorkCover Authority of New South Wales. However, s 106 of the *Occupational Health and Safety Act* 2000 also provides that a secretary of an industrial organisation of employees may initiate proceedings. It is understood that, as a matter of policy, WorkCover prosecutions relating to workplace fatalities and incidents involving serious injury are instituted in the Industrial Court rather than in the Chief Industrial Magistrate's court.

The significant penalties under this legislation are directed to the vindication of safety in the workplace and are no doubt designed to have the effect of discouraging dangerous practices and encouraging a more thoughtful and professional approach to occupational health and safety. This remains a significant area of the Commission's workload given the complexity and seriousness of the matters that fall for determination

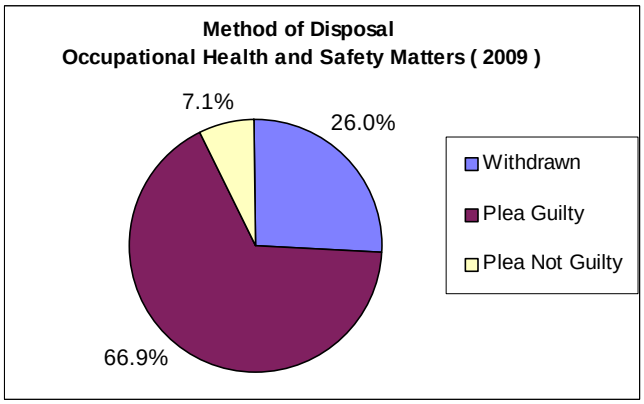
TABLE K

Occupational Health and Safety Prosecutions

	2005	2006	2007	2008	2009
No.	174	193	93	185	131

The table below shows the breakdown of how matters finalised during 2009 were determined:

TABLE L



CHILD PROTECTION (PROHIBITED EMPLOYMENT) LEGISLATION

The *Child Protection (Prohibited Employment) Act* 1998 and associated legislation came into force in July 2000. This Act was repealed on 2 January 2007 and the relevant provisions relating to the imposition of prohibitions on persons convicted of serious sexual offences from being employed in child-related employment unless an order is obtained from the Industrial Relations Commission or the Administrative Decisions Tribunal declaring that the Act was not to apply to a person in respect of a specified offence were transferred to the *Commission for Children and Young People Act* 1998. As a result *Practice Direction No. 5* was repealed and *Practice Direction No. 19* issued in 2007. The Practice Direction provides the procedure for making an application to the Commission for an order.

While not a high volume area of the Commission's jurisdiction, the importance of the legislation is acknowledged through the adoption of procedures to ensure that matters are dealt with expeditiously.

FULL BENCH

Full Benches of the Commission and of the Court are constituted by the President pursuant to s 156 of the *Industrial Relations Act* 1996 and must consist of at least three

Members. The constitution of a Full Bench will vary according to the nature of proceedings being determined. The nature of proceedings range from appeals against decisions of single Members, Industrial Magistrates and the Industrial Registrar; matters referred by a Member (s 193) and major test case decisions (s 51).

During 2009 Full Benches finalised in excess of 60 matters the majority of which involved appeals. A "snapshot" of the significant decisions is provided hereunder. Other significant decisions may be found in Appendix 2.

Botany Bay City Council v Pryor (Inspector) [2009] NSWIRComm 12; (2009) 181 IR 380

The appellant applied for leave to appeal and appeal against two decisions of the Chief Industrial Magistrate concerning a conviction and sentence under s 9(1) of the *Dangerous Goods Act* 1975 (now repealed) and a conviction and sentence under s 8(1) of the *Occupational Health and Safety Act* 2000. Both appeals arose out of events at the Big Splash Aquatic Centre in Botany involving an employee working in the role of casual pool supervisor. At the premises, the appellant kept liquid chlorine in two main tanks each with a capacity of some 2,000 litres. Liquid chlorine was also kept in a smaller tank with a capacity of 500 litres located elsewhere on the premises. An employee utilised plastic tubing to siphon an amount of liquid chlorine (known as sodium hypochlorite) from one of the main tanks into a container, for the purpose of transporting it to the smaller tank. During the course of the procedure the employee sustained injuries to his respiratory system when a quantity of the liquid chlorine went into his mouth.

In relation to the first appeal, the Full Bench found that the evidence was not sufficient to sustain a finding beyond reasonable doubt that on the day of the alleged offence there was a quantity in excess of 1,000 litres of liquid chlorine kept on the premises as would make out the offence. The Chief Industrial Magistrate was in error in finding that the offence under the *Dangerous Goods Act* had been established. The Full Bench granted leave to appeal and upheld the appeal regarding the conviction under the *Dangerous Goods Act.*

The main issue agitated on the second appeal was whether there was a proven risk to safety occasioned by a failure of the appellant to provide a system to manually handle chlorine. The appellant contended that the former practice of manually handling chlorine

was unnecessary at the time of the incident because an automatic system had been installed and, in any event, the former practice had been discontinued. The Court was satisfied that the evidence disclosed that some form of manual handling had been undertaken, albeit rarely, and that the practice of using manual handling had not been entirely discontinued - it being available at least for emergency situations. The appellant did not establish a safe system of work by either removing entirely such practices or establishing a safe system for manual handling where that practice was occasionally adopted. Leave to appeal was granted in the second appeal, however the appeal was dismissed. The appellant also appealed as to the severity of the penalty, however, upon consideration of the relevant legislation and the jurisdictional limit, the Full Bench found that the penalty was not excessive

Thiess Pty Ltd v WorkCover Authority (NSW) (Inspector Jones) [2009] NSWIRComm 77; (2009) 184 IR 406

The appellants sought leave to appeal and appeal decisions of an acting Industrial Magistrate. His Honour found each appellant guilty of an offence under s 8(2) of the *Occupational Health and Safety Act* 2000 in relation to a fatality involving a non-employee, who was an employee of a sub-contractor, at their worksite (the appellants were engaged in a joint venture). The appeal did not seek a review of the penalties imposed, but was confined to the conviction entered against each appellant. A non-employee of the appellants was found dead in one of two large sediment ponds located on the appellants' work premises, the death arising from a heart attack. The charges against each appellant alleged a failure to ensure that persons other than its employees were not exposed to risks to their health and safety arising out of the conduct of the appellants' undertaking while they were at the appellants' place of work contrary to s 8(2) of the *Occupation Health and Safety Act* 2000.

The appellants submitted, absent a factual finding as to what the deceased was doing and where he was doing it at the relevant time, the prosecution had not established the alleged risk to safety. Alternatively, the appellants contended, if such a risk existed, it was so remote as to be speculative and therefore there could be no finding of liability against each appellant for an offence under the Act. His Honour was, therefore, in error. The issues for determination were the particulars pleaded, the notion of risk, the nature of the particular risk and whether a risk existed if, on the appellants' submissions, no person was exposed

to the risk and remoteness of risk. The appellants contended that where there was no actual injury arising from the risk and no exposure of a person while at work to the identified risk (of falling into a sediment pond), there could be no offence.

The Full Bench found that the risk to the safety of persons at the worksite arose because of the existence of two sediment ponds at the worksite. That risk was not eliminated by the proactive conduct of the appellants who knew of their potential danger. Put another way, there was a known risk to safety which the appellants failed to eliminate. It was a risk to all persons working at the appellants' worksite. The majority of the Full Bench did not grant leave to appeal and dismissed the appeal with costs. Haylen J dissented on one issue in the judgment. His Honour agreed that the appeal should be dismissed, however was of the view that leave to appeal was not required and that the appellant had an appeal as of right. This matter has gone on appeal to the Court of Appeal.

Dalzell v Ferguson [2009] NSWIRComm 81; (2009) 185 IR 392

The proceedings involved an appeal against a sentence imposed by the Chief Industrial Magistrate for breach of s 136 of the *Occupational Health and Safety Act* 2000, that is, the appellant did attempt to obstruct and intimidate Union officers from carrying out a safety audit. The Chief Industrial Magistrate had previously heard two competing narratives, where the Union officers alleged the appellant kept them from their safety auditing by hosing them and ordering them to leave the premises, while the appellant asserted the primary purpose of the Union officers was to solicit bribes, aggravate him, and that there were no safety problems to investigate. The Chief Industrial Magistrate rejected each of the appellants three claims relying on employee witness statements that the Union officers had not sought out the appellant, rather he had come to them; holding allegations of Mr Quirks acceptance of bribes were fictitious and a distortion of the facts of an existing Union dispute, and, finally, there was evidence of existing safety issues.

The Chief Industrial Magistrate noted, based on his determination as to the strict liability of an offence under s 136(1)(a), that there may be a potential defence in that the appellant may have genuinely and reasonably believed that the Union was there for purposes other than the safety audit. However, found the defendant's three reasons advanced for this alleged belief were disingenuous and, further, the defendant did not reasonably hold this belief and could not, therefore rely upon it for a defence.

The Full Bench granted leave to appeal for two reasons, firstly, due to the availability of a "defence" of honest and reasonable mistake of fact to an offence under s 136, and, secondly, that the operation of s 136 has yet to fall to be considered by the Full Bench.

However, the appeal was dismissed and the appellant was ordered to pay costs. The Full Bench found that the Chief Industrial Magistrate had not erred in his decision making reference to the strict liability of s 136 and the proposition that the appellant had to bring evidence that he held an honest and reasonable belief that his conduct was not criminal as the Union officers were there for motives other than a safety audit. The nature of the words "obstructing or hindering" in the offence demand a level of knowledge that one is actively seeking to prevent entry by safety officials. The Full Bench did not accept the appellants claims that the Industrial Magistrate had erred in finding that there was no evidence of violence against the appellant that would warrant a belief that the auditors were there merely to harass him. The appellant claimed that his Honour should have focused on whether the respondents had disproved his assertion that he held an honest and reasonable belief, rather than what the Union officers believed about the situation. The relevant issue was whether or not the appellant believed they were there for a legitimate purpose. The Full Bench found no error in his Honour's approach to evaluating whether the respondents had disproved the appellant's claims, and was correct in determining that the appellant had not made out his defence as outlined above.

Cretney v Director General, New South Wales Department of Education and Training (No 2) [2009] NSWIRComm 107; (2009) 186 IR 374

The appellant in these proceedings was a part-time senior school assistant. The trial judge dismissed her claim for unfair contract under s 106 of the *Industrial Relations Act* 1996. The brief facts of the matter before the trial judge were as follows: A management review was conducted at the school at which the appellant worked, containing ten allegations of breaches of discipline by the appellant. A recommendation was made by the review team that the appellant be transferred from the School (that recommendation was not finally acted upon). The contents of a short version of a final report handed down by the Assistant Director General of the Department of Education and Training was published. The report contained statements that the appellant alleged were false, inaccurate and defamatory. The appellant claimed she suffered anxiety, distress, hurt and humiliation as a consequence of the report's publication and other events. It was asserted in the second

further amended summons for relief that the contract of employment was unfair, harsh and unconscionable and contrary to the public interest in that it did not contain certain specified terms to prevent or avoid the unfairness and that it permitted the respondent to conduct itself towards the appellant in the adverse manner set out in the summons. The appellant sought compensation totalling $101,500 for: pain, anxiety, hurt, humiliation and distress; damage to reputation; and the costs of medical treatment and medication.

The Full Bench reviewed the evidence of the case and found that some of the trial judge's findings were not open for her Honour to make. The Court therefore granted leave to appeal as the errors concerned the application of principles of procedural fairness, which had a public aspect, as they permitted the publication of inappropriate communication. The Court dealt with the issues of errors in findings concerning procedural fairness, findings of fact in inappropriate conduct and error in respect of failure to find unfairness in the contract consequential upon the errors in the first two categories. The Full Bench's consideration of the factual issues resulted in a decision that the contract was unfair in that it denied the appellant procedural fairness as it allowed the respondent to make recommendations and findings adverse to the appellant and publish adverse findings without a proper foundation for doing so, and allowed the respondent to avoid its obligation to protect the appellant's professional integrity.

The Court decided there was no proper basis for awarding monetary compensation for damage to reputation, however awarded compensation of $2,500 to the appellant in connection with the unfairness for the stress and suffering she experienced.

Sydney Ferries Corporation v Seamen's Union of Australia, NSW Branch on behalf of Levy [2009] NSWIRComm 126; (2009) 186 IR 99

This matter involved an appeal against the decision of a Deputy President where his Honour found that the dismissal of an employee was 'harsh' within the meaning of s 84 of the *Industrial Relations* Act 1996 and disproportionate to the employee's misconduct, reinstating the employee on terms and conditions no less favourable than if he had not been dismissed. His Honour concluded that his decision rested 'on a very fine balance indeed'. It was for this reason that his Honour declined to make orders for lost remuneration for the period between employee's dismissal and his reinstatement. On this aspect of his Honour's decision, the Union lodged a cross appeal.

The employee was employed as a General Purpose Hand and had 10 years service with Sydney Ferries. There were two reasons identified in the appellant's letter dismissing him from his employment, being alleged abuse towards another employee of the corporation; and the fact the alleged abuse occurred after the appellant had previously been issued with a warning regarding his behaviour. The warning arose from circumstances whereby the employee, during an industrial dispute, directed fellow general purpose hands to 'open the gates' at Manly Wharf.

The appellant raised three issues on appeal: firstly, that his Honour had erred in finding the employee, as an elected Union delegate, could have no individual responsibility for his actions in implementing an unlawful Union direction; secondly, his Honour had erred in failing to properly weigh, in the balance, all the competing considerations that he was required to consider in determining whether or not the employee's dismissal was 'harsh, unreasonable or unjust'; and thirdly, his Honour had erred in ordering reinstatement.

The Full Bench considered the nature of the earlier warning given to the employee, and concluded that his Honour was justified in putting that issue out of account in his assessment of the application of the matter. The Full Bench further found that his Honour made findings that were reasonably open to him on the evidence, did not mistake the facts, and took into account all material considerations. The Full Bench agreed with his Honour's decision to refuse to award back pay to Mr Levy, and that reinstatement was the appropriate remedy in the circumstances. The appeal and cross-appeal were dismissed.

Public Health System Nurses' and Midwives' (State) Award [2009] NSWIRComm 129; (2009) 188 IR 327

The applicant in these proceedings, NSW Nurses' Association, sought to increase the penalty rates for night shift work in the Public Health System Nurses' and Midwives' (State) Award. The provision concerning night shift penalties was last considered by the Commission in the *Shift Workers Case* 1972 AR (NSW) 633. The Nurses' Association relied upon the *Shift Workers Case* to contend that the penalties for night shift fixed by the award should be increased commensurate with the contemporary knowledge of health and safety risks associated with the performance of night shift work, both generally and in particular, for nurses engaged in the public hospital system, and the higher level of social

and domestic inconvenience suffered by nurses living and working in the twenty-first century. The Full Bench stated that the applicant was required to satisfy two separate and significant requirements: first, the applicant needed to demonstrate that an increase in the night shift allowance would directly ameliorate, in the manner discussed in *Operational Ambulance Officers (State) Award* (2001) 113 IR 384, a proven, actual risk arising from the performance of night shifts by nurses (or a class of them) in the public hospital system; and secondly, the applicant needed to demonstrate that the inconveniences experienced by night shift workers had worsened since the *Shift Workers Case*.

The Full Bench provided some background to the award, and outlined the substantial and comprehensive evidence going to the adverse medical affects on night shift workers. The Full Bench accepted the expert evidence adduced by the applicant, and concluded that in order to understand the actual risk it must look to the predicted risk associated with different variables. In this case, to determine the accuracy of the applicant's assertion that nurses are exposed to a risk to health from working a particular pattern of night shifts. The Full Bench examined more closely the nature of some of the more significant risks, such as cardiovascular morbidity and mortality, and cancer. The Full Bench held that the applicant had demonstrated the existence of a correlation between the working of night shifts and the risk to health and safety. However, the relationship was dependent upon the number of shifts worked by nurses over varying periods of time and, further, dependant upon the nature of the disease or medical condition under review.

The Court further considered the correlation between the number of shifts worked by a nurse and the risks to which they are exposed, concluding that the applicant had failed to prove that the nursing population in the public health hospital system is, in fact, working night shifts for a duration which would expose them to risk in the matter described in the expert evidence. The Full Bench stated that the evidence did not disclose the duration over which nurses covered by the award performed the requisite number of night shifts which would attract the risk of particular diseases (noting that some of them have a much longer duration of onset than others). There was, therefore, insufficient evidence to enable the Full Bench to draw a conclusion that the risk has or will materialise for the whole or part of the population of nurses covered by the award.

Regarding the social and domestic factors affecting the night shift workers, the applicant submitted, *inter alia*, that there is a higher level of social and domestic inconvenience suffered by nurses living and working in the twenty-first century, and that shift allowances fixed by the *Shift Workers Case* are no longer adequate for nurses and undervalue the detriment occasioned from undertaking shift work. The Department of Health accepted that there was more information available in 2009 as to the social and domestic inconvenience arising from shift work than at the time of the *Shift Workers Case* and submitted that, *inter alia*, the actual adverse social effects suffered by shift workers had not significantly changed since 1972, but, in fact, had decreased and the key factors identified by the applicant were really the same social and domestic issues considered in the 1972 case. The Full Bench did not find that the negative social and domestic consequences of working night shifts, such as the effect on social life and marital quality and the work/non-work life balance, had worsened since the *Shift Workers Case*.

The Full Bench dismissed the application upon two conditions: first, the full Bench granted leave for the Nurses' Association to further press its current application for night shift allowances after a further review of night shift arrangements for nurses in public hospitals. Secondly, the Court considered that the parties should jointly conduct a study or survey of nurses working night shifts (whether on a rotating shift or otherwise) in order to properly assess the medical issues raised in the proceedings.

Commissioner of the NSW Fire Brigades v NSW Fire Brigade Employees Union (on behalf of Levy) [2009] NSWIRComm 138

The Commissioner of the New South Wales Fire Brigades sought leave to appeal and to appeal against a decision given by a Commissioner in which the Commissioner held that there was jurisdiction to hear an application for reinstatement filed by the New South Wales Fire Brigade Employees' Union ("FBEU") on behalf of a member. The member had commenced full-time employment as a recruit fire-fighter after having served on a part-time basis in that role. His employment was annulled at the conclusion of six months, allegedly because of his inability to complete the required training to perform fire-fighting duties. A criminal conviction for dangerous driving and the loss of his licence was asserted to mean that the employee was unable to complete the course.

The employee commenced proceedings under the *Government and Related Employees Appeal Tribunal Act* 1980 (GREAT Act) and was represented in those proceedings by a solicitor from his Union. The Notice of Appeal specified the decision appealed against as the annulment of Mr Levy's appointment: the relief sought was withdrawal of the annulment and/or reinstatement and/or progression to Level 1 Fire-fighter and/or reimbursement of lost earnings. In those proceedings, the NSW Fire Brigade ("NSWFB") raised a jurisdictional question arguing that the effect of s 24(3)(b) of the GREAT Act prevented the employee appealing to the Tribunal because the period of six months' probation was reasonable having regard to the nature and circumstances of his employment and the statutory provisions in relation to the probationary appointment. The Tribunal upheld the employer's submission that the six month duration of the probationary period was reasonable and, therefore, it followed that thereafter the Tribunal lacked jurisdiction to hear Mr Levy's application for reinstatement.

The employee by his Union filed an application for relief in relation to unfair dismissal under the *Industrial Relations Act* 1996 seeking, amongst other relief, reinstatement in his former position. At the same time the Union notified a dispute under s 130 of the *Industrial Relations Act* where the Union alleged that the employee's dismissal was improper, procedurally unfair and manifestly unreasonable. The termination of employees by the NSWFB without reference to procedural fairness safeguards contained within the Fire Brigades Regulation 2003 was specifically raised for consideration by the Union. Both the dispute and the application alleging Mr Levy's termination to be unfair were the subject of conciliation proceedings that were unsuccessful. The Commissioner found that the application by the Union lodged on behalf of the Mr Levy under Ch 2, Pt 6 of the Act was jurisdictionally competent.

The NSW Fire Brigade sought to set aside the finding as to jurisdiction made by the Commissioner, submitting the Commissioner failed to consider the operation of s 25(3) of the GREAT Act and further, properly construed and applied, s 25(3) as a matter of jurisdiction, precluded the Industrial Relations Commission from proceeding to hear and determine the application for reinstatement. A further issue of significance was whether s 83(2) of the *Industrial Relations Act* 1996, together with cl 6 of the Industrial Relations (General) Regulation 1996, requires the reasonableness of a six month period of probation to be determined as a threshold issue or whether a member of the Commission is at liberty

to consider that matter as part of the overall unfairness of the termination. For the above reasons, the Full Bench granted leave to appeal. The Full Bench discussed the various statutory provisions and interpretation, and concluded that s 25(3) of the GREAT Act operates to prohibit further proceedings in the Commission by the employee and/or his Union in relation to his termination, and the proceedings were therefore struck out for want of jurisdiction.

Director General, NSW Department of Education and Training v NSW Teachers Federation [2009] NSWIRComm 147

On 1 September 2009, the Full Bench made dispute orders against the NSW Teachers Federation, its officers, employees and members employed by the Managing Director of TAFE pursuant to s 137(1)(a) of the *Industrial Relations Act* 1996.

The dispute involved the issue of employee related cost savings appropriate to fund salary increases under the *Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award 2009*, consented to by the parties. The award stated that cost saving measures to improve productivity and fund salary increases would be identified by a working party by April 2009. Agreement could not be reached as to cost savings, and the Director General sought to vary the award specifically increasing teaching hours to fund salary increases. The Federation opposed the application and the matter was listed before the Full Bench though Walton J, Vice President, continued conciliation. By August, his honour was actively preparing to resolve the matter. The Commission became aware of planned industrial action across TAFE campuses and ordered on 4 August 2009 that this not proceed, suspending conciliation proceedings. Stop work meetings were held by the Federation on 11 August contrary to Commission directions, and the Federation placed on its website a report that at the stop work meetings TAFE teachers voted to take further industrial action 'if necessary' including a possible 24 hour strike in the week commencing 31 August 2009.

The Commission recognised the inappropriate industrial behaviour of the Federation in agreeing to the award provisions of substantial salary increases in exchange for cost savings by the department and then holding industrial action. On 25 August 2009 the Federation advised that they intended to attempt to resolve the dispute through conciliation without industrial action, and the Full Bench assumed this positive response would allow

conciliation before the Vice-President to recommence. However, on 31 August the Commission was made aware of an intended 24 hour strike and rally by TAFE teachers to be held on 2 September. The Department sought a certificate of attempted conciliation under s 135(2) of the Act and, upon the issuing of that certificate, the dispute orders referred to earlier were made. The Federation did not oppose the certificate.

The Vice President stepped aside from the Full Bench under s 173 of the *Industrial Relations Act* 1996 due to his involvement in prior conciliation proceedings, upon application by the Federation. The Federation further sought to remove the other members of the Full Bench from the arbitration but were refused as it could not be said that participating in the issue of procedural directions constituted acting as a conciliator.

The Commission rarely issues dispute orders, preferring conciliation followed by arbitration. The Federation had previously agreed and understood that salary increases of 12 per cent over three years were given on the basis that if parties failed to reach agreement on cost savings the matter would go to arbitration. The Federation's position was obviously to retain salary increases while using industrial action to avoid resolution on cost saving measures.

The Commission therefore issued dispute orders ordering the Teachers Federation to cease proposed industrial action on 2 September 2009 and prohibiting further action for a period of three months.

An appeal to the Court of Appeal was dismissed.

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 which reflect the unique range of jurisdiction which the Commission exercises. The standards, and how the Commission performed against those standards, are set out in Appendix 3 of this report.

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 Justice and Attorney General 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 both electronic and hard copy format. This process is required and driven by legislative requirements and enables the enforcement and implementation of awarded or approved employment conditions for employees. This team is also responsible for the maintenance of records relating to parties to awards and records relating to Industrial Committees and their members.

The preparation of enterprise agreement comparison reports for the Industrial Registrar is another aspect of the team's responsibilities, which involves a detailed comparison of conditions of employment under the proposed agreement to those under the relevant industrial instrument and statutory requirements. This assists the Commission in its deliberations in these matters.

Additionally, this team provides information management, technology services and support to the Commission, the Industrial Registrar and Registry staff. The demand for the provision of on-line services and information has continued to grow and this team's main functions include - caseload reporting; maintenance and support of the Commission's case management system - *CiTiS* (Combined Industrial Tribunals Information System) and other internal systems; updating the Commission's *Intranet* and *Internet* sites and the maintenance of the *NSW Industrial Gazette* website.

INDUSTRIAL ORGANISATIONS TEAM

This team processes a diverse range of applications that are determined by the Industrial Registrar, which include:

- registration, amalgamation and consent to alteration of the rules of industrial organisations;
- election of officers of industrial organisations or for special arrangements in relation thereto;
- Authority to Enter Premises for union officials;
- Certificates of Conscientious Objection to membership of industrial organisations;
- special rates of pay for employees who consider that they are unable to earn the relevant award rate because of the effects of impairment;

- special arrangements in respect of the keeping of time and wage records and the provision of pay slips; and
- postponement of the time for taking annual leave.

In respect to industrial organisations, the team also administers provisions relating to the regulation and corporate governance of industrial organisations under Chapter 5 of the *Industrial Relations Act* 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				
2005	***2006***	***2007***	***2008***	***2009***
175	179	189	189	152

Special Wage Matters - Year End Current Files					
	2005	***2006***	***2007***	***2008***	***2009***
Special Wage Permits	1110	991	749	502	357
* SWS - P	246	219	214	161	105
** SWP - MC	300	189	243	276	318
TOTAL	**1656**	**1399**	**1206**	**939**	**780**

Special Wage Matters - Matters Lodged				
2005	**2006**	**2007**	**2008**	**2009**
1734	1433	1241	868	503

* Applications in cases where a State award covers the employment provisions of the applicant and the employer participates in the 'Supported Wage System' program conducted by the Federal Department of Employment and Workplace Relations.

** Wage Agreements filed under the 'Supported Wage System' in respect of employment covered by a State award that includes a 'Supported Wage System' clause. NOTE: Permit not required to be issued as the 'Supported Wage System' clause provides for means by which a special rate of pay can be agreed between the employer and employee.

EXECUTIVE AND LEGAL TEAM

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

OTHER MATTERS

JUDICIAL EDUCATION

The Annual Conference of the Industrial Relations Commission was held from 23 - 25 September 2009. The first day covered a variety of topics with presentations by his Honour Justice Michael Walton, Vice-President (*Open Forum - Workload and Case Management Update*); Dr Richard Dennis, Executive Director, Australia Institute (*The Carbon Trading Emissions Scheme*); Mr Ian Cummin, Executive General Manager, People and Organisation Performance, Bluescope Steel (*Industrial Relations in the Bluescope, Port Kembla Steelworks*); Professor Michael Quinlan, School of Organisation and Management, University of NSW (*OHS Developments in the Federal System*) and a session on *Bluescope Procedures* facilitated by his Honour Justice Michael Walton, Vice-President. On the second day of the conference sessions were given by Mr Chris Wheeler, NSW Deputy Ombudsman (*The Power of Sorry);* Ms Joanna Kalowski, International Mediator (*Mediation and Repeat Participants*); and Ms Elizabeth Rea, Lecturer in Aromatherapy (*Stress Management - A Role for Alternate Therapies*). 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 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 Justice and Attorney General (*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 Justice and Attorney General website (http://www.lawlink.nsw.gov.au/ircjudgments) 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 (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 is to be substantially upgraded during 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. There were no amendments to the Rules of the Commission in 2009.

I have previously reported on a Working Party comprising Members of the Commission, officers of the Department of Justice and Attorney General, representatives of the Bar Association and Law Society of New South Wales, having completed a comprehensive review of the Commission's Rules with a view to ensuring that the Rules provide the proper mechanism for matters before the Commission to be dealt with in a timely and appropriate manner.

The Commission has determined, from the commencement of the new Law Term in 2010, it will transition to the *Uniform Civil Procedure* regime that currently operates in the Supreme, Land and Environment, District and Local Courts. The Commission believes that this will offer significant benefits to major stakeholders and clients. Essentially, this will mean that much of the procedure of the Commission will be determined under the *Civil Procedure* Act 2005 and the Uniform Civil Procedure Rules 2005, however, there will be 'local rules' that will prevail. These local rules are known as the Industrial Relations Commission Rules 2009 and were published to the *New South Wales Legislation website* on 11 December 2009 and will have effect from 1 February 2010.

AMENDMENTS TO LEGISLATION ETC

The legislative amendments enacted during 2009, or which came into force that year affecting the operation and functions of the Commission, are reported at Appendix 5.

Amendments to Regulations affecting the Commission are reported at Appendix 6.

PRACTICE DIRECTIONS

There were no new Practice Directions published during 2009, however, with the transition to the new Rules regime in 2010 current practice directions will be reviewed and re-issued in the new year.

CONCLUSION

In my conclusion to the 2008 Annual Report I was hopeful of being able to report this year on the expanding role of the Commission in the industrial affairs of New South Wales, that is to say, some real progress having been made on utilising the significant potential of the Commission by broadening the Commission's jurisdiction to encompass all areas of employment, industrial relations and disciplinary matters. Unfortunately, this is not to be.

Principally and as I noted earlier in this Report, this was due to the protracted negotiations between the federal government and the various State governments in relation to the transition to a national industrial relations system from 1 January 2010 for the private sector which, as far as New South Wales was concerned, did not reach resolution until very late in the year. Without knowing what role or commitment the Commission would play arising out of any agreement and what impact that might have on the Commission's resources appeared to dampen any enthusiasm to broaden the Commission's jurisdiction. There was, however, some indication of the government's intention with the enactment of legislation transferring the jurisdiction of the Chief Industrial Magistrate to the Industrial Court including provisions for legally qualified non-judicial members to deal to finality with small claims recovery of money matters. This legislation is likely to be proclaimed to commence early in 2010.

Additionally, as I earlier noted, the *Government and Related Employees Appeals Tribunal* and the *Transport Appeals Board* will co-locate within the Commission's premises early in 2010 as a precursor to the Commission assuming that jurisdiction in the later part of that year.

I intend to continue to press for the expansion of the role of the Commission in the industrial affairs of this State, that is, continue to pursue the government to broaden the jurisdiction as I have outlined previously to ensure that the capacity of this Commission is fully utilised and that the experience and expertise of the Members is utilised to the maximum extent for the benefit of the people of New South Wales.

The transition to a national industrial relations system from the 1 January 2010 will, technically at least, see the residue of the private sector pass from the jurisdiction of this Commission. That does not mean, however, that this Commission will no longer have a role to play in assisting parties within the private sector to resolve their industrial disputes. A significant number of over 80 companies State-wide who utilised the provisions of s 146A of the *Industrial Relations Act* 1996 to access this Commission to resolve their industrial disputes have indicated an intention to continue do so despite the repeal of that section from 1 January 2010. Those companies have indicated that they intend utilising the provisions of s 146B of the Act which enables this Commission to exercise certain dispute resolution functions under federal enterprise agreements. Their decision to do so is a credit to the members of this Commission and a ringing endorsement of this Commission's capacity to resolve disputes in a timely and effective manner.

The transition to a national industrial relations system will also see the appointment of a number of members of this Commission as dual appointees of the federal tribunal - *Fair Work Australia* - with three of them working full time for that organisation. I look forward to working closely with the President of the federal body to ensure that the procedures in place between our organisations facilitate a high level of service and responsiveness to the communities in those important regional areas of the Hunter and the Illawarra.

As we move towards the second decade of the 21st century and the eleventh decade of this Commission's existence (in one form or another) there is one certainty and that is that this Commission must continue to evolve and be responsive to the needs of our stakeholders and the wider community so that the Commission can continue to play an important and ongoing role in the industrial affairs of the people of this State.

I have every confidence in the members of this Commission, the staff of both members and the Registrar, together with the major stakeholders of the Commission to continue to be proactive in their interactions with one another to ensure that our reputation for a forum for the timely, fair and effective resolution of disputes is not only maintained but enhanced during the coming year.

ANOTHER ERA

The above photograph taken on 26 April 1934 depicts the then members of the Industrial Relations Commission of New South Wales. Standing is The Hon. Joseph Alexander Browne, President. Seated at the left is The Hon. Maurice Emanuel Cantor and, at the right, The Hon. Alan Mayo Webb. Cantor was appointed on 15 December 1927; Browne and Webb on 20 June 1932.

APPENDIX 1

INDUSTRY PANELS

PANEL A

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

PANEL B

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

PANEL N

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

PANEL S

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

APPENDIX 2

OTHER SIGNIFICANT FULL BENCH DECISIONS

Staff Specialists (State) Award 2008 [2009] NSWIRComm 44

These proceedings concerned an application by the Director General, New South Wales Department of Health, for leave to appeal and to appeal against a decision and orders of a Commissioner. The Commissioner had decided that the Staff Specialists (State) Award should be varied so as to provide that staff specialists who salary sacrifice a new/additional fringe benefits tax exempt item will not be required to share the income tax savings arising from that exercise.

The Commissioner's decision to vary the Award to incorporate the variation proposed by ASMOF was based on the fact that there was an agreement (albeit unenforceable) regarding salary sacrificing which had been struck between the parties in 2002, that ASMOF was entitled to continue to rely on the faith of that agreement, that it was "entirely inappropriate" for the appellant to "walk away" from the agreement, and so it was appropriate to vary the Award to put beyond doubt "what should operate between the parties on the basis of the agreed arrangements that have existed and should have continued to exist until negotiations had taken place on any replacement agreement or arrangements."

The Full Bench summarised the history of the award negotiations, agreements and memorandums of understanding between the parties. The Full Bench found that the Commissioner erred in determining that it was appropriate to vary the Award.

An additional issue that the Full Bench raised was that of the Commission's Wage Fixing Principles. The Court noted that there was a requirement for ASMOF's application to be referred to the President for consideration as to whether the matter should be processed as a special case before a Full Bench of the Commission. The Court stated that the principle is an important mechanism for protecting the public interest by ensuring, amongst other things, that authoritative consideration is given to whether an award variation will set off a damaging round of flow on claims.

The Full Bench found that the Commissioner committed an error in that she purported to conduct her own "inquiry" into an industrial matter pursuant to s 162(2)(j) of the Act and to use the results of that inquiry as part of the foundation for her decision in the matter. The Commissioner did not inform the parties that she was proposing to undertake such an inquiry, nor did she provide the parties with an opportunity to comment on the appropriateness of that course or to make submissions about the outcome of that inquiry. The appellant was denied natural justice as a result of the Commissioner's actions. The Full Bench granted leave to appeal and upheld the appeal.

Musicians' Union of New South Wales [2009] NSWIRComm 45

The Industrial Registrar, Mr G M Grimson, applied to the Industrial Court for the cancellation of the registration of The Musicians' Union of New South Wales pursuant to s 225(1) of the *Industrial Relations Act* 1996, by way of a notice of motion filed on 25 July 2007.

The application was made on the ground that the industrial organisation had contravened industrial relations legislation under s 226(a) of the Act in that elections had not been conducted in accordance with s 249 of the Act and clause 31 of the Industrial Relations (General) Regulation 2001; and accounting records and other financial statements had not been lodged with the Industrial Registrar pursuant to s 282 of the Act.

In February 2009, these proceedings were referred to a Full Bench for hearing. The fact that an application to cancel the Union's registration had been made and was listed for hearing before a Full Bench was advised to the Union, the Musicians' Union of Australia, the Media Entertainment and Arts Alliance, State peak councils and was broadcast generally by way of an announcement on the Commission's website. In the proceedings before the Full Bench in April 2009, the Musicians' Union of Australia indicated it had no objection to an order cancelling the Union's registration. The Full Bench found that grounds 1(a) and 1(b) of the notice of motion had been made out and was satisfied that there were proper grounds, having regard to

the gravity of the failures in contravention of s 226(a), to cancel the registration of the Union pursuant to s 227 of the Act.

Casari v Sydney South West Area Health Service [2009] NSWIRComm 103; (2009) 185 IR 217

The trial judge in this matter dismissed the appellant's application for relief from unfair dismissal. The appellant was 64 years old, and had been employed with Sydney South West Area Health Service for 12 years. He was summarily dismissed for serious and wilful misconduct for the taking of a photograph of a young patient in the emergency department of a hospital in the area.

The appellant appealed the trial judge's decision on the basis of the findings as to procedural fairness in finding that: the respondent had established that the conduct complained of had occurred and the finding that the appellant breached a duty of care owed by the respondent; in inferring that the appellant had a guilty mind sufficient to establish misconduct; and in failing to find the appellant's actions were innocent.

The Full Bench granted leave to appeal as it was in the public interest and the appeal raised the question of what constitutes serious and wilful misconduct justifying summary dismissal in the context of child protection.

The Full Bench considered the law relating to summary dismissal, and did not accept that the appellant engaged in conduct that was 'so seriously in breach of the contract that by standards of fairness and justice the employer should not be bound to continue the employment'; or, the conduct of the appellant was such that the respondent was entitled to conclude that the appellant no longer intended to be bound by the provisions of his contract of employment; or, that the appellant's conduct may properly be regarded as 'deliberately flouting one of the essential conditions of the contract'.

The Full Bench noted that the appellant had suffered significant humiliation and distress caused by the summary dismissal, which was not justified. The Full Bench ordered that the appellant be re-employed in his former position with back payment to the date of his dismissal but only for the purposes of the appellant affecting a resignation from his employment.

This matter has gone on appeal to the Court of Appeal.

Chicken Extra Ingleburn Pty Ltd v Mina Hanna [2009] NSWIRComm 118

Chicken Extra Ingleburn ("Appellant") sought leave to appeal the decision of the Chief Industrial Magistrate and his award to the respondent on the basis that lack of legal representation affected procedural fairness in the case.

In background to the proceeding, the Chief Industrial Magistrate on an ex parte basis had decided the case as the company had repeatedly failed to appear at court with their solicitors filing a "Notice of Ceasing to Act". The Chief Industrial Magistrate determined that the appellant was fully aware of the proceedings and were given several opportunities to participate. Delaying the proceedings any further would disadvantage the applicant unfairly, so he proceeded ex parte and ordered that the company pay the applicant's wages plus interest, superannuation plus interest and court costs within 28 days.

The appeal was filed by the appellants former solicitors who subsequently filed a further "Notice of Ceasing to Act." In April the Appellant failed to appear before Boland J President for directions which were issued along with the date of the hearing. In May an employee of the appellant appeared seeking more time and directions were varied to allow the appellant extensions for filing but maintaining the previously issued hearing date.

On 29 June 2009, the appellant filed unidentified documents that had previously been filed in the Chief Industrial Magistrate's court proceedings. There were no submissions relating to the appeal filed. On 10 July 2009, the appellant requested more time to prepare documentation and submissions which was not granted. On 14 July 2009 the respondent filed submissions stating they had not been served with the appellants appeal books or submissions having only been served with two statements and were thus unable to address the issues of the appeal.

On 16 July 2009 when the appeal was called to hearing an employee of the appellant company appeared, and was challenged by respondent's counsel submitting that he was not a corporate director nor did he have

any authorisation to appear for the company. The employee sought an adjournment on the grounds he had mistakenly failed to acquire a solicitor and the current predicament was the fault of the previous solicitor.

The Full Bench decided that in the interest of justice for both parties to the appeal, an adjournment should not be granted. The appellants failure to acquire new representation in the five months since the previous solicitors had filed their Notice of Ceasing to Act was admittedly a mistake but not an acceptable explanation for failing to prepare an adequate appeal. The appellant had sufficient opportunity to participate in proceedings but was ill prepared for the appeal by their failure to attend court, the choice to self-represent and failure to comply with Court orders despite the Court allowing directions to be amended and varying timelines to accommodate the appellant.

Leave to appeal was refused and the appellant ordered to pay the respondents costs on appeal in addition to costs of the proceedings before the Chief Industrial Magistrate.

Inspector Ching v Bros Bins Systems Pty Ltd [2009] NSWIRComm 154; (2009) 189 IR 330

The matter involved the acquittal, appeals and remittance of the case of "Bros Bins" over many years through different courts.

In 2002 Marks J acquitted Bros Bins of failure to ensure that the rear loading hook lift truck used by their employees for rubbish collection was safe and without risk to health in the case of *Inspector Ching v Bros Bins Systems Pty Ltd* [2002] NSWIRComm 276 under s 197A of the *Industrial Relations Act* 1996.

In 2003 the Full Bench overturned the acquittal by Marks J and remitted the matter for trial: *WorkCover Authority of New South Wales v Bros Bins Systems Pty Ltd* (2003) 130 IR 62 ("Bros Bins (2003)").

The remittal order was reversed by the NSW Court of Appeal in *Bros Bins Systems Pty Ltd v Industrial Relations Commission of New South Wales* [2008] NSWCA 292 ("Bros Bins (2008)"). The Court of Appeal stated that if the Full Bench set aside the first decision of Marks J it was subsequently obliged to redetermine guilt or innocence.

In this proceeding the Full Bench therefore reconsidered the case against Bros Bins including determining guilt and sentence. The defendant had no representative as they had gone into liquidation and the liquidators had advised they had no intention of participating in the proceedings. The matter hence proceeded ex parte.

The Full Bench accepted that there was a failure to adequately label the hydraulic control levers in the vehicle to avoid any risk to safety. The failure did not cause the accident, however it did give rise to the relevant risk to safety. The Court concluded that while repairs were being performed under the hoist of the truck, and an employee of the defendant was required to operate the hoist to keep it raised, then it is the defendant who is in control of the truck and is responsible to ensure no other person enters the truck cabin and does not touch the levers.

The Full Bench determined that the defendant failed to provide an adequate safety prop to allow for work to be carried out under the hoist. The Full Bench rejected the defendant's suggestion that Tibby Rose (the auto repairers) ought to have been aware and prepared for the risk of working under a jib. The safety responsibilities of other parties do not diminish the culpability of the defendant for their continuing to operate in circumstances of obvious and known risk. This may affect sentencing, but does not affect the offence.

The Court considered the defendants protests that the lever could not have been accidentally pushed and that one of the employees must have deliberately used it. However, regardless of whether the incident was deliberate or accidental, the failure to label and secure the levers, or prop up the jig provides a sufficient risk such that the defendant is guilty of an offence under s 17(1)(b) of the Act.

Inspector Ching v Bros Bins Systems Pty Ltd [2009] NSWIRComm 155; (2009) 189 IR 343

On 17 September 2009 the defendant Bros Bins Systems was found guilty of a breach under s 17(1)(b) of the *Occupational Health and Safety Act* 1983 ("the Act").

The Full Bench considered a number of aggravating and mitigating factors in determining sentencing including the ease with which the defendant could have, but failed to, install the required safety measures at relatively low cost, the role the designers of the truck played in the failure to install adequate safety

measures, the fact the defendant never anticipated this type of accident may occur, that there was no precedent for it in his twenty years in the industry, that he was personally devastated by the death of the victim who was known to him, and the strain the proceedings had placed on him and his family.

The penalty is determined by considering the objective seriousness of the offence, and despite the defendants claims that the event was unforeseeable, the Court found that there was a real and obvious risk of injury. The defendant looked at the relatively small amount of time spent with the jig raised for repairs as a proportion of the total time the truck was in use, and saw this as evidence that there was a limited risk. The Full Bench however determined that every discrete circumstance would be looked at separately with a different risk of injury, and the defendant ought to have evaluated each situation for risk. The risk was reasonably foreseeable looking at the repairs situation discretely and the defendant was obliged to seek out potential risks and take measures to avoid them. The offence is objectively serious.

In assessing penalty, the Full Bench considered the general deterrent effect of the penalty particularly considering evidence that few in the industry have installed the referenced safety measures. Subjective factors include the defendants cooperation with Work Cover in the investigation, contrition for the event and prior good record.

The delay between the incident and the imposition of this sentence in 2009 has no bearing over the penalty as the delay was due to successful appeals by both parties and is distinguishable from cases where delay reduced penalty as they were against individuals rather than corporations.

The costs of the proceeding were divided, for the initial case before Marks J and subsequent Court of Appeal proceedings - the defendant is responsible for both parties costs. In subsequent liability and penalty proceedings and Full Bench appeals each party should bear their own costs. The defendant was ordered to pay both parties costs in these proceedings.

The penalty imposed was $50,000.00 considering all above factors and the defendants lack of prior convictions.

SAS Trustee Corporation v Hazlewood [2009] NSWIRComm 157; (2009) 188 IR 174

The appellant sought leave to appeal and appeal against a judgment in which the trial judge found that the respondent, a former police officer, was incapable due to infirmity of mind constituted by post traumatic stress disorder (PTSD), from exercising the functions of a police officer on 5 February 1998, being the date of his medical discharge from the New South Wales Police Force. At the time of his medical discharge, the respondent did not claim that any of his specified incapacitating medical conditions of alcohol dependence, depression and paranoid personality traits were caused by his police duties.

The appellant appealed on the grounds that His Honour erred in his construction of s 10B(2) *Police Regulation (Superannuation) Act* in finding that: a "traumatic stressor" could constitute an "injury" in the absence of the proximate manifestation of symptoms; the "notification" requirement did not require full or sufficient compliance; it was inappropriate to apply the notice requirement to the respondent's condition; the appellant had a discretion to ignore the notice requirement. Additional issues on appeal were his Honour's conclusion of "part compliance" with the notice requirement, failure to address the evidence and submissions made concerning an advice from Commissioner of Police regarding notice, and the application of s 66 *Superannuation Administration Act* 1996.

The appellant submitted that leave to appeal should be granted because the appeal involved the proper interpretation and application of s 10B(2) of the Act. Counsel observed that the type of infirmity claimed by the respondent was one that was common to police officers given the nature of their work. Accordingly, the questions to be determined in the appeal were of great importance to the future administration of the Police Superannuation Scheme. Counsel further submitted that s 66 of the SA Act, which was applied by the trial judge to overcome the respondent's technical failure to comply with the requirements of the Act governing the PSS, was generally applicable to all of the appellant's schemes. The appellant contended that s 66 could not be used to determine an application contrary to a statutory pre-requisite. The Full Bench decided that the circumstances justified the grant of leave to appeal.

The Court found that it could not have been the statutory intent that the notice requirements of the section were inapplicable with respect to particular injuries such as the onset of PTSD. It found that there needs to be notification given by a police officer or former police officer or their medical representatives, that the

events which have occurred are in some way impacting upon them physiologically, or in some other way that has the capacity of manifesting in the ultimate condition. What the legislation requires is notification of an injury, which could include either a physical wound or psychic injury such as depression, which the police officer claims caused the infirmity rendering the officer incapable of performing his or her duties. The Court held that even though the police officer said that he was depressed, he also needed to add that this was because of what happened to him whilst carrying out his police duties, or consequence of it, in order to meet the requirement of s 10B of the Act. What was required is some evidence from the police officer, or his medical practitioner, to that effect. The Full Bench ordered that leave to appeal be granted and the appeal upheld.

Morrison v Milner and Baldwin (No 2) [2009] NSWIRComm 191

The proceedings concerned appeals against a first instance judgment regarding an incident that occurred at the Bellambi West Colliery situated at Wilton. Allied Coal employed Mr Milner as Mine Manager and Mr Baldwin was a director of the company and described as its managing director. Two miners became involved with the rescue in response to a miner becoming immobilised under an unsupported roof. One miner suffered fatal injuries and the other was severely injured and was comatose for approximately one month.

In February 2006, following a Coronial Inquiry, Mr Morrison, the Director of Mine and Forest Safety Performance, New South Wales Department of Primary Industries and an Inspector appointed under s 47A of the *Occupational Health and Safety Act* 1983, commenced proceedings against Mr Milner and Mr Baldwin alleging a breach of s 15(1) of the OHS Act. The trial judge found that the appellant had not established a breach of s 15 of the Act.

Leave to appeal was granted as the appeal raised several important issues relating to the underground coal mining industry, including: the question of a mining corporation's liability in relation to allegations that the corporation failed to ensure the safety of employees by failing to undertake an assessment of the risks associated with the recovery of an immobilised continuous miner from under unsupported roof in pillar extraction coal mining operations; failing to establish a Safe Work Procedure; failing to provide any, or any adequate, information and instruction to its employees; and permitting employees without appropriate seniority and qualifications to determine the methodology for the recovery of an immobilised continuous miner.

In considering the grounds of appeal the Full Bench outlined the differences between development mining, longwall mining and partial pillar extraction and discussed the trial judge's finding there was a safe work procedure in place. The Full Bench found that the trial judge's finding that the crew were lacking in qualification or seniority to undertake the task of recovering a stranded continuous miner under unsupported roof was open to him, as were his findings and assumptions regarding the safe work procedure. The Full Bench found that the primary judge did not err in finding that the relevant particulars of the charge were not made out, and therefore dismissed the appeal.

Teachers (Non Government Early Childhood Service Centres other than Preschools) (State) Award 2006 [2009] NSWIRComm 198

The proceedings concerned applications by the Independent Education Union for new awards covering the terms and conditions of teachers in non-government pre-schools and long day care centres. The decision outlined the background of the awards and summarised the position of the teachers in relation to their government counterparts. The Union claimed increases in pay rates, together with changed working conditions by way of the Commission's Wage Fixing Principle 5 'Adjustment of Allowances and Service Increments', Principle 6 'Work Value Changes' and Principle 10 'Special Case'. The respondents to the claim were the Australian Federation of Employers and Industries and the Association of Quality Child Care Centres of NSW Inc. The respondents submitted that there was no special case made out, and that work value had not changed since 2006.

The primary issue was the changing environment in early education, as there has been a paradigm shift in public policy. There have been substantial developments in understanding the importance of early childhood education, resulting in a range of government initiatives in the industry. There is a greater community awareness of the fundamental importance of early childhood education, particularly to address issues of social and educational disadvantage.

In relation to the special case claim, the Union adduced evidence regarding the shortage of teachers in the early education sector, the wage parity between teachers in government and non-government schools, and differentiation between the wages of early childhood as opposed to schoolteachers. The respondents' position was that that the Commission should not attempt to resolve the shortage by increasing rates of pay. It was contended this was against principle, there were other reasons for the shortage, the increases were unaffordable and that wage rises would not resolve the shortage. The Full Bench accepted that there is a critical shortage of early childhood teachers and that the public interest would be best served by increasing rates of pay in the subject awards.

The Union submitted that teachers' work had changed to a more rigorous, structured and documented teaching regime; increased administrative responsibilities; increase in extent and complexity of client requirements; and more onerous regulation. Further, that directors and authorised supervisors' work had increased. The respondents submitted that the Union had not identified, on an objective assessment basis, whether any changes that have occurred amount to such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification from the datum point of January 2006. The Full Bench was satisfied that the evidence demonstrated there have been changes in the value of work of employees to be covered by the proposed Awards.

After assessing the present and future government funding situation as outlined in the Bilateral Agreement on Achieving Universal Access to Early Childhood Education between the New South Wales Government and the Commonwealth, the Full Bench granted increases of 4 percent per annum for 3 years for early childhood teachers, authorised supervisors and directors.

APPENDIX 3

TIME STANDARDS

Industrial Relations Commission

Applications for leave to appeal and appeal

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 6 months	50%	75.1%	50%	**90.5%**	⇧
Within 12 months	90%	85.8%	90%	**100%**	⇧
Within 18 months	100%	96.5%	100%	**100%**	⇧

Award Applications [including Major Industrial Cases]

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 2 months	50%	52.7%	50%	**63.9%**	⇧
Within 3 months	70%	68.9%	70%	**70.8%**	⇧
Within 6 months	80%	93.6%	80%	**82.9%**	⇧
Within 12 months	100%	98.8%	100%	**94.8%**	

Enterprise Agreements

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 1 month	75%	78.8%	75%	**91.2%**	⇧
Within 2 months	85%	94.0%	85%	**94.7%**	⇧
Within 3 months	100%	97.0%	100%	**94.7%**	

Industrial Disputes

Time to first listing	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 72 Hours	50%	43.5%	50%	**46.1%**	
Within 5 Days	70%	61.5%	70%	**62.0%**	
Within 10 Days	100%	85.9%	100%	**82.0%**	

Applications relating to Unfair Dismissal

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 2 months	50%	66.7%	50%	**64.0%**	⇧
Within 3 months	70%	73.4%	70%	**73.2%**	⇧
Within 6 months	90%	87.4%	90%	**90.0%**	⇧
Within 9 months	100%	93.3%	100%	**95.3%**	

TIME STANDARDS

Industrial Court

Applications for leave to appeal

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 9 months	50%	53.5%	50%	**53.2%**	⇧
Within 12 months	90%	76.7%	90%	**68.1%**	
Within 18 months	100%	91.7%	100%	**91.5%**	

Prosecutions under OHS legislation

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 9 months	50%	20.8%	50%	**34.7%**	
Within 12 months	75%	34.5%	75%	**59.1%**	
Within 18 months	90%	51.1%	90%	**78.8%**	
Within 24 months	100%	64.1%	100%	**85.9%**	

Applications for relief from Harsh/Unjust Contracts

Time from commencement to finalisation	Standard for 2008/ Achieved in 2008		Standard for 2009/ Achieved in 2009		
Within 6 months	30%	16.7%	30%	**17.0%**	
Within 12 months	60%	25.5%	60%	**32.3%**	
Within 18 months	80%	30.4%	80%	**34.0%**	
Within 24 months	100%	37.3%	100%	**57.7%**	

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

APPENDIX 4

COMMITTEES

Library Committee

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

Education Committee

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

Section 106 Committee

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

Award Review Committee

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

Building Committee

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

APPENDIX 5

LEGISLATIVE AMENDMENTS

***Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009 No 32**
This act was assented to on 9 June 2009, however, had not commenced as at 31 December 2009. The Act will transfer the jurisdiction of the Chief Industrial Magistrate and Industrial Magistrates to the Industrial Court. As a consequence a number of other Acts will also be amended to reflect the transfer of jurisdiction - these Acts include the *Annual Holidays Act* 1944, *Apprenticeship and Traineeship Act* 2001, *Building and Construction Industry Long Service Payments Act* 1986, *Criminal Procedure Act* 1986, *Industrial Relations (Child Employment) Act* 2006, and the *Long Service Leave Act* 1955..

***Statute Law (Miscellaneous Provisions) Act* 2009 No 56**
This Act commenced on 17 July 2009. Miscellaneous amendments were made to various Acts including the *Mining Act* 2008, *Police Act* 1990, *Government and Related Employees Appeal Tribunal Act* 1980, *Occupational Health and Safety Act* 2000.

***Occupational Health and Safety Amendment (Authorised Representatives) Act* 2009 No 68**
This act was assented to and commenced on 1 October 2009. The Act amended the *Occupational Health and Safety Act* 2000 with respect to the inspection and investigation powers of authorised representatives of industrial organisations. The amended Act provides for the powers of entry for representatives in situations of suspected breach of the *OH&S Act* provisions.

***Courts and Crimes Legislation Amendment Act* 2009 No 77**
This act was assented to on 3 November 2009. Schedule 2.9 which grants power to the Industrial Registrar to issue an order under s 246 of the *Criminal Procedure* Act 1986 will commence on the day that the *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009 commences.

***Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009 No 87**
This act was assented to on 19 November 2009, however, had not commenced as at 31 December 2009. The object of this Act is to allow Commissioners of the Industrial Relations Commission who are Australian lawyers to hear and determine small claims applications for orders for the recovery of remuneration and other amounts payable by employers consequent upon the transfer of the jurisdiction of the Chief Industrial Magistrate to the Industrial Court. This legislation will commence at the same time as the *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009.

***Statute Law (Miscellaneous Provisions) Act (No 2)* 2009 No 106**
This Act to commence on 8 January 2010 made miscellaneous amendments to a number of Acts including the *Building Professionals Act* 2005, *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act* 2009, *Rail Safety Act* 2008, *Mining Amendment Act* 2008 and the *Police Integrity Commission Act* 1996.

***Industrial Relations (Commonwealth Powers) Act 2009* No 115**
This Act was assented to on 14 December 2009 to commence from 1 January 2010. The Act refers certain industrial relations matters to the Commonwealth under section 51 (xxxvii) of the *Constitution.* It outlines matters to be included and excluded from reference to the Commonwealth and provides for text to be included in the Commonwealth *Fair Work* legislation.

***Judicial Officers Amendment Act* 2009 No 117**
This act was assented to and commenced on 14 December 2009. The objects of this Act which amends the *Judicial Officers Act* 1986 are twofold: (a) to enact in NSW model national provisions approved by the Standing Committee of Attorneys-General relating to the temporary exchange of judicial officers between various courts and tribunals in Australia and other countries, and (b) to extend to all judicial or quasi-judicial offices (including offices subject to any such temporary exchanges and offices to which permanent appointments are made) the existing provisions of that Act that make it clear that judicial officers may be appointed to act in other judicial offices without having to surrender or vacate their original judicial office.

APPENDIX 6

AMENDMENTS TO REGULATIONS AFFECTING THE COMMISSION

Industrial Relations (General) Amendment (Fees) Regulation 2009
This regulation commenced on 1 July 2009. The regulation amended the *Industrial Relations (General) Regulation 2001* to increase fees charged by the New South Wales Industrial Relations Commission.

Industrial Relations Commission Rules 2009
These rules were published on the *NSW Legislation website* on 24 December 2009 and will take effect from 1 February 2010. The rules replace the *Industrial Relations Commission Rules 1996* and cover matters specific to the effective operation of the IRC.

Occupational Health and Safety Amendment (National Code of Practice and National Standard for Licensing) Regulation 2009
This regulation commenced on 1 September 2009. The regulation amends the *Occupational Health and Safety Regulation* 2001 to implement the national scheme for occupational health and safety training and assessments of competency, specifically the approval of those providing and completing OH&S training and the issue of licenses to authorise workers to perform high-risk work.

Public Sector Employment and Management Regulation 2009
The regulation commenced on 1 September 2009. The regulation amended the provisions of the *Public Sector Employment and Management (General) Regulation 1996* and removed redundant provisions of that regulation that are now covered by industrial instruments. The amendments refer to the appointment of public service officers, conditions. Specific matters such as employee war service and criminal charges are now dealt with under the award.

Police Amendment (Selection Procedure) Regulation 2009
This regulation was published on 10 July 2009. The amendment applied the provisions of the *Public Sector Employment and Management Act* 2002 to police selection procedures for temporary employees under the *Police Act 1990*.

Uniform Civil Procedure Rules (Amendment No 31) 2009
The rules commenced on 1 February 2010. The amendment applied the provisions of the *Uniform Civil Procedure Rules* 2005 to the Industrial Relations Commission of NSW and the Industrial Court.

APPENDIX 7

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

Matters filed during period 1 January 2009 to 31 December 2009 and matters completed and continuing as at 31 December 2009 which were filed under the *Industrial Relations Act* 1996.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

(other than in the Industrial Court)

Nature of Application	Filed 1.1.2009 – 31.12.2009	Completed 1.1.2009 – 31.12.2009	Continuing as at 31.12.09 (including previous years)
APPEALS	**21**	**21**	**9**
Appeal - from Industrial Registrar	4	2	2
Appeal - from an Award matter	0	1	0
Appeal - from a dispute matter	4	7	0
Appeal - from an unfair dismissal matter	10	9	4
Appeal - other	3	2	3
AWARDS	**254**	**363**	**18**
Application create new Award	34	52	7
Application vary an Award	216	254	5
Application – State Wage Case	2	1	1
Review of Award	0	53	5
Award - other	2	3	0
DISPUTES	**638**	**666**	**221**
s130 of the Act	565	596	195
s130, s380 of the Act	5	5	3
s332 contract determination	30	32	7
s146A of the Act	22	27	6
s146B of the Act	7	3	4
Dispute - other	9	3	6
ENTERPRISE AGREEMENTS	**57**	**57**	**2**
Approval (Employees)	5	4	2
Approval (Union)	52	53	0
UNFAIR DISMISSALS	**673**	**695**	**135**
Application (by individual only)	293	307	36
Application (representative)	180	184	50
Application (organisation representative)	190	194	48
Application (organisation – multiple)	10	10	1
OTHER	**192**	**207**	**60**
Contract Agreements	1	1	0
Contract Determinations	13	20	3
Contract of Carriage (claim for compensation)	1	5	6
Application under Child Protection (Prohibited Employment) Act	0	1	0
Registration pursuant to Clothing Trades Award	71	71	2
Application for reinstatement injured employee (by individual)	1	2	1
Application for reinstatement injured employee (by organisation)	14	13	8
Protection of injured workers from dismissal - Workers Compensation Act 1987	1	1	0
Application for Review of Order under s181D *Police Service Act*	36	40	20
Application for Rescission of Order under s173 *Police Service Act*	24	22	6
Application for Relief from Victimisation s213 of the Act	16	16	6
Miscellaneous (not categorised)	14	15	8
SUB-TOTAL	**1835**	**2009**	**445**

APPENDIX 8

MATTERS FILED IN THE INDUSTRIAL COURT

Matters filed during period 1 January 2009 to 31 December 2009 and matters completed and continuing as at 31 December 2009 which were filed under the *Industrial Relations Act* 1996.

INDUSTRIAL COURT OF NEW SOUTH WALES

Nature of Application	Filed 1.1.2009 – 31.12.2009	Completed 1.1.2009 – 31.12.2009	Continuing as at 31.12.09 (including previous years)
APPEALS	**34**	**47**	**31**
Appeal from Local Court (Industrial Magistrate)	4	16	4
Appeal – superannuation	10	13	9
Appeal – OHS prosecution	6	5	6
Appeal – against decision of VETAB	1	1	0
Appeal – s106 matter	7	10	7
Appeal – other	6	2	5
CONTRAVENTION	**1**	**0**	**1**
Contravention of Dispute Order s139 of the Act	1	0	1
HARSH CONTRACTS	**35**	**59**	**55**
Application under s106 of the Act	35	59	55
PROSECUTIONS	**131**	**127**	**211**
Prosecution – s8(1) *OHS Act* 2000	69	58	104
Prosecution – s8(2) *OHS Act* 2000	34	31	68
Prosecution – s9 *OHS Act* 2000	1	1	2
Prosecution – s10(1) *OHS Act* 2000	13	9	17
Prosecution – s10(2) *OHS Act* 2000	1	2	0
Prosecution – s11 *OHS Act* 2000	0	4	7
Prosecution – s20(1) *OHS Act* 2000	1	1	2
Prosecution – s26(1) *OHS Act* 2000	8	8	6
Prosecution – s81(1) *OHS Act* 2000	0	3	0
Prosecution – s136 *OHS Act* 2000	1	10	1
Prosecution – other *OHS Act* 2000	3	0	3
Prosecution – s15(1) *OHS Act* 1983	0	0	1
OTHER	**50**	**23**	**44**
Declaratory jurisdiction (s154, s248)	7	3	6
Cancellation of registration industrial organisation	8	2	6
Recovery of remuneration and other amounts	23	11	24
Unlawful Dismissal - s23 OHS Act 2000	8	5	4
Miscellaneous (not otherwise categorised)	4	2	4
SUB-TOTAL	**251**	**256**	**342**

TOTAL (IRC & IC MATTERS)	**2086**	**2265**	**787**

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.**

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	
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"[5]

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	

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