2003

ANNUAL REPORT OF THE PRESIDENT

OF THE

INDUSTRIAL COURT

OF QUEENSLAND

in respect of

The Industrial Court of Queensland

The Queensland Industrial Relations Commission and

The Industrial Registry

Annual Report of the President
of the Industrial Court of Queensland
2002–2003
ISSN 1441 – 7340

Printed by Watson Ferguson & Company

Industrial Court of Queensland

14th Floor, Central Plaza 2,
66 Eagle Street, (Corner Elizabeth and Creek Streets), BRISBANE QLD 4000
Postal Address: GPO Box 373, BRISBANE QLD 4001
General Enquiries: (07) 3227 8060 Facsimile: (07) 3221 6074

December 2003

The Honourable Gordon Nuttall, MP
Minister for Industrial Relations
Level 6
75 William Street
BRISBANE QLD 4000.

Dear Minister

I am pleased to submit to you my report on the operation of the *Industrial Relations Act 1999* and the work of the Industrial Court of Queensland, the Queensland Industrial Relations Commission, and the Industrial Registry for the year 1 July 2002 to 30 June 2003, as required by section 252 of the Act.

The year has seen the first case on a "Queensland Minimum Wage" under the Act. The final stage in the first round of Award Review got under way. There has also been an operational review of the Industrial Registry. Substantial restructuring is now being carried out. The Registry is adopting new technologies and streamlining its operations in order to meet future demands and increased expectations of its clients.

I commend the report to you.

D.R. Hall
President
Industrial Court of Queensland

TABLE OF CONTENTS

THE INDUSTRIAL COURT OF QUEENSLAND

The Industrial Court of Queensland is a superior court of record. It was first established as the Industrial Court by the *Industrial Peace Act* of 1912, which commenced operation in 1913. The jurisdiction of that court was limited, but it was broadened and strengthened by the *Industrial Arbitration Act 1916*, which was proclaimed into force in January 1917. That Court, as established and continued, is now governed largely by Chapter 8 Part 1 of the *Industrial Relations Act 1999*. The Court's jurisdiction and powers are provided for chiefly by Division 3 of Chapter 8 Part 1. Appeals to the Court and general provisions about appeals are provided for in Chapter 9, Divisions 2 and 5.

By s 247 of the Act, the Industrial Court is constituted by the President sitting alone. The Act requires the President to have been either a Supreme or District Court judge, or a lawyer of at least 5 years standing with skills and experience in the area of industrial relations. The current President is Mr David Hall, who was sworn in to the role in August 1999. Under the cooperative arrangement between the Australian and state Commissions, the President is also a Deputy President of the Australian Industrial Relations Commission.

By virtue of s 257, the President of the Court is also President of the Commission. The President may preside on a Full Bench of the Commission and, for certain matters under the Act, the Full Bench *must* include the President (see s 256(2)). These matters include:

- appeals, on grounds other than error of law or excess or want of jurisdiction, from most decisions of the Commission and the Registrar, and Industrial Magistrates' decisions under the Act; and
- de-registration proceedings against industrial organisations (brought under Chapter 12 Part 16).

More information about the Full Bench appears later in this report under "Industrial Relations Commission of Queensland".

Jurisdiction of the Court

Section 248 of the Act outlines the Court's jurisdiction generally and states that it may exercise all powers prescribed under the *Industrial Relations Act* or another Act. (The Court's jurisdiction under other Acts is largely appellate jurisdiction and will be outlined briefly below.) The jurisdiction includes hearing and deciding:

- cases stated to it by the Commission (available under s 282);
- offences against the Act, other than those for which jurisdiction is conferred on the Industrial Magistrates Court (s 292 gives Industrial Magistrates jurisdiction over offences for which the maximum penalty is 40 penalty units or less, except where the Act specifically provides for Magistrates' jurisdiction); and
- appeals from decisions of Industrial Magistrates relating to offences under the Act or recovery of damages or sums of money under the Act (appellate jurisdiction will be dealt with briefly below).

The section also allows the Court to issue prerogative orders, or other process, to ensure that the Commission and Magistrates exercise their jurisdictions according to law and do not exceed their jurisdiction. One such application was made during the year. It was an application to quash two decisions of the Commission in relation to negotiations for a certified agreement, and to order the Commission to "proceed according to law". That application was dismissed.

The Court also has the power, under s 671, to issue an injunction to restrain a person, found guilty of wilfully contravening an industrial instrument, a permit or the Act, from continuing to do so, or from committing further contraventions. There have been no applications for an injunction under this section during the year.

Cases Stated

Under s 282 of the Act, the Commission may refer a question of law, relevant to proceedings before it, to the Court for the

Court's opinion. The Court may determine the matter raised by the case stated and remit it to the Commission. The Commission must then give effect to the Court's opinion.

During the year there was one case stated to the Court by the Commission. This was on a question of jurisdiction arising in a dispute before the Commission. (Table 1 shows that last year there were two cases stated.)

Offences under Industrial Relations Act

Under s 683, proceedings for an offence against the Act must be heard and decided by the Court or a Magistrate according to their respective jurisdictions. The original jurisdiction of the Court includes the power to try offences for which the penalty prescribed is greater than 40 penalty units (other offences are brought before an Industrial Magistrate).

Most of these offences are contained in Chapter 12, Part 7 and Part 8. Part 7 governs the conduct of industrial organisations' elections (the offences are in Div. 4: ie ss 491-497). Part 8 relates to Commission inquiries into organisations' elections (see ss 510 and 511). There have been no actions to prosecute such offences during the year.

There are other offences which must be tried before the Court. For example, s 660 states that a person must not disrupt or disturb proceedings in the Commission, in the Industrial Magistrates Court, or before the Registrar; a person must not insult officials of those tribunals, attempt to improperly influence the tribunals or their officials or to bring any of those tribunals into disrepute. To do so is to commit an offence, for which the person may be imprisoned for up to 1 year, or fined 100 penalty units. The Court also has all necessary powers to protect itself from contempt of its proceedings and may punish a contempt of the court. This could be by ordering imprisonment of the offender: see s 251. There have been no proceedings brought under s 251 or s 660 during the year.

Non-payment of an employee's wages under an industrial agreement or permit is also a serious offence, the maximum penalty for which is 200 penalty units: see s 666. Complaints relating to this offence are brought before an Industrial Magistrate; and may subsequently come to the Court on appeal.

Under s 671, the Court may issue an injunction to restrain a person from contravening, or continuing to contravene, an industrial instrument or the Act. If the person disobeys the injunction, a penalty up to 200 penalty units can be imposed. There have been no cases under this section during the year.

Industrial organisations

The Court has original jurisdiction over certain other matters concerning industrial organisations. For example, an industrial organisation's rules must comply with restrictions on their content which are set out in s 435 of the Act. On application by a member of the organisation or by a prescribed person, the Court may decide on, and issue a declaration about, the rules' compliance: s 459. If the Court declares that any provision contravenes s 435, the Registrar may omit or amend the provision under s 467. Under s 459, the Court may also order a person who is obliged to perform or abide by rules of an industrial organisation, to do so.

Membership disputes are also decided by the Court, by virtue of ss 535 and 536. An organisation, or a person who wishes to become a member, may apply to the Court under s 535, to decide questions, including: a person's eligibility for, and qualifications for membership; and the reasonableness of a membership subscription or other requirements of membership. There have been no applications to the Court during the year under these industrial organisations provisions.

Workplace Health and Safety undertakings

Recent amendments to the *Workplace Health and Safety Act 1995*, introduced enforceable 'workplace health and safety undertakings'. Breach of an undertaking

may result in an application to the Court, by the chief executive Workplace Health and Safety Division, to enforce compliance. Similar provisions now exist in the *Electrical Safety Act 2002* also. Both are discussed in more detail below, under "Amendments to Legislation" (see p 24-25).

Appellate Jurisdiction of the Court

Matters filed in the Court are predominantly appeals (see Table 1). Appeals to the Court under the *Industrial Relations Act* are available only on the grounds of error of law, or of excess, or want, of jurisdiction: s 341. Appeals are by way of re-hearing on the record although fresh evidence may be adduced if the Court considers it appropriate: s 348. Appeal decisions are final and conclusive, under s 349. (Judicial review has been found by the Supreme Court, to be available, but only for decisions that involve jurisdictional error: see *Carey v President of the Industrial Court of Queensland* [2003] QSC 272 at [6] citing *Squires v President of Industrial Court Queensland* [2002] QSC 272.).

The Court hears and determines appeals from decisions of a single Member of the Commission, of a Full Bench and of the Industrial Registrar. However, Full Bench decisions may only be appealed to the Court if the President was not a member of the Bench. Any decision of a Full Bench which included the President may only be appealed to the Queensland Court of Appeal.

A determination by the Commission under s 149 of the Act is not appealable to the Court. (Section 149 allows the Commission to arbitrate, where a protracted or damaging dispute over negotiations for a Certified Agreement cannot be resolved by conciliation.)

Decisions of the Commission on an apprentice or trainee appeal under the *Training and Employment Act 2000* may be appealed to the Court. Such appeals are available on a question of law only: *Training and Employment Act* s 244.

Appeals also lie to the Court from decisions of the Industrial Magistrates Court. These are Industrial Magistrates' decisions on:

- offences and wage claims under the *Industrial Relations Act* (see s 341(2));
- prosecutions under the *Workplace Health and Safety Act 1995* (see s 164(3) *WH & S Act*); and
- appeals from review decisions, and non-reviewable decisions, on claims for compensation under the *WorkCover Queensland Act 1996* (ss 509, 510 *WorkCover Act* – now replaced, since 1 July 2003, by the *Workers' Compensation and Rehabilitation Act 2003*: see ss 561, 562).

The Court is the final appeal court for prosecutions under the *Workplace Health and Safety Act* and the *Industrial Relations Act*, and for compensation claims under the *WorkCover Act* (since 1 July 2003, the *Workers' Compensation and Rehabilitation Act*).

The Court's role under the *Workplace Health and Safety Act* extends to being the avenue of appeal for persons dissatisfied with a decision, on internal review, by the Director, Workplace Health and Safety. Appeals from review decisions of the Director are by way of a hearing de novo, that is, unaffected by the decision appealed from. (See *WH & S Act* Part 11, Div. 2.) There have been no appeals filed under this provision during the year.

Table 2 shows a marginal increase in the number of appeals over last year's figure. The table also indicates the types of appeal cases filed during the year.

Costs Jurisdiction

The Court may order costs against a party to an application. Under s 335 of the *Industrial Relations Act* costs may only be ordered against a party if the Court is satisfied that:

- the party's application was vexatious or without grounds; or,
- in a reinstatement application, if the party caused another party to incur

additional costs, by doing some unreasonable act or making an unreasonable omission during the course of the matter.

There is a power to award costs of an appeal against a party under s 510A of the *WorkCover Act*, if the Court is satisfied that the party made the application vexatiously or without reasonable cause. However, because of the wording of s 510A, this power has been found not to allow an award of costs to a successful appellant. It will only permit costs to be awarded to a respondent, to an appeal that has failed, in circumstances where the appeal application is found to have been made vexatiously or frivolously. (The costs jurisdiction was reproduced in identical terms in s 563 of the *Workers' Compensation and Rehabilitation Act 2003*, which has since replaced the *WorkCover Act*.)

The question of costs is often decided on submissions after a decision is delivered in a matter, rather than on a separate application. During the year, the Court has given decisions in 11 applications for costs (see Table 1), either as a second decision based on written submissions after the appeal has been determined, or at the end of the substantive decision, based on argument during the appeal hearing.

Table 1 Matters filed in the Court 2001/02 and 2002/03

Type of Matter	2001/02	2002/03
Appeals to the Court	**85**	**87**
— Magistrate's decision	52	40
— Commission's decision	32	47
— Registrar's decision	0	0
— Director, WH&S decn	1	0
Stay order	**12**	**10**
Direction to observe/ perform Ind Org rules	**1**	**0**
Case stated by Commn	**2**	**1**
Prerogative order	**1**	**1**
Applicn for orders – other	**1**	**1**
TOTAL	**102**	**100**
Number of Court Decisions Released	**75**	**53**
— incl decns on Costs (separately or with substantive decision)	10	11

Table 2 Number of matters filed in the Court 1993/94 – 2002/03

1993/94	51	1998/99	95
1994/95	60	1999/00	61
1995/96	89	2000/01	74
1996/97	81	2001/02	102
1997/98	90	2002/03	100

Table 3 Appeals filed in the Court 2001/02 and 2002/03

Appeals from decisions of Industrial Commission	2001/02	2002/03
IRA s 341(1)	26	27
❖ Disputes	0	1
❖ CAs	1	2
❖ Wages	5	2
❖ Reinstmt/contr	19	22
❖ Organisations	1	0
T & E Act s 244	1	20*
SUBTOTAL	**32**	**47**
Appeals from decisions of Industrial Magistrate	**2001/02**	**2002/03**
IRA s341(2)	8	6
WorkCover Act s509	26	20
Wkrs' Comp 1990 s105	1	0
WH & S Act s164(3)	11	14
SUBTOTAL	**52**	**40**
Appeal from review decn by Director WH & S	**1**	**0**
TOTAL	**85**	**87**

* It is important to note that all of these appeals relate to agreements of a number of employees with one employer. The matters were originally heard before the Commission last year.

Tribunal Rules

Under s 338 of the Act, Rules about proceedings in the Tribunals may only be made with the consent of the President. The *Industrial Relations (Tribunals) Rules 2000* are to be revised in the coming year. In order to undertake the revision, a sub-committee was established during the year to consult with and assist the President. It is expected that the new Rules will be gazetted by the end of 2003, for commencement early in 2004.

Professional contribution

During the year, the President attended the following conferences and meetings, and delivered papers as indicated:

- 2002 Queensland Bar Association Seminar on Bullying — chaired and addressed the meeting.
- 2003 Australian Industrial Relations Conference — paper presented on s 275 of the *Industrial Relations Act 1999* (Qld)
- 2003 New South Wales Industrial Relations Commission Annual Seminar — paper presented on the Queensland industrial relations system.

The President is also a patron of the Industrial Relations Education Committee.

President's Advisory Committee

The President's Advisory Committee is constituted under s 253 of the Act. Members of the Committee include the President, the Vice President, the chief executive of the Department of Industrial Relations, a representative of the Queensland Anti-Discrimination Commission, two representatives each of employee and employer organisations and two persons with knowledge and experience in the area of industrial relations. The Committee meets monthly to discuss issues affecting the work, accessibility, and operational effectiveness of the Court and Commission. During the year, matters dealt with by the Committee included the cost and availability of transcripts (including availability in electronic format); the Award Review process; and the operational review of the Industrial Registry.

Current members of the Committee are listed below:

Ex officio appointments

Mr DM Hall, President of the Industrial Court and Industrial Relations Commission
Ms D Linnane, Vice President of the Industrial Relations Commission
Mr P Henneken, Director-General, Department of Industrial Relations
Ms S Booth, Anti-Discrimination Commissioner

Industrial Organisation Representatives

Mr M Belfield, Australian Industry Group
Ms G Grace, Queensland Council of Unions
Mr W Ludwig, Australian Workers' Union
Mr S Nance, Queensland Chamber of Commerce and Industry

Other appointments

Professor M Gardner, Pro-Vice Chancellor (Academic) University of Queensland
Ms K Prior, Industrial Relations Consultant

THE QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

The Queensland Industrial Relations Commission was established as a court of record by the *Industrial Conciliation and Arbitration Act 1961*. At that time it was called the Industrial Conciliation and Arbitration Commission. As a tribunal, independent of government and other interests, it has remained essential to the industrial conciliation and arbitration system in Queensland. Under current legislation, it derives its powers and functions from Chapter 8, Part 2 of the *Industrial Relations Act 1999*.

The Commission is headed by the President who is also President of the Industrial Court. Other presidential members are the Vice President and two Deputy Presidents. There are seven other Commissioners.

The Vice President is responsible for administration of the Commission and Registry, including allocation of matters, establishing industry panels for disputes, approving references to a Full Bench, and general conduct of Commission business. Two Deputy Presidents provide assistance to the Vice President in administration of the Commission and the Registry, and in determining the Member or Members who are to constitute the Commission for each matter, including Full Bench matters. By s 264, powers of the Vice President can be delegated to the Deputy Presidents to enable them to carry out their functions.

All Members of the Queensland Commission are also appointed to the Australian Industrial Relations Commission (AIRC). These 'dual commissions' are provided for by s 305, and facilitate the cooperative arrangement between Australian and state Commissions. The President and Vice-President hold dual appointments as Deputy Presidents of the AIRC. AIRC Commissioners Hodder, Bacon and Hoffman hold dual appointments on the Queensland Commission under s 306.

Current members of the Commission are listed in Table 4.

Table 4 Current Members of the Commission

Member	Role and date sworn in
Mr DR Hall	President 2.8.1999 Chief Industr Commr 1.3.1993
Ms DM Linnane	Vice-President 2.8.1999
Ms DA Swan	Deputy President 3.2.2003 Commissioner 10.9.1990
Mr AL Bloomfield	Deputy President 3.2.2003 Commr Adminr 2.8.1999 Commissioner 15.3.1993
Mr KL Edwards	Commissioner 13.4.1988
Ms GK Fisher	Commissioner 12.2.1990
Mr RE Bechly	Commissioner 10.9.1990
Mr BJ Blades	Commissioner 1.3.1998
Mr DK Brown	Commissioner 2.8.1999
Ms IC Asbury	Commissioner 28.9.2000
Mr JM Thompson	Commissioner 28.9.2000

Jurisdiction, Powers and Functions of the Commission

Under s 256 of the Act, the Commission is constituted by a single Commissioner sitting alone. The Commission's jurisdiction is set down in s 265; its functions are outlined in s 273; and it is given powers to make orders and do other things necessary to enable it carry out its functions by ss 274-288. Table 6 indicates the number of applications filed under these provisions during the year. Further discussion of the powers of the Commission appears below.

The jurisdiction under the Act includes regulation of callings, dealing with industrial disputes and resolving questions and issues relating to industrial matters. "Industrial matter" is defined broadly in s 7, and includes matters affecting or relating to work to be done; privileges, rights or functions of employees and employers; matters which, in the opinion of the Commission, contribute to an industrial dispute or industrial action. Schedule 1 of

the Act lists 27 matters which are considered to be industrial matters, for example: wages or remuneration; hours of work; pay equity; occupational superannuation; termination of employment; demarcation disputes; interpretation and enforcement of industrial instruments; what is fair and just in matters concerning relations between employers and employees.

The Commission also has certain jurisdiction under the *Trading (Allowable Hours) Act 1990* and the *Training and Employment Act 2000* (considered below).

Industry Panel System

Under s 264(6) of the Act, the Vice President must establish panels, for allocating matters involving particular industries to particular Commissioners. This ensures that, where possible, members with experience and expertise in the relevant industries are assigned to deal with disputes. The Commission is thereby able to deal with disputes more quickly and effectively. The current arrangement is a two-panel system, with industries divided between the panels. Each panel is headed by a Deputy President, who is responsible for allocating disputes for conciliation, and hearings for certified agreements, within the panel. Table 5 sets out the panels in operation since 1 March 2003.

Table 5 Industry Panels 2003

Deputy President Swan Commr Edwards Commr Bechly Commr Brown	**Deputy President Bloomfield** Commr Blades Commr Asbury Commr Thompson
Agriculture	Aged Care
Agriculture Associated Bulk Handling	Ambulance
Banking and Insurance	Arts and Entertainment
Catering (excl. Constrctn Catering)	Beauty and Hairdressing
Cemeteries and Funerals	Building and Constructing
Childcare	Cement
Clerical	Chemicals
Disability Services	Concrete
Dry Cleaning & Laundry	Construction Catering
Education	Electrical Contractors
Fast Food	Electricity
Fire Services	Forestry Products (incl Timber, Sawmilling)
Food Manufacturing	Gas and Oil
General Manufacturing	Health
General Transport (excl. Sugar)	Hospitals
Hotels and Motels	Metal Industry
Hospitality	Mining (incl. Associated Bulk Handling)
Local Authorities (excl. Brisbane City Cncl)	Nursing
Maritime Transport	Police
Meat and Poultry	Printing and Publishing
Miscellaneous	Professional Engineering & Technical Drafting
Pharmaceuticals	Public Sector (not otherwise allocated)
Port Authorities	Quarries
Prisons	Racing
Professional Services	Residential Accommodation
Rail	Sports
Retail	Sugar (including Bulk Sugar, Sugar Transport)
Sales and Wholesale Warehouses (incl. Stores & Distribution Stores)	Tree Lopping
Security	Aged & Infirm Permits
Shearing	
Statutory Authorities (not o/wise allocated)	

Commission's Powers

As indicated already, the Commission's functions are outlined in Part 2 of Chapter 8 in the *Industrial Relations Act*. In Div. 4 of that Part, s 274 gives the Commission general powers to do "all things necessary or convenient" in order to carry out its functions. Other sections in that Division give more specific powers, which are listed below. Specific powers are also distributed throughout the Act. For example various provisions in Chapters 5 and 6 empower the Commission to do what is necessary to make, approve, interpret and enforce industrial instruments (Awards and Agreements). Provisions in Chapter 3 enable it to order reinstatement or award compensation to workers who have been unfairly dismissed. The Commission's exercise of its powers, and the powers necessary for conducting proceedings and exercising its jurisdiction are governed by Chapter 8, Part 6, Div 4. The Act also

states in s 266 that, in exercising any of its powers, the Commission must not allow any discrimination in employment. In exercising its powers and performing its functions, the Commission must consider the public interest and act in a way that furthers the objects of the Act: see for example ss 273, 320.

The powers given by the Act include the power to:

- hear and determine applications for reinstatement following termination of employment, including awarding compensation if reinstatement is impracticable, and imposing a penalty on the employer if the dismissal was for an invalid reason: ss 76, 78-81;
- make orders for payment of severance allowance or separation benefits, and order penalties against employers who contravene such orders: s 87;
- make, amend or repeal Awards, on its own initiative or on application: s 125. The Commission may also review Awards under s 130. (The first program of Award review was commenced by the Commission on its own initiative in 1999);
- make orders fixing minimum wages and conditions, and tool allowance for apprentices and trainees: ss 137, 138; and orders fixing wages and conditions for employees on labour market programs, and for students in vocational placement schemes: ss 140, 140A;
- resolve industrial disputes (s 230), or assist parties to negotiate certified agreements (ss 148, 149), by conciliation and, if necessary, by arbitration. The Commission's powers in such disputes includes the power to make orders necessary to ensure negotiations proceed effectively and are conducted in good faith, and the power to enforce its orders;
- certify or refuse certification of agreements, and amend or terminate certified agreements, according to the requirements of the Act: ss 156, 157, 169-173;
- declare a class of persons to be employees rather than independent contractors, and declare a person to be their employer: s 275;
- amend or declare void a contract for services, or a contract of service not covered by an industrial award or agreement, where the contract is found to be unfair: s 276;
- grant an injunction to compel compliance with an industrial instrument or permit, or with the Act, or to prevent contraventions of an instrument, permit or the Act: s 277;
- determine claims for, and order payment of unpaid wages, superannuation contributions, apprentices' tool allowances, and certain other remuneration, where the claim is less than $20,000 (claims above that sum must be heard before an Industrial Magistrate): s 278;
- make orders to resolve demarcation disputes (that is, disputes about what employee organisation has the right to represent particular employees): s 279. In addition, if an organisation breaches an undertaking it has made about a demarcation dispute, the Commission has the power to amend its eligibility rules to remove any overlap with another organisation's eligibility rules: s 466;
- interpret an industrial instrument: s 284;
- order a secret ballot about industrial action, and direct how the secret ballot is to be conducted: ss 176, 285;
- make general rulings about industrial matters, employment conditions, and a Queensland minimum wage: s 287; and statements of policy about industrial matters: s 288;
- order repayment of fees, charged in contravention of the Act by a private employment agent, where the total fee paid was not more than $20,000: s 408F (claims above that sum must be decided by an Industrial Magistrate);
- issue permits to 'aged or infirm persons' allowing them to work for less

than the minimum wage under the applicable industrial instrument: s 696;

- ❖ grant an injunction under the *Whistleblowers Protection Act 1994*, to prevent reprisal action against an employee whistleblower where the reprisals involve a breach of an industrial instrument. There was one application for an injunction under that Act during the year;
- ❖ hear and determine applications for changes in trading hours for non-exempt shops under the *Trading (Allowable Hours) Act 1990*;
- ❖ hear and determine applications to reinstate training contracts and appeals from decisions of the Training Recognition Council under the *Training and Employment Act 2000*.

Industrial organisations

The Commission's powers in relation to employer and employee organisations include:

- ❖ the power to determine applications to amend the name, list of callings, or eligibility rules of an industrial organisation: Chapter 12 Part 6;
- ❖ the power to conduct an inquiry, under Chapter 12 Part 8, into any alleged irregularity in the election of office-bearers in an industrial organisation. Applications for such inquiries are made by financial members of the organisation to the Registrar. The Registrar may then refer the application to the Commission if there appear to be grounds for conducting an inquiry and the circumstances justify it: s 502;
- ❖ the power to approve amalgamations of organisations: s 618; and withdrawals from amalgamations: s 623.

In addition, a Full Bench of the Commission may order the de-registration of an industrial organisation under Chapter 12 Part 16. For this purpose, the Bench must include the President: s 256(2). There have been no applications for de-registration during 2002-03. In certain circumstances, the Commission may review an organisation to determine whether it should be de-registered (see ss 645, 646).

Table 6 indicates the volume of matters relating to industrial organisations during the year. More detail is provided in Table 10. While there has been an increase, the difference is not remarkable. More information about industrial organisations and matters relating to them is provided later in this Report (see Table 10 and p 26 ff).

The Commission may exercise most of its powers on its own initiative (see s 325). And it may start proceedings on its own initiative if it considers there is a need to do so (see s 317). The review of Awards under s 130 was initiated by the Commission during the year.

Award Review

Section 130 of the Act requires the Commission to review each Award within three years of when it was made or when it was last reviewed – effectively every three years. The first round of review was commenced by the Commission of its own initiative in 1999. The background to and purpose of the review were outlined in some detail in the last Annual Report (at p 15). During the year, that first round of Award Review was almost completed, with extensive help from the Registrar and Registry staff. Reviewed Awards are being published in the *Queensland Government Industrial Gazette* in stages. (This has enabled significantly lower printing costs.)

The second Review is being undertaken, again on the Commission's initiative (under s 130(1)(a)). Commissioner Fisher was given responsibility for overseeing the initial stages. Consultations are being held with industrial organisations, the Registrar and other parties with significant interest in the matter.

Business Plan

Following on a recommendation by a recent operational review of the Industrial Registry (see below p 22), the Commission began work to devise a *Business Plan* in May 2003. At the close of the year, the draft had still to be finalised and approved.

Table 6 Applications filed and Matters heard 2001-02 and 2002-03[*]

Section	Type of Application/Matter	2001/02	2002/03
s 53	Long Serv Leave – payment in lieu of	120	137
s 74	Application for Reinstatement (Unfair dismissal)	1,728	1671
s 74(2)(b)	Application to extend time for filing	1	2
s 87	Application for severance allowance	43	11
	Exemption from requirement to pay severance or redundancy entitlements	10	13
s 90	Order re redundancy – over 15 employees	0	0
s 120	Prohibited conduct – breach	9	7
s 125	Awards:		
	— New award	3	4
	— Repeal and replace award	3	3
	— Rescind award	3	0
	— Amend award	69	52
s 130	Review of Award	165	91
s 132	Exemption from Award	0	0
s 137	Order – wages & conditions (trainees)	15	14
s 138	Order – tools (trainees)	1	3
s 140	Order – trainees' conditions order	0	1
s 148	Assistance to negotiate a CA	17	33
s 156	Application to approve a new CA	374	189
s 156	Agreement replacing existing CA	314	328
s 163	Designated Award	1	2
s 169	Amending a CA	1	0
s 172-173	Terminate a CA	0	0
s 176	Secret ballot re industrial action	6	0
s 177	Authorisation to take industrial action	247	339
s 184	Ballot on CA	2	0
	Dispute – re: ballot for CA	1	2
s 203	Application to approve a QWA	171	88
s 229	Notification of dispute	486	525
s 230	Request for orders to settle/arbitrate dispute	18	13
	— Arbitration	— 9	— 8
	— Mediation	— 1	— 0
	— Other orders	— 8	— 5
s 231	Application for mediation	0	1
s 265(3)	Inquiry about an industrial matter	1	0
s 274	Application for directions/orders	1	0
s 275	Declare class of persons to be employees	2	1
s 276	Application to amend/void a contract	28	31

[*] Note that some matters arise as part of substantive applications; the "Total of applications/matters" at end of the Table is the total filed in Registry, and may not equal the sum of figures given in the Table.

Section	Type of Application/Matter	2001/02	2002/03
s 277	Application for injunction	5	9
s 278	Claim for unpaid wages/superannuation	216	166
s 279	Representation order (demarctn dispute)	0	0
s 280	Application to re-open a proceeding	7	6
s 281	Reference to a Full Bench	3 (2 heard together)	2 (1 refused)
s 284	Interpretation of industrial instrument	5	4
s 287	Application for general ruling	2	2
s 287(5)	Exemption from general ruling	2	2
s 288	Application for statement of policy	3	0
s 288	Statement of policy and general ruling	2	2
s 319	Representation of party/Legal representn	1	1*
s 326	Interlocutory orders	6	1
s 329(h)	Application for adjournment	0	1
s 331	Applic to dismiss/refrain from hearing	3	22**
s 335	Costs	14***	12***
s 342	Appeal to Full Bench	5	4
s 342	Leave to appeal to Full Bench	1	3
s 408F	Repaymnt of private employment agent's fee	0	1
s 409-657	Industrial Organisation matters [Table 10]	67	70
s 695	Student work permit	6	12
s 696	Aged and/or infirm permit	74	75
T(AH) Act	Trading hours order	1	2
T&E Act s62	Reinstatement of training contract	0	1
T&E Act s230	Apprentice/trainee appeals	33	2
	— extension of time to appeal		1
Whistleblower's s47	Application for injunction	0	1
TOTAL APPLICATIONS/MATTERS		**4212**	**3959**
No. of Decisions released (excl. New Awards; Award amdts)		**237**	**234**
— Incl. Reinstatement Decisions released		**82**	**78**

* This application for legal representation was made during substantive proceedings.
** Including applications filed as part of other proceedings.
*** Each brought as part of the main application, and heard with the substantive matter or subsequently.

Industrial instruments

An essential part of the system of employment and industrial relations in Queensland is the use of industrial instruments – Awards and Agreements – to regulate the relationship between employees and employers. Awards and Agreements set out the terms and conditions of employment and have the force of law once made or certified or approved by the Commission.

The predominant types of instruments are: Awards; Certified Agreements (CAs); and Queensland Workplace Agreements (QWAs). Awards and CAs are collective instruments, that is, they cover a range of employees and employers in a particular industry. They will usually be negotiated by employee organisations with employers and/or related employer organisations. QWAs apply to individual employees. Table 8 indicates the types and number of industrial instruments in force within the Commission's jurisdiction.

Awards

Section 265(2) gives the Commission jurisdiction to regulate a calling by an Award. Awards are regulated by Chapter 5 of the Act. The Commission's powers with regard to Awards are set out in Part 2 of Chapter 5. Awards can be limited to a geographic region or a particular employer. But they may cover all employers who are engaged in a particular calling, along with their employees and any industrial organisations (that is, employer or employee organisations) that are concerned with that calling. Table 8 shows that there are 330 Awards currently in force in Queensland. Table 6 shows that during the year there were only seven Awards made, including four new Awards. As indicated above, there has been an ongoing program of Award Review under way in recent years. With the first round of review drawing to a close, the next round is beginning. Brief detail can be found above at p 9.

Certified Agreements

Certified Agreements are regulated by Chapter 6 Part 1 of the Act. A CA will usually cover one employer and, either all of its employees, or a particular category of its employees. It can be negotiated between an employer and a group of employees or between an employer and one or more employee organisations (unions) representing the employees. Such agreements can also be made to cover 'multi-employers', for example associated companies or companies engaged in a joint venture. A CA may stand alone, replacing a relevant Award, or it may operate in conjunction with an Award. The affected employees must have access to the agreement before they approve it, and they must have its terms and its effect on their work and conditions explained to them. A majority of workers must approve it and the Commission must also be satisfied that it passes the "no-disadvantage test". That is, it must not place the affected employees under terms and conditions of employment that are less beneficial, on balance, than terms and conditions in an Award that is relevant to the calling (a "designated Award"). During the year there have been two applications to the Commission to determine a designated Award.

If the parties have difficulty in negotiating the terms and conditions of the agreement, they may apply to the Commission for assistance with conciliation. As Table 6 shows, there has been a marked increase in such applications for assistance during the year. If conciliation cannot resolve the impasse, the Commission has the power to arbitrate, as it would do for an industrial dispute.

During the year there were 518 applications to approve a Certified Agreement. Table 7 shows that, of these, 189 were new Agreements. The number of CAs currently in force is indicated in Table 8.

Queensland Workplace Agreements

QWAs are governed by Chapter 6 Part 2. They can be negotiated collectively by one employer with a group of employees, but they are individual agreements. That is, ultimately each QWA governs the relationship between an employer and an individual employee. Referring to Table 7, the number of QWAs approved indicates the number of individual employees who

agreed to QWAs with their employers during the year. To have effect, a QWA must be filed. It must then be approved by the Commission. Unless there is a public interest reason for not approving it, or it does not pass the 'no disadvantage' test as outlined in s 209 (determined by comparing it with a designated Award), the QWA will usually be approved. A copy of the approved agreement must be given by the employer to the employee.

Table 7 Agreements filed 2001-02 and 2002-03

Agreements & notifications filed	2001-02	2002-03
Certified agreements	688	518
Notice: initiation of bargaining period: s143(2)	1	2
Notice: authorisn engage in industrial action: s177	225	339
Queensland Workplace Agreements	171	88

Table 8 Industrial Instruments in force 30 June 2003

Type of Instrument	Number
Awards	330
Industrial agreements	798
Certified agreements	3570
Traineeship agreements	169
Superannuation industrial agreements	136
Superannuation awards	3
Superannuation certified agreements	1
TOTAL	**5007**

Industrial Agreements

Industrial Agreements (IAs) were made under the *Industrial Relations Act 1990*. A large number of these remain in force by virtue of the transitional provisions of the current Act (s 713). Many of these are effectively redundant, but they cannot be terminated except by written agreement of the parties. There is a program under way to rationalise IAs. This is a necessary part of a major upgrade being undertaken on the Registry's file and case management systems. (Brief detail on the operational review of Registry appears below at p 22.)

To commence this program, parties to IAs will be notified of the intention to declare obsolete a number of Agreements unless objections are lodged. Objections will be heard by the Commission.

Obtaining copies of Instruments

Awards and CAs can be obtained through the Department of Industrial Relations database (IRIS), through Wageline, or from the relevant industrial organisations and workplaces. Awards and any variations to them are also published in the Queensland Government Industrial Gazette. In addition, current and superseded Awards are publicly available for viewing in the Commission's library. QWAs are confidential and are filed in the Industrial Registry. A QWA is only available to the employer and employee who are party to the agreement.

Unfair dismissals

Table 6 shows that over 40% of matters filed in the Registry during the year were applications for reinstatement or "unfair dismissals". While the number is down slightly since the previous year, the percentage of applications is slightly higher. Applications for reinstatement are allocated to Commission Members by the Vice President. (Each Member sets aside certain weeks of the year, during which that Member is available for reinstatement matters).

While there is a common belief that people come to the Commission seeking compensation for what they see as unfair dismissal or dismissal for an invalid reason, in fact, the primary remedy which the Commission can award under the Act is reinstatement to an applicant's former job, or alternatively re-employment in another job with the same employer. This is indicated in s 78 of the Act. It is only if the Commission determines, because of the circumstances, that reinstatement or re-employment is impracticable, that compensation *may* be awarded instead. The Commission will decide the amount of any compensation based on the applicant's wages before dismissal, the circumstances surrounding the dismissal, and any amount that has already been paid to the applicant

by the former employer. The powers of the Commission in this regard are outlined in s 79 of the Act.

The path to a remedy for dismissed employees begins by filing an *Application for Reinstatement*. All such applications are dealt with first by conciliation conferences. These are proceedings where a member of the Commission assists the parties – that is, the former employee and employer – to negotiate an agreement. This allows each party to tell her or his side of the story. And at the same time, the Commissioner can inform the parties of their rights and obligations under the legislation and under any award or agreement that applies to their employment relationship. No record is kept of these conferences, except for the outcome.

In many cases, an agreement can be reached, disputed claims are resolved, or the matter is not pursued further. This is reflected in the figures in Tables 6 and 9. Of the many applications filed, a limited number of those proceed to formal hearings. Decisions on reinstatement applications made up one third of the 234 decisions released during the year.

If the parties cannot reach agreement in the conference, the Commissioner doing the conciliation will issue a certificate to that effect, and will also inform the parties of the merits of the case and the possible consequences of continuing. If the applicant is a person who is excluded from the unfair dismissal provisions in s 73(1), the Commissioner must state that in the certificate. (Reasons for which an applicant may be excluded include: earning above the amount stipulated in the Regulations; being a short-term casual employee; or having been dismissed during a legitimate probation period. Most excluded applicants are rejected by the Registrar in the first instance.) The Commissioner may also recommend to the parties that the matter be discontinued if it appears the claim has no basis.

The applicant must then decide whether to pursue the matter to a hearing. This is a more formal procedure where the Commission is constituted as a court, presided over by a different member of the Commission. Parties may be represented by advocates (employees who are union members and employers who are members of employer organisations will usually be represented by the union/organisation), or in some circumstances by lawyers.

Table 9 shows general outcomes of reinstatement applications during the year.

Table 9. Reinstatement Applications 2002-03 – Breakdown of outcomes

Total No. of Applications	**1671**
Rejected by Registrar	27
No jurisdiction found by Commission	4
Application refused following hearing	5*
Application dismissed following hearing	26
Application struck out at hearing	1
Application Granted following hearing	31
Application withdrawn	797**
Lapsed	259**
Inactive	445
Completed	11**
Still in progress	65

Contracts

Under s 276 of the Act, the Commission has the power to amend or declare void a contract of service (such as an employment contract) or a contract for services (like that of an independent contractor), if the evidence shows the contract was unfair when made, or it has become unfair. This could happen because the original contract has been amended or because of the way it has operated. In light of the increasing use of fixed term or temporary contracts of employment, and independent contracting arrangements, this is an important avenue for workers and contractors to seek a remedy, if they find themselves tied to an unfair contract.

* Including 1 time limit expired; extension of time refused.

** Including those with negotiated settlements.

A contract may be deemed unfair if it is harsh, unjust or unconscionable, if it is against the public interest, or if it provides remuneration that is less than the person would have received under a relevant industrial instrument such as an Award or Certified Agreement. A contract will also be found to be unfair if it seems to have been designed to avoid or circumvent the provisions of a relevant industrial instrument.

Table 6 shows that there has been a slight increase in the number of applications to amend or void a contract during the year, although it is still considerably lower than that of 2 years ago when there were 47. As with the applications for reinstatement, there is a level of remuneration at which the provision ceases to be available. That is, a person cannot file an application under s 276 if he or she earned above the prescribed amount (set out in s 4 of the *Industrial Relations Regulation 2000*). During the year, the stipulated cut-off was $75,200, until 31 January 2003, when it increased to $81,500. Applications filed by persons who are excluded may be rejected by the Industrial Registrar.

Disputes and the Conferencing role

For disputes notified to the Commission – whether it concerns the terms of a certified agreement being negotiated between a union representing workers and their employer, or a grievance between an individual worker and employer – the first step in resolving the matter is always a conciliation conference. Because of the emphasis placed on conciliated and negotiated outcomes in disputes, a large proportion of the Commission's work is conducted at this conference stage. For that reason also, the parties to an application for reinstatement or for payment of unpaid wages will be directed to attend a conference with a member of the Commission. And where an entity alleging prohibited conduct (in relation to freedom of association under Chapter 4) has applied for a remedy, the Commission must direct the parties involved to a conciliation conference before a hearing. An idea of the volume of conference work in the Commission can be gauged from the number of applications and notifications filed, as indicated in Table 6. The figures show that there has been an 8% increase in the number of dispute notifications filed. These made up approximately 13% of matters filed during the year.

Unless withdrawn before the first conference, there will be at least one conciliation conference for each dispute notification filed, one for each reinstatement application filed, one for each unpaid wages application filed. Certified agreement negotiations may require mediation or conciliation conferences in order to avoid a dispute. Some complex disputes require lengthy and intensive conciliation in order to reach satisfactory outcomes. If a dispute has the potential to have a serious impact, the Commission has the power to intervene in the public interest under s 230 of the Act, even without the dispute being notified. The Commission must then take steps to settle the matter by conciliation or if necessary by arbitration. Section 230 has not been used in this way since the Act was introduced in 1999.

In many cases, a settlement can be agreed upon during the conference, or the parties may be able to resolve their conflict following conciliation. If not, the Commission may order the matter to be arbitrated in a hearing. Parties to an industrial dispute that cannot be resolved by negotiation can also request that the Commission arbitrate the dispute under s 230. Table 6 shows that the number of arbitrations is low in comparison to the number of dispute notifications filed.

Parties who request assistance to negotiate a certified agreement, under s 148, may require several conferences to work through their differences satisfactorily. There was a marked increase in the number of these requests during the year: Table 6 shows that the number has almost doubled since the previous year.

Industrial action

Industrial action is protected if engaged in according to the terms of s 174 of the Act. Under s 176, industrial action can only be taken if it is authorised by the industrial

organisation's management committee, is permitted under the organisation's rules, and if the Registrar is notified of the authorisation. During the year a significantly higher number of authorisations to take industrial action were notified to the Registrar, than in the previous year.

If it appears to the Commission that industrial action may be avoided, or a dispute settled by ascertaining the relevant employees' attitudes to the issues, the Commission may order that a secret ballot be conducted of the employees. In that event, the action is not protected industrial action unless and until the ballot is conducted and a majority vote in favour of it. During the year there have been no instances where the Commission has order a secret ballot for this purpose. By contrast, in the previous year there were six applications by employers for a secret ballot to be ordered. However this difference is not as striking as it appears, since those six applications related to threatened industrial action by one employee organisation covering employees in several regional newspapers. The applicants were the proprietors/employers.

Cases stated or referred

Under s 282 of the Act, the Commission may state a written case to the Court for an opinion or for determination of a legal question arising in a matter before it. During the year there was 1 case stated to the Court by the Commission. This was a question of jurisdiction arising in a dispute which was being conciliated.

Where a matter before the Commission is of substantial industrial importance, s 281 allows the Member hearing the matter to refer it to a Full Bench, with approval of the Vice President or the President. In certain circumstances, a party to a case may apply to have the matter referred. There was one referral under this provision during the year. An application for a new enterprise award was approved in principle when heard by the Commission. However, two matters, concerning wage increases and operative date, were referred to the Full Bench with the Vice President's approval. A summary of the Full Bench decision can be found with decision summaries at the end of this report.

Jurisdiction under Training and Employment Act

The Commission has jurisdiction under Chapter 8 Part 2 of the *Training and Employment Act 2000* to hear and determine appeals from decisions of the Training Recognition Council. These include decisions about registration or cancellation of training contracts, cancellation of completion certificates or qualifications, decisions to stand down an apprentice or trainee, or declaration of a prohibited employer. In addition, a person who was a party to a training contract which has been cancelled by agreement may apply to the Commission, under s 62, for the contract to be reinstated if the agreement to cancel was obtained by coercion.

The Commission may order the employer or the apprentice/trainee to resume training. It may also make orders about continuity of training and may order the employer to compensate the apprentice/trainee, or the apprentice/trainee to repay any amount paid on cancellation of the contract. If resumption of training would be inappropriate, the Commission may order cancellation of the training contract and, if circumstances warrant it, may order the employer to pay compensation.

During the year, there have been two apprentice/trainee appeals, one application for an extension of time to appeal, and one application to reinstate a training contract under s 62.

The Full Bench of the Commission

Under s 256(2) of the Act, the Full Bench is composed of three Commissioners. And since amendments to the Act which commenced on 3 February 2003, the Bench must always include a presidential member.

For certain matters, the Full Bench *must* include the President. These are:

- hearings on a "show cause" notice issued by the Registrar in regard to an

industrial dispute: this may occur when an organisation has failed to comply with an order of the Commission under s 233;

- ❖ applications to de-register industrial organisations under Chapter 12 Part 16; and
- ❖ appeals to the Full Bench.

Appeals to the Full Bench

With the leave of the Bench, the Full Bench hears appeals on grounds other than an error of law, or an excess, or want, of jurisdiction (for which an appeal lies to the Court): s 342. On these grounds, a person may appeal to the Full Bench from decisions of the Commission, from most decisions of the Registrar, and from decisions by Industrial Magistrates exercising jurisdiction under the Act. For the purpose of hearing appeals, the Full Bench must include the President: s 256(2). Leave to appeal is only given where the Full Bench considers that it is in the public interest that the appeal be heard. During the year, there have been four appeals to a Full Bench from decisions of the Commission.

Industrial organisations

The Full Bench hears and determines applications for de-registration of an industrial organisation. It can also make representation orders to settle demarcation disputes. If an organisation involved in an industrial dispute does not comply with orders of the Commission, a Full Bench may make further orders against the organisation, including penalties (up to 1000 penalty units) against the organisation. Refer to Table 10 for the number of industrial organisation matters dealt with during the year.

Declaring persons to be employees

Under s 275, a Full Bench may declare a class of persons to be employees rather than contractors; and the principal of their 'contracts' to be their employer. This situation is different from that of a single worker who may be an employee or may be an independent contractor. The power under s 275 relates to a whole class of employees. An application will relate to workers employed in a particular industry under contracts for services (that is, as "independent contractors"). One such application was continuing during the year having been lodged in 2001-02. That matter has had a number of interim proceedings and is yet to be finally determined.

Trading hours jurisdiction

The Full Bench determines applications by non-exempt shops to vary trading hours under Part 5 of the *Trading (Allowable Hours) Act 1990* (see s 21). By s 23 of that Act, the Commission may do so on its own initiative or on application by an organisation. During the year, there were two applications under the *T(AH) Act*.

An important tool for regulation of industrial matters and employment conditions by the Full Bench is the jurisdiction to issue *general rulings* and *statements of policy*.

General Rulings and Statements of Policy

Under s 287, the Full Bench may make General Rulings about industrial matters for employees bound by industrial instruments, and about general employment conditions. The State Wage Case, for employees covered by industrial instruments, has been commenced by an application for a general ruling in recent years. The State Wage Case will be covered briefly below.

Section 287 also requires that a general ruling be made each year about a Queensland Minimum Wage for *all* employees. This is discussed below.

Another application for a general ruling during the year related to entitlements of employees who are required to participate in jury service. The application was filed in May 2003 and the matter was still before the commission at the end of the year.

Under s 288 the Full Bench may also issue a Statement of Policy about an industrial matter when it considers such a statement is necessary or appropriate to deal with an issue. The Statement may be made without the need for a related matter to be before the Commission, but can be issued

following application. A Statement of Policy differs from a General Ruling in that, to be given effect, it requires an application by a party to an award to have the stated policy inserted into the award. By contrast, a general ruling applies generally from the stated date, and can cover all employees, or all industrial instruments, or an employment condition generally. It is designed to avoid multiple inquiries into the same matter.

During the year, the Commission was hearing two applications, filed by the QCU and the AWU, for a Statement of Policy on termination, change and redundancy (TCR) entitlements. The applications were filed during the previous year. They sought an improvement on the standard previously established by a Full Bench in 1987. The Statement of Policy will be inserted into nominated awards, subject to separate applications. This has been a lengthy matter and was still in progress at the end of the year.

General Rulings and Statements of Policy are available on the Commission's website http://www.qirc.qld.gov.au/rulings/index.htm

State Wage Case

During the year, a Full Bench dealt with applications to flow-on the 2002 federal Safety Net wage increase: the State Wage Case. Separate applications for a General Ruling were lodged by the Australian Workers' Union and the Queensland Council of Unions for a Statement of Policy and General Ruling. A statement of intent was issued by the Full Bench and gazetted on 2 August 2002. A Statement of Principles and General Ruling were gazetted on 16 August 2002. The General Ruling provided for an increase in all award rates, on the basis of $18 per week for full-time adult employees. The increase commenced from 1 September 2002.

Similar applications to flow on the 2003 federal Safety Net adjustment were before the Commission at the close of the year. Those applications were filed in May 2003 and also sought an order to flow on the arbitrated wage adjustment ($17 per week) to the Queensland Minimum Wage, that is, to apply to non-award as well as award employees. The Cane Harvesters Union of Employers (QMCHA) is seeking an exemption from any increase. A decision and ruling were expected on those applications early in the new financial year.

Queensland Minimum Wage case

The first application for a general ruling on a minimum wage was filed by the Minister for Industrial Relations in July 2002. The matter was heard and determined by a Full Bench including the President and the Vice President. A Declaration of Intent was issued by the Bench in December 2002 and a General Ruling was declared shortly afterwards. Following further hearings and submissions, an order was released and gazetted with a declaration of general ruling in March 2003.

The application sought a minimum wage of $431.40 per week for non-award employees. That was the existing minimum wage for workers employed in sectors regulated by awards. The proposal to extend the minimum wage to award-free employees had overwhelming support. The Full Bench observed that the existing minimum wage had its basis "in the need to protect and enhance the dignity of the poorest and most vulnerable workers in the economy. Extension of the minimum wage to the award free sector will further contribute to attainment of that goal." The Bench declared a general ruling to that effect, to apply to the award-free sector. The ruling set down an effective date of 1 April 2003. There were exceptions and other issues considered in this decision. The case is outlined in more detail in the Full Bench Case Summaries below (see p 38 ff).

The matter of junior rates of pay for the award-free sector was dealt with by a separate decision following further submissions. That decision was delivered in March 2003. It awarded a scale of increase ranging from 55% for employees aged 17 years and under, to 85% for those in 3rd year of experience and 100% for those aged 20 years and over.

The Queensland Chamber of Commerce and Industry Organisation of Employers (QCCI) applied for a deferral of the General

Ruling about a Queensland Minimum Wage, on behalf of Queensland Fruit and Vegetable Growers. The deferral was sought for certain employers in drought declared areas and properties for a period up to 12 months after removal of the drought declared classification. The Full Bench rejected the application. The reasons for that decision are outlined in more detail in the Full Bench Case summaries at the end of this report.

Costs

The Commission has a discretion to order costs against a party to an application. However the discretion may only be exercised if the Commission is satisfied the 'offending' party's application was vexatious or without reasonable cause, or if a party to a reinstatement application, by some unreasonable act or omission during the course of the matter, caused another party to incur additional costs. While there have been no pure 'applications for costs' filed during the year, there have been matters where an application for costs was made during the course of proceedings by a party because of alleged unreasonable-ness by the other party, or where submissions on costs were made and heard after a matter was ruled upon. Table 6 indicates how many of these costs matters were dealt with.

Educational activities

Deputy President Swan lectured to students studying Industrial Law at the University of Queensland during the year.

Commissioner Brown hosted a group of special needs students from Kenmore High School who would be entering the workforce in 2003. Commissioner Brown entertained the students with a talk on the Commission's work and also gave them information and advice about their rights and obligations as future employees.

Commissioner Brown also lectured to Australian Catholic University Business Law Students about the Commission and industrial relations in Queensland.

Commissioner Thompson travelled to Bremer High School to give a talk to year 11 students who were studying employment and industrial relations.

Other professional activities included Members who took annual leave to attend conferences as follows:

- Vice President Linnane, Deputy President Bloomfield, and Commissioners Edwards, Fisher, Bechly, Blades and Asbury attended the *Industrial Relations Society of Australia Convention* in March 2003.
- Commissioners Fisher and Asbury attended the *Australian Labour Law Conference* in October 2002.
- Deputy President Bloomfield and Commissioner Bechly attended the *Industrial Relations Society of Queensland Conference* in September 2002.
- Commissioner Bechly attended *HR Week* in August 2002.

In addition, twice during the year, the research officer hosted a group of business students from the Russo Institute. On each visit, an introductory talk on the work of the Commission and its role in the industrial relations system was given by the research officer, following which the students were invited to sit in on a hearing.

QUEENSLAND INDUSTRIAL REGISTRY

The Queensland Industrial Registry is the first point of contact for people making applications for a remedy to the Industrial Relations Commission or notifying a dispute that requires conciliation; and for persons lodging an appeal to the Industrial Court.

It acts as the Registry for the Commission and the Court and also provides important administrative support. It does not have any function in relation to the Industrial Magistrates Court, which operates in conjunction with the Magistrates Courts for the State. The Registry is headed by the Industrial Registrar.

The Industrial Registrar also deals with applications, and acts as a Tribunal for certain matters under the Act. The Registrar, Deputy Registrar, and staff of the Registry are officers of the Court and the Commission. Like other bodies in the industrial relations system, the Registry and Registrar are set up under, and derive their functions from Chapter 8 of the Act. The Registry and Registrar are specifically covered by Part 4 of that chapter.

The Registry also serves as Registry for the Australian Industrial Relations Commission in Queensland, under a fee for service arrangement.

Industrial Registrar's Powers

The Registrar may make certain preliminary decisions about applications lodged. For example, the Registrar may determine that a reinstatement application under s 74 should be rejected because the applicant is excluded by s 72 of the Act. Applicants excluded are those found to be:

- short-term casual employees as defined in s 72(8) (unless the reason is one of discrimination, pregnancy, parental leave, or adoption of a child: s 73(2)(i), (j), (k), or (m));
- employees still within the probationary period (unless the dismissal is claimed to be for an invalid reason, as stated in s 73(2));
- apprentices or trainees;
- employees engaged for a specific period or task or on a labour market program, unless the period, task or program has not yet ended; or
- employees, not covered by industrial instruments or tenured under the *Public Service Act*, who were earning more than the prescribed limit (set down by s 4 of the *Regulations*). The prescribed limit during the year was $75,200 until 31 January 2003 when it was increased to $81,500.

During the year, the Registrar has rejected 27 applications for reinstatement on these bases (see Table 9).

The Registrar's powers under the Act also include the power to decide applications for student work permits under s 695. These permits allow students undertaking tertiary studies to work in a particular calling for a set period, when their studies require it. Table 6 indicates a substantial increase in number of these applications in 2002-03.

The Registrar has important functions and powers with regard to industrial organisations (ie unions, or organisations, of employers or employees). These are outlined below (pp 21-22).

Applications filed and processed by Registry

During 2002-03, the number of applications and notifications filed decreased in comparison to the number filed in the previous year (see Table 6). There were more dispute notifications lodged in this year than in the previous year, more applications for payment of long service leave, and more applications for student work permits. There was also a large increase in applications to dismiss a matter. However, the number of applications for reinstatement fell once again. And there were significant decreases in applications for recovery of wages and severance pay, and appeals on apprenticeship and traineeship decisions (although it is notable that the 2001-02 apprentice/trainee appeals were artificially high because of one incident).

The Registry has set itself benchmarks for timeliness in initial processing of applications and notifications. The table below indicates how successful it has been in meeting those targets during the year to 30 June 2003. While falling slightly short on one criterion, overall the Registry has performed well during the year, exceeding two of the three published targets.

Criterion	Target	2001-02	2002-03
Notify parties to dispute conferences within 5 wrkg hrs	99%	100%	98%
Process applications within 8 wrkg hrs	95%	99%	98%
Initial processing of agreements within 3 working days	90%	93%	99%

Industrial Organisations Role

Register and rules

Under s 426 of the Act, the Registrar is responsible for maintaining the register of industrial organisations, along with copies of each organisation's rules. These are available for inspection on payment of the fee indicated in the *Industrial Relations (Tribunals) Rules*. Industrial organisations' rules must include rules about the election of office-bearers. The *Industrial Relations Regulations* provide 'Model Election Rules' which the organisations can adopt. If an organisation decides to adopt the model rules without alteration, the Registrar must register them as an amendment to the organisation's rules, under s 456. However, if an organisation has not adopted the model rules, and its own election rules do not comply with the requirements of the Act, s 467 allows the Registrar to amend the organisation's rules in line with the model election rules.

The Industrial Registrar may approve applications to amend an industrial organisation's rules under s 467, other than by amending its name or its eligibility rules (which must be approved by the Commission). If the Registrar considers an organisation's rules do not provide all the requirements under s 435, the Registrar may act on his or her own initiative to amend the rules to include the requirement. If the Industrial Court finds the rules do not comply with s 435, s 467 allows the Registrar to amend the rules to remove the offending provisions. Table 10 shows that the number of Registrar-approved amendments in this year is double the number in the previous year. All amendments during the year have been on application by the organisations.

Industrial organisations must also file in the Registry each year, copies of their registers of office-bearers (s 547). The Registrar may direct an organisation to give its register of members or officers to the Registry or to correct its register of members or officers (s 550). Failure to comply with the Registrar's direction can incur a penalty up to 40 penalty units. The Registrar has issued no directions under s 550 during the year. More information on office-bearers and organisations' registers is provided later in this report, under the section headed "Industrial Organisations".

Elections

Under s 482, the Registrar must arrange for the Electoral Commission to conduct an election of office-bearers for an industrial organisation, when its rules require one, and the organisation has filed the prescribed information in the Registry. Table 10 shows that the number of elections arranged during the year is approximately 30% less than the previous year. More information on elections appears later in this report under "Industrial Organisations".

The Registrar must decide applications to allow a secret ballot to be conducted other than by postal ballot. Under s 445, organisations which elect their officials by a direct voting system must include in their rules procedures for how ballots are to be conducted. These must be by secret postal ballot, or some other form of secret ballot. If the election is not to be a secret *postal* ballot, the organisation must apply to the Registrar for approval of some other form of secret ballot, under s 447. There have been no applications for an alternative form of secret ballot during the year.

The Registrar may also refer an application for an election inquiry to the Commission. Under s 500 a member of an industrial organisation who believes there has been

some irregularity in its election of office-bearers, can lodge an application for an inquiry to be conducted. The Registrar can refer these applications to the Commission under s 499. The Commission may then authorise the Registrar to carry out certain inspections and investigations for such an inquiry. There have been no election inquiries held during the year.

Financial accountability

Organisations must also file copies of their audit reports and financial accounts, along with records of certain loans, grants or donations (s 570, 578). The Registrar may direct an officer of an organisation to keep the accounts in a certain way, to make entries of a stated type in the accounts, or to disclose to the Registrar certain information about the organisation's funds and accounts. An organisation that does not file any of these these registers or records can be penalised up to 40 penalty units.

The Registrar also has an investigative role in relation to organisations' financial records when irregularities or other reasonable grounds for investigation are apparent (s 571). If a contravention of the Act or an organisation's rules is found, the Registrar can notify the organisation to take certain action to remedy it. If this notice is not complied with, the Registrar can apply to the Court for an order (see ss 573 and 574). The investigative power may include engaging a 'Registrar's auditor' to examine an organisation's accounting records over a particular period if it appears that proper records are not being kept, or an offence may have been committed, or an organisation's property may have been misappropriated (s 575).

There has been no action under this Division of the Act during the year.

Exemptions

Industrial organisations may apply to the Registrar for exemptions from holding elections, or from the requirement to file audit reports and financial accounts, or from certain other obligations under Chapter 12. Such exemptions may be granted, when appropriate, to organisations with counterpart federal bodies, and for organisations which are corporations. These exemptions are outlined in more detail below under Industrial Organisations (see p 26 ff).

Operational Review of the Industrial Registry

During the second half of 2002, a review was conducted of the operations and structure of the Registry. The review was carried out by a consultant from the firm, BDO Kendalls, and the subsequent report contained a number of recommendations. These included acquisition of a new case management system combined with a single file system; moving towards electronic payment of fees; and electronic lodgement of documents. These steps will streamline the work of the Registry, ensure quality control is maintained, and help Registry to meet clients' expectations in terms of services. The changes are also intended to create more career path options for Registry staff. The restructuring of operations is a major undertaking. A project manager was appointed from within the Department of Industrial Relations to work on the task of implementing the recommendations. It is expected that the project will be completed in the second half of 2003.

Freedom of Information and Information Privacy

During the year there were two applications for access to documents under the *Freedom of Information Act 1992*. However, as these were submitted late in June 2003, they were still being processed at the close of the year.

The *Statement of Affairs 2003* under the *Freedom of Information Act* is available on the Commission's website www.qirc.qld.gov.au/statement/index.htm

There have been no complaints or applications relating to breaches of information privacy during the year.

AMENDMENTS TO LEGISLATION

The legislation that chiefly relates to the work of the Court, the Commission and the Registrar is the *Industrial Relations Act 1999*. Associated with the Act are the *Industrial Relations Regulation 2001* and *Industrial Relations (Tribunals) Rules 2000*. As indicated elsewhere in this report, the Commission's jurisdiction extends to certain matters under the *Training and Employment Act 2000* and the *Trading (Allowable Hours) Act 1990*. In addition, the Court has appellate jurisdiction under the *WorkCover Queensland Act 1996* and the *Workplace Health and Safety Act 1995*. The following outlines any important legislative amendments made during the year which affect the work of the Tribunals.

Industrial Relations Amendment Act 2002

The *Industrial Relations Amendment Act 2002* was assented to on 13 December 2002; the substantive provisions commenced on 3 February 2003. The Act introduced significant changes to the structure of the Commission, giving it a more clearly delineated hierarchy, in line with similar bodies, such as the Australian and New South Wales Industrial Relations Commissions. One purpose of the changes was to allow the Commission to meet community expectations more effectively, with regard to conciliating disputes and conducting fair arbitrations. In his second reading speech, the Minister indicated that the amendments aim to ensure the Commission retains power to exercise its authority with regard to industrial disputes, while giving it the structure and flexibility needed to resolve disputes quickly and effectively as they emerge.

With the new structure, the status and role of the President, as head of the Court and Commission, remain unchanged. However the role of the Vice President was extended, and two positions of Deputy President were instituted. These four are the presidential members of the Commission. The position of Commissioner Administrator was abolished.

The Vice President now takes on much of the administrative function of the Commission, including assigning files to members, and determining which members are to constitute the Full Bench for any matter. Giving this role to the Vice President is intended to allow for more authority in designation of matters, and in decisions about conduct of business. The Deputy Presidents provide essential support to this function, in terms of deciding who is to constitute the Commission for matters, including Full Bench matters. By virtue of s 264(3), the Vice President is now given all powers necessary to undertake the increased range of responsibilities, and may delegate powers to the Deputy Presidents to facilitate their support: s 264(3) and (4). The Act states that Commissioners must comply with directions given by the Vice President or Deputy Presidents performing these administrative functions: s 264(5).

The Act now provides that the Vice President must establish panels, for allocating matters concerning particular industries to the appropriate Members. This provision enacts what had already been the practice of the Commission. It ensures that, where possible, matters are dealt with by Members with experience and expertise in the relevant industries. The panel arrangement enables the Commission to deal with disputes, in both the public and private sectors, in the most efficient and effective way possible. The previous multi-panel system has been replaced by two panels, with industries divided between them. Each panel is headed by a Deputy President, who allocates matters within the panel.

The Amendment Act also enhanced the status of the Full Bench, by introducing a requirement that the composition of the Bench must include a presidential member. In this way, the standing, authority and expertise of the Full Bench are reinforced. For the most significant matters, such as the State Wage Case and major test cases, all three members of the Bench are likely to be presidential members. (Information about the Full Bench appears above, p 16)

Amendments to Regulations and Tribunal Rules

Industrial Relations Amendment Regulation (No 1) 2003

The purpose of this Amendment Regulation was to increase the level of salary above which applicants for certain remedies are excluded from a remedy in the Commission. That is, under s 72(1)(e) of the Act, workers who are not covered by an industrial instrument and who are not public service employees are excluded from the unfair dismissal provisions if they earn above the prescribed limit (set down in s 4 of the Regulations). Workers under a contract of service or a contract for services are excluded from the unfair contract jurisdiction in s 276 on a similar basis. The prescribed wage limit was raised by this Amendment Regulation from $75,200 to $81,500 per annum. The amendment took effect from 31 January 2003.

Industrial Relations (Tribunals) Amendment Rule (No 1) 2002

This Amendment Rule effected an increase to the fees charged by the Registry for filing, searching and photocopying documents. The fees are set out in Schedule 1 of the Rules. The *Financial Management Practice Manual* provides for annual increases in Regulatory fees, in line with rises in the Consumer Price Index, assessed on the basis of the Brisbane (All Groups) CPI movement for the March quarter. The increase took effect from 1 July 2002. (A similar increase for 2003-04 was gazetted on 27 June 2003 to take effect for the year commencing 1 July 2003.)

Workplace Health and Safety and other Acts Amendment Act 2003

From 1 June 2003, this Amendment Act introduced a new "industrial matter" which may be brought before the Commission, and also expanded the circumstances in which a finding of unfair dismissal can be made. Details are as follows.

Workplace health and safety representatives

Under s 70(1) of the *Workplace Health and Safety Act*, workers at a workplace may negotiate with their employer about workplace health and safety representatives for the workplace. For example, issues for negotiation might include: the number of representatives; the extent to which the employer will allow election of representatives; when they may conduct inspections. From 1 June 2003, this Amendment Act provides that the Commission may hear and decide an application arising from failure of these negotiations, just as it may hear and decide other “industrial matters”. The new part of s 70 of the *WH&S Act* states:

(4) The Queensland Industrial Relations Commission may hear and decide, as an industrial matter, an application by a person aggrieved by the failure of a negotiation under subsection (1). [ie s70(1)]

(5) Subsection (4) must be read with the *Industrial Relations Act 1999*.

Electrical Safety Act

The Amendment Act also also amends the *Electrical Safety Act 2002*, by inserting a new s 196A ‘Discrimination or victimisation’. This is relevant to the work of the Commission because it:

- makes it an offence to dismiss a worker, or act to the detriment of a worker’s employment because the worker has complained about exposure to electrical risk; and
- if the employer dismisses a worker for such a reason it is “unfair dismissal” for the purposes of the *IR Act*, so the worker has access to the remedies available under Chapter 3 Part 2.

Workplace health and safety undertaking

The Amendment Act also introduced provisions for an application to the Industrial Court by the chief executive WH&S Div if the chief executive believes a person has breached an enforceable "workplace health and safety undertaking".

A workplace health and safety undertaking is a new undertaking that a person may enter into, instead of facing prosecution for

breach of the *WH&S Act*. If an "identified person" is facing possible prosecution for a workplace health and safety breach (under s 24 or s 167 of the *WH&S Act*) the person can enter a written undertaking with the chief executive not to do the breach again.

The undertaking is enforceable, and breach of it exposes the person to a fine up to a maximum of 1000 penalty units under s 42G. (Note also that, under s 181B of the *Penalties and Sentences Act*, the maximum fine for a corporation, may be multiplied by five.)

If the chief executive believes a person has contravened the undertaking, the chief executive can apply to the Industrial Court under s 42I for an order—

- to require the person to comply with the undertaking;
- to require the person to pay an amount equivalent to any financial benefit the person realised by breaching the undertaking;
- to require the person to enter into a security bond to the State;
- any other order the Court considers appropriate.

A person can be prosecuted for breach of the undertaking in the Industrial Magistrates Court *and* be subject to one of these orders by the Industrial Court. Both the prosecution and the application for an Industrial Court order can be conducted on the basis of the same facts and circumstances (see s 42I(4) and (5)).

Electrical Safety Act 2002

There are similar provisions for enforceable undertakings under the *Electrical Safety Act 2002*, which was passed in September 2002 and commenced on 1 October 2002. Under Part 3 of the *Electrical Safety Act*, a person alleged to have contravened the obligation offence provisions in that Act, can enter into a written undertaking with the chief executive. Again, contravention of the undertaking exposes the person to prosecution in the Industrial Magistrates Court and a maximum fine of 1000 penalty units: s 52. And the chief executive can also apply to the Industrial Court for an order in terms similar to those outlined above for the *Workplace Health and Safety Act*: s 54 *Electrical Safety Act*. A prosecution for breach of the undertaking and an application for an Industrial Court order can both be pursued and may be based on the same facts and circumstances.

Workers' Compensation and Rehabilitation Act 2003

The *Workers' Compensation and Rehabilitation Act 2003* was passed in May 2003. It replaces the *WorkCover Queensland Act*. Its relevance for the industrial tribunals is, firstly, that appeals which previously came to the Industrial Court under the *WorkCover Act* are now made under this new Act (see above, p 3, for information about the Court's appeal jurisdiction). It is also important because it made certain amendments to the *Industrial Relations Act*, as follows.

The *WC & R Act* incorporates into the *IR Act* changes necessary to ensure that employers can be made to comply with the Full Bench's general rulings on the Queensland minimum wage for non-award workers. The general ruling establishes an entitlement to the minimum wage for all employees, and these amendments ensure that the entitlement can be enforced under existing processes in the *IR Act*. Particular amendments were given a retrospective operation in order to provide for the 2002 minimum wage general ruling (whose operative date was set at the first pay period after 1 April 2003). For this reason, several of the amendments were deemed to commence on 1 April 2003. These were:

- A new provision, s 8A, was inserted. This states that an employee is entitled to a wage that is not less than the minimum wage declared by a General Ruling under s 287 (see above p 17-18 for information about General Rulings by the Full Bench of the Commission).
- Other amendments were made to:
  - s 275 (Power to declare persons to be employees or employers) where it was made clear that, when exercising its discretion to declare a class of persons to be employees, one of the things the Commission can take into account under

s 275(3), is whether a contract of service or contract for services was designed to exclude operation of the minimum wage general ruling;
- s 276 (Power to amend or void contracts) where the minimum wage ruling was included as one of the things, in s 276(2), which the Commission may consider when deciding whether to amend, or declare void, a contract of service or contract for services;
- s 376 (Definitions for Pt 2 [Wages and occupational superannuation]) where the definition of "fixed rate" was amended to include the rate applicable to employees entitled to the Queensland minimum wage;
- Schedule 5, definition of "reduced wages" was enhanced to take better account of the minimum wage general ruling and the new s 8A;

❖ Other necessary amendments were made to include reference to the new s 8A in: s 293 (Magistrates' jurisdiction is exclusive); and the Schedule 5 definition of "claim for wages".

Other amendments commenced on the date of assent, ie 23 May 2003. These were amendments to:

❖ s 666 (Non-payment of wages) to incorporate reference to the new s 8A; and

❖ s 701 (False pretences relating to employment) to incorporate reference to the minimum wage general ruling.

⬩◈⬩◈⬩◈⬩◇⬩◈⬩

INDUSTRIAL ORGANISATIONS

Industrial organisations – that is, unions – are either employer organisations or employee organisations. The requirements for registration, rules on membership, structure and control, election of office-bearers, and financial accountability of industrial organisations are governed by Chapter 12 of the Act.

Membership of Industrial Organisations

Eligibility for and admission to membership of industrial organisations are governed by Part 10 of Chapter 12. At 30 June 2003, there were 45 employee organisations registered in Queensland; and at 31 December 2002 total membership was 378,161 (compared to 372,660 members at December 2001). The organisations are listed according to membership numbers in Table 11. Equivalent figures for employer organisations are: 37 organisations registered at 30 June 2003, with a total membership of 43,344 at 31 December 2002 (compared to 40,244 members in December 2001). Table 12 lists the organisations according to membership.

The Court decides questions or resolves disputes about membership of an industrial organisation (see ss 535, 536). Under s 535, a person or organisation may ask the Court to decide a question or dispute about: a person's eligibility for membership; when a person became a member; whether a membership subscription, fine or levy, or some other requirement of the rules is reasonable; and the qualifications for membership of a membership applicant. There have been no applications to the Court under this provision during the year.

Applications for registration of an organisation, or amalgamation of two or more organisations, may only be made to the Commission. There were no new registration applications filed during 2002-03. Amalgamations (and withdrawals from amalgamations) are approved under Chapt 12 Part 15. Under s 618, the Commission may approve an amalgamation only if the process has complied with the *Industrial Relations Regulations*, and the rules of the

amalgamated organisation will comply with the Act's requirements about rules (which are in Parts 3 and 4 of the Chapter). An amalgamation between Australian Liquor Hospitality and Miscellaneous Workers' Union and Queensland Blind Workers' Union of Employees was approved. This followed an application during the previous year, pursuant to which these two organisations were declared to have a community of interest.

Part 16 of the Chapter provides for an organisation to be de-registered, on certain grounds, by a Full Bench of the Commission. For this purpose, the Bench must include the President (see s 256(2)). The grounds for de-registration are set out in s 638; and s 639 states who may apply. In certain circumstances, the Full Bench can act of its own initiative to bring proceedings to de-register an organisation. The Registrar can also apply to have an organisation de-registered on one of the grounds in s 638, or on the ground that the organisation is defunct. No applications for de-registration have been made during the year.

Under s 426 of the Act, the Registrar must keep a register of industrial organisations, along with copies of their rules. Each organisation must also file a copy of its register of officers every year (s 547). The rules and the register of officers are open for inspection on payment of the fee prescribed (see ss 426 and 549). Any industrial organisation with a counterpart federal organisation may apply to the Registrar, under s 582, for exemption from the requirement to keep registers of officers or members. There was one such application granted during the year.

During 2002-03, there were 39 applications in respect of industrial organisations' rules, registrations, name changes, and exemptions from requirements of the Act lodged with the Registrar. Twenty-five of these were applications for rule changes.

Rules

Industrial organisations must have rules on certain matters which are outlined in Parts 3 and 4 of Chapter 12. Part 3 covers general content of the rules, including restrictions on content (see ss 435 and 436). Part 4 sets out requirements for rules governing election of officers in the organisation (this Part does not apply to organisations that are corporations). Elections are discussed briefly below. A copy of the rules of each organisation must be lodged along with registration details in the Registry (s 426). These are open for inspection on payment of the fee indicated in the Schedule of the Tribunal Rules.

Under Part 5 of Chapter 12, a person who is a member of an organisation can make an application to the Industrial Court, if he or she believes the organisation's rules do not comply with restrictions set down in s 435. A member can also apply to the Court for a direction that an office-bearer, or some person who is obliged to do certain things under the organisation's rules, perform those things, or observe the organisation's rules. If a person does not comply with the Court's direction to perform or observe the rules, he or she can be penalised up to 40 penalty units. If necessary, financial assistance can be made available for applications under Part 5. This is an important avenue for members to ensure that their organisations are accountable. Table 1 shows one of these applications was dealt with by the Court last year and none this year.

The rules of an organisation can be amended, on approval by the Commission or the Registrar. If the Court has declared, following an application under s 459, that a rule does not comply with s 435, the organisation must amend it within 3 months – if this is not done, the Commission or the Registrar may amend the rule to enforce compliance (s 468). The Commission must determine an application to amend the eligibility rules (s 474) and the list of callings represented by an organisation (s 427). All other applications to amend rules are determined by the Registrar under s 467. Amendments to rules may only be approved, if they are proposed in accordance with the organisation's rules and will not contravene the restrictions set down in s 435 (see ss 474, 478). There have been 25 applications filed during the year for amendments to rules; three of those were for changes to eligibility rules. This is a significant increase on the

previous year (see Table 10). There have also been three applications filed for approval of new rules. These were all non-eligibility rules and could be approved by the Registrar.

If an organisation wishes to change its name, this may be done only if the amendment is proposed according to the organisation's rules and approved under the Act. Section 472 enables the Registrar to approve a simple change of the word "union" to the word "organisation". However more substantial name changes must be approved by the Commission (s 473). The Australian Federation of Civil Engineering Contractors, Queensland Branch, Industrial Union of Employers was granted approval to change its name to: Queensland Major Contractors' Association, Industrial Organisation of Employers. This was the only name change during the year.

Table 10 shows the number of applications to amend organisations' names and rules.

Elections

The Act requires all industrial organisations to make rules governing elections to office (see Chapter 12 Part 4). Section 440 also states a general requirement of transparency: that is, rules should ensure that election processes are transparent and irregularities are avoided. If a member of an organisation believes there has been irregularity in the conduct of its election, the member can apply to the Industrial Registrar under Chapter 12 Part 8 to conduct an election inquiry. If the Registrar is satisfied there are reasonable grounds and the circumstances justify an inquiry, the application may be referred to the Commission. There have been no election inquiry matters referred by the Registrar during the year.

The rules must provide for elections to be either by a direct voting system (Div 3 of Part 4) or by a collegiate electoral system (Div 4 of Part 4). A direct vote must be conducted by a secret postal ballot, or by some alternative form of secret ballot approved by the Registrar. Schedule 3 of the *Industrial Relations Regulation 2000* sets out 'Model Election Rules' which organisations may resolve to adopt, in whole or in part.

Industrial organisations' elections are conducted by the Queensland Electoral Commission in accordance with each organisation's rules (Chapter 12, Part 7). This is arranged by the Registrar when the organisation notifies the Registry that it is seeking to hold an election. The Registrar must be satisfied that the election is required under the rules. The cost is borne by the State. An industrial organisation may seek an exemption from having the Electoral Commission conduct an election on its behalf (see Part 13 Div 3). No applications for such an exemption were filed during the year.

Table 10 lists industrial organisation matters filed in Registry. During the year, 31 requests to conduct elections for office-bearers were filed and dealt with by the Registrar, compared to 46 in 2001-02. Any industrial organisation with a counterpart federal organisation may apply to the Registrar for exemption from certain of the Act's requirements, including the stipulations about holding elections. Four organisations sought 'election exemptions' during the year, on the ground that their federal counterparts held elections under the federal *Workplace Relations Act*. One of those was still pending at the close of the year.

Financial Accountability

The Industrial Registrar is responsible for monitoring the financial accountability of industrial organisations. Chapter 12 Part 12 of the Act sets out accounting and audit obligations of organisations. Copies of audit reports and accounts must be filed in the Registry in accordance with s 570. Under Division 5 of Part 12, the Registrar must investigate any irregularity or accounting deficiency found by an organisation's auditor, and may engage another auditor to examine an organisation's accounting records. Other records to be filed include statements of any loans, grants or payments totalling more than $1000 to any one person during the financial year. These must be available for inspection to members of the organisation (ss 578 and 579). The Registrar has not

had to investigate any accounting irregularities during 2002-03.

Any industrial organisation with a counterpart federal organisation may apply to the Registrar for exemption from accounting and audit provisions, under s 586. If the application is approved, the organisation must file with the Registrar a certified copy of the documents filed under the federal *Workplace Relations Act*. (Similar provisions apply where an employer organisation is a corporation subject to other statutory requirements to file accounts and audit reports: see s 590). Two exemptions from the accounting and auditing requirements were granted on the basis of compliance with the federal *Workplace Relations Act* during 2002-03; a third application was received shortly before the close of the year and was awaiting consideration.

Table 10 Industrial organisation matters filed 2001-02 and 2002-03

Industrial Organisation matters		01/02	02/03
s 422(3)	New rules [Registry approval]	2	3
s 427	Amendment – list of callings	0	0
s 473	Amendment – Change of name	2	1
s 474	Part amendment – eligibility rules	2	3
s 329(j)	— Extension of time to object – eligibility rules amdt	0	1
s 478	Part amendment to rules	11	23
s 482	Request for conduct of election	46	31
s 594	Exemption from conduct of election	3	4
s 582	Exemption – members' register	0	1
s 447	Exemption – postal ballot	0	0
s 586	Exemption – branch financial return	0	3
s 618	Amalgamation	1	0
s 638	Review union registratn – application for de-registration	0	0
TOTAL		**67**	**70**

Cole Royal Commission

During the Royal Commission of Inquiry into the Building and Construction Industry (Cole Royal Commission), a large number of documents relating to unions of employers and unions of employees were subpoenaed by the Royal Commission. These included Rules, Financial Accounts and Registers of Officers at various times and covering a number of years. A considerable amount of Registry staff time and resources were expended in complying with the Royal Commission's requirements.

After the Royal Commission wound up its inquiry, further certifications regarding registration and officers of industrial organisations were forwarded by Registry, on request, to the Interim Building Task-force set up by the federal government.

Table 11 Industrial Organisations of Employees – Membership at 31 Dec 2002

Industrial Organisation	Members
The Australian Workers' Union of Employees, Queensland	53,874
Queensland Teachers Union of Employees	38,575
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.	35,174
The Queensland Public Sector Union of Employees	32,235
Queensland Nurses' Union of Employees.	28,877
Australian Liquor, Hospitality and Miscellaneous Workers Union, Qld Branch, Union of Employees.	24,733
Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Qld	17,864
Transport Workers' Union of Australia, Union of Employees (Queensland Branch)	16,202
The Electrical Trades Union of Employees of Australia, Queensland Branch	12,545
Queensland Services, Industrial Union of Employees	12,084
Queensland Independent Education Union of Employees	11,182
Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees	9,800
The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland	8,749
Queensland Police "Union of Employees"	8,223
Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch	7,496
Federated Ironworkers Association of Australia (Queensland Branch) Union of Employees	7,126
Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees	6,372
Australasian Meat Industry Union of Employees (Queensland Branch)	6,120
The National Union of Workers Industrial Union of Employees Queensland	5,927
Finance Sector Union of Australia, Queensland Branch, Industrial Union of Employees	5,904
Federated Engine Drivers' and Firemen's Association of Australasia Queensland Branch, Union of Employees	4,487
Queensland Colliery Employees Union of Employees	4,399
The Plumbers and Gasfitters Employees Union of Australia, Qld Branch, Union of Employees	3,092
The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees	2,447
United Firefighters' Union of Australia, Union of Employees, Queensland	2,050
Australian Federated Union of Locomotive Employees, Queensland Union of Employees	1,518
Australian Journalists' Association (Queensland District) "Union of Employees"	1,459
The Bacon Factories' Union of Employees, Queensland	1,317
Federated Clerks' Union of Australia, North Queensland Branch, Union of Employees	1,262
Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees	1,122
Australian Salaried Medical Officers Federation Industrial Organisation of Employees, Queensland	983
Property Sales Association of Queensland, Union of Employees	777
Actors, Entertainers and Announcers Equity Association, Queensland, Union of Employees	729
The University of Queensland Academic Staff Association (Union of Employees)	652
Queensland Association of Academic Staff in Colleges of Advanced Education (Union of Employees)	637
Australian Institute of Marine and Power Engineers' Union of Employees, Queensland District.	495
The Seamen's Union of Australasia, Queensland Branch, Union of Employees	436
James Cook University Staff Association (Union of Employees)	410
The Queensland Police Commissioned Officers Union of Employees	308
Musicians' Union of Australia (Brisbane Branch) Union of Employees	231
Griffith University Faculty Staff Association (Union of Employees)	195
Queensland Fire Service Senior Officers' Association, Union of Employees	75
Queensland Blind Workers Union of Employees	18
The Australian Stevedoring Supervisors Association (Queensland) Union of Employees	Figures not supplied
Merchant Service Guild of Australia, Queensland Branch, Union of Employees	Figures not supplied
Number Employee Organisations	**45**
Total Membership	**378,161**

Table 12. Industrial Organisations of Employers – Membership at 31 December 2002

Industrial Organisation	Members
Queensland Master Builders Association, Industrial Organisation of Employers	8,324
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers	7,966
Agforce Queensland Industrial Union of Employers	7,679
Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)	2,703
Motor Trades Association of Queensland Industrial Organisation of Employers	2,049
Australian Dental Association (Queensland Branch) Union of Employers	1,717
Retailers' Association of Queensland Limited, Union of Employers	1,576
Australian Industry Group, Industrial Organisation of Employers (Queensland)	1,485
National Electrical and Communications Association Queensland, Industrial Organisation of Employers	1,296
Children's Services Employers Association Queensland Union of Employers	970
Master Plumbers' Association of Queensland (Union of Employers)	754
Queensland Hotels Association, Union of Employers	704
The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers	650
Queensland Motel Employers Association, Industrial Organisation of Employers	611
The Baking Industry Association of Queensland – Union of Employers.	530
The Registered and Licensed Clubs Association of Queensland, Union of Employers	505
Nursery and Garden Industry Queensland Industrial Union of Employers	434
Hardware Association of Queensland, Union of Employers	404
National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers	387
Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers	380
The Queensland Road Transport Association Industrial Organisation of Employers	372
Queensland Real Estate Industrial Organisation of Employers	295
The Hairdressing Federation of Queensland – Union of Employers	278
Building Service Contractors' Association of Australia – Queensland Division, Industrial Organisation of Employers	229
Queensland Mechanical Cane Harvesters Association, Union of Employers	199
Queensland Private Childcare Centres Employers Organisation of Queensland Industrial Organisation of Employers	153
Furnishing Industry Association of Australia (Queensland) Limited Union of Employers	148
T.A.B. Agents' Association of Queensland Union of Employers	143
Consulting Surveyors Queensland Industrial Organisation of Employers	95
Association of Wall and Ceiling Industries Queensland – Union of Employers	86
Queensland Master Hairdressers' Industrial Union of Employers	79
The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited	51
Queensland Cane Growers' Association Union of Employers	26
Queensland Major Contractors Association, Industrial Organisation of Employers	20
Australian Sugar Milling Association, Queensland, Union of Employers	17
Queensland Country Press Association – Union of Employers	17
Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers	12
Number of Employer Organisations	**37**
Total Membership	**43,344**

Decisions of the Industrial Court of Queensland

Queensland Public Sector Union of Employees AND Department of Corrective Services (No C45 of 2002)
Department of Corrective Services AND Queensland Public Sector Union of Employees (No C46 of 2002)
Queensland Corrective Services Commission Employees' Award – State

Hall P; 31 July 2002; (2002) 170 QGIG 422

Industrial Relations Act 1999 s 341(1) — appeal against decision of Industrial Commission

This was an appeal from a decision of the Queensland Industrial Relations Commission. The QPSU sought an interpretation of the *Queensland Services Commission Employees' Award – State*, specifically ss 3.7, 3.8 and 3.9, regarding the classification and pay point at which new recruits were to be engaged and the means of career progression through pay points and classification structures.

The questions to be answered on appeal were:

1. Do employees in the corrections stream who, on appointment, satisfy the requirements for a degree, have the right to automatically progress through prescribed pay points?
2. Do employees in the corrections stream, who, after they are appointed, satisfy the requirements for a degree, have the right to automatically progress through the prescribed pay points?
3. If not, what are the progressional arrangements for such employees?

The Commission answered "yes" to questions one and two. The DCS appealed on these interpretations arguing that the Commission acted on the basis of ss 3.7 and 3.9, but gave little weight to s 3.8. On that basis the Department contended that questions one and two should be answered "no".

On appeal the President, reading the Award as a whole, determined that the provisions dealt with distinct matters. Taking into account the headings of the sections and the natural and grammatical meaning contained within the instrument (*Re Commercial Bank of Australia Limited*) the President held that s 3.8 was exhaustive.

The Court held that the starting point in construing an Award was its purpose. On such a purposive approach, the Court ultimately held that the answers to the above questions were:

1. "yes";
2. "no"; and
3. "Employees in the Corrections Stream who satisfy the requirements for a degree may move (by progression) from Classification Level 1 to Classification Level 2 only by satisfying s 3.8. Such employees progress through paypoints pursuant to s 3.9(1)(a)."

The QPSU's Appeal was against the "finding" of the Commission regarding the continued acceptance by the QPSU since 1994, of the interpretation contended for by the DCS. The QPSU also appealed against the related conclusion and recommendation.

Before the Commission, evidence had been admitted, regarding the parties' treatment of the Award after it had been made. Applying the relevant authorities, the Court found that such evidence was inadmissible because it was irrelevant. As such, neither the Commission's 'finding' (based on the evidence before it) nor its recommendation was appellable. Neither was appellable because neither fell within the definition of "decision" as defined in s 341(1) and Schedule 5 of the *Industrial Relations Act 1999.* Accordingly, QPSU's Appeal was dismissed.

Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Union of Employees AND Wilsons Parking Australia 1992 Pty Ltd

(C78 of 2002); Hall P; 24 October 2002; (2002) 171 QGIG 323

Industrial Relations Act 1999 s 341(1) — appeal against decision of Industrial Commission

This was an appeal against a decision of the Commission rejecting an application for payment of unpaid long service leave filed on behalf of a former employee (B) of the respondent. The matter for determination before the Commission was whether continuity of service could be established for B, in circumstances involving transmission of business. The difficulty arose because, while B had worked as an attendant in the same carpark for 12 years, the employer – ie the carpark operator – had changed 4 times during that period. Because of the employment history, the essential question was whether B was a "transferred employee" within the

meaning of s 69 (Continuity of service – transfer of calling). If so, he could claim "continuous service" under s 42, and an entitlement to long service leave under s 43.

Under s 69, a transferred employee is one who becomes an employee of a new employer because of the "transfer of a calling" to the new employer from the former employer. However, in this case, the transfer was not simply from one employer to another. The carpark was owned by the building's owner, who leased the operation of the carpark through a tender process. The successful tenderer was given a lease for a period of years, at the end of which new tenders would be called. Therefore, operation of the carpark was never directly transferred from a "former employer" to a "new employer". The Commission, at first instance, had examined the meaning of "transfer" of a calling in Schedule 5 and in cases on transmission of business, and concluded that continuity of service had been broken.

In Schedule 5, "transfer" of a calling "includes the transmission, assurance, conveyance, assignment or succession" of the calling, either by "(i) operation of law", or by "(ii) agreement, **including an agreement effected by a third person**" (emphasis added). The President looked at the history of provisions governing transmission, or transfer, of callings since the *Industrial Conciliation and Arbitration Act 1961*. Clearly, the worker's claim would have failed under that Act, and under the *Industrial Relations Act 1990*. And, while the language changed with the *Workplace Relations Act 1997*, the significant inclusion of the phrase "an agreement effected by a third person", did not appear until the present Act. The reason for the added words did not appear in the Minister's second reading speech or in the Explanatory Notes to the Industrial Relations Bill. The Commission (correctly, in the President's view) had regard to the 1998 *Report of the Industrial Relations Taskforce*, which preceded the Bill. It had recommended that the definition of transfer of business be widened "to deal with contrived circumstances" where employees' entitlements are lost. This, in the President's opinion, was unhelpful.

The President examined cases on transmisison of business in other jurisdictions. In *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648, the High Court outlined three steps to determine whether an employer, who takes over the commercial activities of a former employer, "succeeds to the business" of the former employer:

> "As a general rule, the question … will require the identification or characterisation of the business … of the first employer as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer." (at 655).

In the present case, the President said, that test would clearly find that the respondent had succeeded to the business of the former employer: "The same activity was being carried out, on the same site, with the same equipment and without break in time." (at 325). The President discussed Federal Court analyses of the High Court's statement. Those cases indicated that the phrase "successor, assignee or transmittee" in the federal Act, should be given a broad, practical interpretation rather than a narrow, technical one, and that there was no longer a need to find definite legal nexus or privity between predecessor and successor. The view expressed in *Health Services Union v Gribbles Radiology* [2002] FCA 856[*], was that a technical approach requiring direct transaction between the two, would permit the object of the provision to be evaded easily: "The use of the word 'successor' … suggests that there is not a need for a direct transaction." (at [52]).

The President pointed to the way business carried on in this case: there were no changes or gaps in time with each new operator; and to the fact that the lessor had included a monthly breakdown of transactions by the previous operator in its invitation to treat when calling for tenders. The President was of the view that, on the tests outlined above, the respondent was clearly a "successor" to the previous operator/ employer. The respondent argued that the definition of "transfer" in s 69 had not been under consideration in those cases. However, the President said that the Act defined the word inclusively, therefore there was no apparent reason to reject those authorities.

The President turned to the phrase "an agreement effected by a third person", and viewed the words as meaning more than a simple brokering arrangement by a third person effecting a transfer from one operator to another. The President interpreted the words

[*] Subject to appeal at the time of this decision.

necessarily to include a circumstance where the succession was effected by an agreement entered into between a third person and the second operator (the "new employer"). And that was what had occurred in the present case:

> "It was the lease entered into between AXA [building owner] and [the respondent] which put [the respondent] into possession of the … carpark …, and into possession of the equipment previously used by [the former employer] to operate a carpark. It was that lease which subjected [the respondent] to an obligation to conduct the business of a car park …. It was that combination of circumstances which, without gap in time, led to [the respondent's] conducting the "undertaking" (or "calling") previously conducted by [the former employer]." (at 326).

The President said that, historically, the question whether there was a transmission was a mixed question of law and fact, provided there was agreement between the first and second employers. The purpose of protecting continuity only in circumstances of direct agreement "became a little elusive". The President considered that if the purpose was to have the new employer confront potential liability for long service leave, that purpose would also be observed if "transmission" were extended to the case where "an agreement between the second employer and a third party brings about succession of the second employer to the previous calling of the first employer" (at 327). On that reading, the calling in this case was transferred from the former employer to the respondent within the meaning of s 69(1).

It remained to consider whether B was employed by the respondent because of the transfer of the calling (carpark operator) to it (as required by Part 6 of the Act). The President stated that, plainly on the facts, B became an employee of the respondent solely because it succeeded to the carparking business of the former employer.

Held: The appeal was allowed. The decision of the Commission was set aside and the respondent ordered to pay $4518.80 in long service leave entitlements to B.

WorkCover Queensland AND Brooks

(C91 of 2002); Hall P; 4 February 2003; (2003) 172 QGIG 888

Industrial Relations Act 1999 s 341(2) — appeal against a decision of the Industrial Magistrate

WorkCover Queensland brought this appeal pursuant to s 341(2) of the *Industrial Relations Act 1999* against a decision of the Industrial Magistrate, Gladstone.

The Defendant before the Industrial Magistrate (respondent on appeal) had been charged with several counts of fraud and attempted fraud under the *WorkCover Queensland Act 1996*, for different periods from September 1997 to January 2002. Before the Industrial Magistrate two preliminary points were raised by the defendant's counsel:

1) that the prosecution was incompetent as it should have been brought under the (repealed) *Workers' Compensation Act 1990;* and
2) that the complaint was out of time.

Both these points were relevant before the Industrial Court. The Court allowed no other points to be argued as no other points had yet been argued before the Industrial Magistrate, and it was not an appropriate circumstance in which to exercise the discretion at s 348(2) of the *Industrial Relations Act 1999.*

President Hall dealt with the second point first. The limitation period is set out in s 525(3) of the *WorkCover Queensland Act 1996.* It requires that summary proceedings before an Industrial Magistrate must start (the later of) within one year of commission of the offence or within 6 months after the commission of the offence comes to the knowledge of the Chief Executive Officer. The Court made five comments regarding this point:

1. There was a distinction between the Chief Executive Officer's knowledge and the complainant's knowledge as the determining factor, as set out in ss 524 and 525. Section 525 required the knowledge to be that of the Chief Executive Officer.
2. The Chief Executive Officer can strictly only know that an offence has been committed once proceedings have been completed. So it seems that s 525 is directing one's attention to the situation where the Chief Executive Officer has formed the belief that an offence has been committed.

3. Section 525 read with s 402(1) allows the Chief Executive Officer to delegate his/her powers. Here the complainant (Ms Reid) was both the delegate and the complainant. She had given (separate) evidence that she had acquired knowledge of the commission of the offence, as both the delegate and the complainant, on 17 June 2002.
4. The collective knowledge of WorkCover does not equate to the knowledge of the Chief Executive Officer or delegate, where the Act specifically requires the knowledge to be the knowledge of the Chief Executive Officer or delegate (see *Ayres v WorkCover Queensland* (1998) 158 QGIG 528).
5. There was no evidence before the Industrial Magistrate that any particular employee in WorkCover had knowledge of the commission of the offence before 17 June 2002. In fact, on the material before the Industrial Magistrate the only conclusion able to be reached was that the commission of the offence first came to the knowledge of the delegate on 17 June 2002.

The Court concluded that the complaint was made within time.

Regarding the first point, the Court held that the prosecution could only have been brought under the current Act as all the conduct complained of occurred after the repeal of the previous Act and when the current Act was in force. Further, the transitional provisions in the legislation only related to an injury itself and proceedings consequent upon that injury. This same view was reached by the Supreme Court in other proceedings involving the parties (see *Brookes v O'Bryan and WorkCover Queensland* [2002] QSC at page 4).

Held: Appeal allowed. Industrial Magistrate's decision set aside and matter remitted to the Industrial Magistrate's Court differently constituted. Industrial Magistrate's order as to costs set aside.

Gary Eric Newman AND JBL Quality Applicators Pty Ltd

(C96 of 2002); Hall P; 12 February 2003; (2003) 172 QGIG 1096

Industrial Relations Act 1999 s 164(3) — appeal against decision of Industrial Magistrate

This was an appeal from a decision of the Industrial Magistrate, Southport. In the Magistrates Court, JBL Quality Applicators Pty Ltd pleaded guilty to a breach of s 30(1)(a) of the *Workplace Health and Safety Act 1995*. There was a circumstance of aggravation in that grievous bodily injury was suffered by Mr Breed. Section 24 of the *Workplace Health and Safety Act 1995*, read with s 181B of the *Penalties and Sentences Act 1992* makes the maximum fine able to be imposed on a corporate defendant $300,000.00. The Industrial Magistrate here fined the defendant $5,000.00 and gave orders for Court and investigation costs.

The appeal was brought by the Division of Workplace Health and Safety and was against the manifest inadequacy of the sentence.

The defendant corporation argued before the Industrial Magistrate and before the Court that there were significant mitigating factors. President Hall held that such mitigating factors existed but that they should not be given precedence over the objective gravity of the offence (see *Master Ryane (Qld) Pty Ltd v Thouard* (2000) 165 QGIG 44). He held that on the face of the circumstances here, a more significant penalty should have been imposed.

The injured worker was employed by the defendant corporation on a sub-contractor basis. The nature of the working relationship meant that the obligations owed by the defendant corporation fell under s 30 of the *Workplace Health and Safety Act 1995.* That section sets out the obligations owed by those in control of workplaces. Mr Breed suffered significant injuries when he fell from a height of 4.15 metres while rendering an outside wall, working off an A frame scaffold. He was not able to work for 4 months because of the seriousness of his injuries.

The Court held that because of the limited number of cases involving falls from heights and the different factual situations in each, it was difficult to develop a "tariff" sentence. President Hall compared the current case with that of *Neilands v CMC Cairns Pty Ltd* (2001) 168 QGIG 132, but reached the conclusion that

there were enough differences to indicate that the sentence imposed here was too low.

The Court also considered the matter in the context of other recent decisions, but generally found them unhelpful. President Hall ultimately concluded that the inadequacy of the sentence was manifest. He commented that whilst expending money in the pursuit of workplace, health and safety is praiseworthy after the event, it is not enough. The *Workplace Health and Safety Act 1995* requires compliance by expending time and money, **before** an event can occur. It is not enough to merely desire good workplace health and safety practices.

The Court further made the distinction between occupiers and employers but found that that the penalty range is the same, regardless of whether the defendant is an employer or occupier (in this case the defendant was an occupier). President Hall highlighted the problem that can occur when a number of persons have obligations, such that "everyone relies on somebody else to do something".

Held: Decision of Industrial Magistrate set aside. Respondent fined $27,500.00. Industrial Magistrate's orders re costs still in place.

Mayne Logistics Armaguard AND Paul Cochrane

(C8 of 2002); Hall P; 25 February 2003; (2003) 172 QGIG 1139

Industrial Relations Act 1999 s 341(1) — appeal against decision of Industrial Commission

This was an appeal on a preliminary issue raised by the Appellant in a Reinstatement application originally filed in the Industrial Registry by the Respondent.

Before the Commission, the Appellant had sought orders pursuant to s 679(5) and (6) of the *Industrial Relations Act 1999*. The effect of the orders sought would be:

- that all materials (documents, exhibits, statements, evidence etc) would be prohibited from release, search or publication to anyone other than members of the Court and Commission and the parties' legal representatives;
- that none of the materials could be published by any person in receipt of them; and
- that the materials would be used only for the purpose of the proceedings, be kept in a confidential and secure fashion and be returned to the Appellant upon completion of the proceedings.

Further, the Appellant sought an order that the proceedings be held *in camera.*

The Commission rejected the Appellant's application for orders. The appeal was against that decision. The Respondent neither supported nor opposed the Appellant's application (both in the Commission and the Court).

For the Appellant to be successful on Appeal, it had to be established that the matter fell within the principles in *House v The King* (1936) 55 CLR 499. The Court found that this was such a matter and that the Commission acted upon a wrong principle in exercising its discretion.

It was found that the Commission acted upon the Common Law principle that judicial proceedings should be held in open Court, and that the public should be only be excluded in rare and exceptional cases. Instead the Commission should have started with the Statute. From a reading of the *Industrial Relations Act 1999* (ss 679, 274(2), 320 and 329), the Court concluded that this was a case where access to the materials should be limited. This was especially when regard was had to the nature of the industry concerned (being the transportation and storage of large quantities of cash) and the safety of the Appellant's employees and members of the public. However, the President found that the orders sought by the Appellant were too wide and did not give sufficient regard to the notion that justice should be public.

The Court concluded that an interim order in the terms sought should be granted, and that the Commission should determine, at the conclusion of the Reinstatement proceedings, which materials should be released from operation of the order. While the Court considered this would cause difficulty for the Appellant, such an order struck a balance between the interests of the public and the interests of the parties.

Held: The Decision of the Commission to be set aside; substituted orders were issued.

WorkCover Queensland AND Queensland Health (Fraser Coast District Health Service)

(C3 of 2003); Hall P; 4 March 2003; (2003) 172 QGIG 1228

WorkCover Queensland Act 1996 s 509 — appeal against decision of Industrial Magistrate

WorkCover Queensland brought this Appeal pursuant to s 509 *WorkCover Queensland Act 1996* against a decision of an Industrial Magistrate. Before the Industrial Magistrate the Respondent had argued that the Review Unit's decision, accepting the worker's compensation benefits, was a nullity because it was not made within the 35 day time limit prescribed in s 494(1) of the Act. The Industrial Magistrate decided for the Respondent, contrary to the Industrial Court's decision in *Australian Meat Holdings Pty Ltd v WorkCover Queensland* (2002) 171 QGIG 394. The Industrial Magistrate accepted that the Court's decision would have been different if a subsequent decision of the Chief Justice of the Supreme Court (*Narayan v S Pack Pty Ltd* [2002] QSC 373) had been available to it.

The Court held that in so determining, the Industrial Magistrate erred. The Court said that the circumstances in this case and in *Australian Meat Holdings* were different from those in *Narayan.* The latter concerned the case where a right is given with a direction that certain conditions be complied with. By comparison, the circumstances here and in *Australian Meat Holdings* involved the case where a public duty was imposed with a direction that it be performed in a certain amount of time. The Court held that "Non-compliance with such a prescription does not deprive an innocent party of a right or remedy otherwise available." (at 1228).

Further, the issue in this case concerned the consequence of non-compliance with s 494, rather than whether the duty placed upon the Review Unit in s 494 was mandatory or not.

Held: Appeal allowed. Industrial Magistrate's decision set aside and matter remitted to the Industrial Magistrates Court to be heard and determined according to law.

Graham Stratford AND Clive John Newman

(C20 of 2003); Hall P; 17 June 2003; (2003) 173 QGIG 661

Workplace Health and Safety Act 1995 s 164(3) — appeal against decision of Industrial Magistrate

This was an appeal from a decision of the Industrial Magistrate. The appellant was charged pursuant to s 24 of the *Workplace Health and Safety Act 1995* for failing to discharge a duty under s 29 of the Act. The appellant was sentenced and a conviction was recorded.

The appellant conducted a fireworks display during which roman candles detonated within metal casings causing fatal injuries to one spectator. Several other spectators suffered injuries ranging from grievous bodily harm to bodily harm.

On appeal the appellant argued the duty imposed by s 29 was discharged by him, as he had identified the appropriate hazards under the relevant advisory standards. The risk of detonation associated with the candles, as distinct from deflagration, was unheard of throughout the industry or among experts in the field.

Scientific evidence led by the appellant was that, at the time prior to the accident, it was believed that roman candles contained in metal casings did not constitute a hazard. Subsequent investigations found that detonation had occurred because the candles were poorly constructed. As such, evidence submitted by the Respondent failed to establish the appellant knew or should have known the specific risks associated with the candles. The President considered the finding of guilt should not be allowed to stand on the basis of the respondent's evidence.

Held: Appeal allowed. The Industrial Magistrate's decision was set aside and the complaint was dismissed.

Decisions of the Queensland Industrial Relations Commission

The decisions summarised below are a sample of decisions released and gazetted by the Industrial Relations Commission during the year.

Decisions of the Full Bench

Gordon Nuttall, Minister for Industrial Relations AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers & Ors

(B1106 of 2002); Hall P, Linnane VP, Edwards C; 18 December 2002; (2003) 172 QGIG 2

Industrial Relations Act 1999, s 287 — application for Declaration of a General Ruling about a Minimum Wage for all employees

This was the first application under s 287(1)(c) for a General Ruling about a minimum wage for all employees (ie including employees who are not covered by Awards, and therefore do not benefit from the State Wage Case). Since amendments to the Act in December 2001, a minimum wage general ruling must be declared at least once a year. The original application related to employees not covered by industrial instruments, but was subsequently amended to cover all employees including those under industrial instruments. (Other significant amendments were also made; these are detailed in the decision at p 2.) Directions orders were issued by the Registrar for both the original and the amended applications, and both were advertised in the press and the Industrial Gazette.

This decision addresses the application in relation to adult employees. Because of difficulties associated with the issue, the application was adjourned so far as it related to junior rates. That issue was re-listed for hearing in March 2003 (see summary below).

Minimum weekly wage
The applicant proposed that the minimum wage level set for Award workers by the State Wage Case 2002 (reported at 170 QGIG 436) be applied to all workers, by way of a general ruling declaring the Queensland Minimum Wage to be $431.40 per week. The Bench considered the application in terms of employees in the non-Award sector first. There was "overwhelming" support for the proposal. The Bench viewed the level of support as unsurprising, considering the wage level sought was the same as that set for award workers, and the same as the level in Western Australia and in the federal jurisdiction: "The existing minimum wage has its basis in the need to protect and enhance the dignity of the poorest and most vulnerable workers in the economy. Extension of the minimum wage to the award free sector will further contribute to attainment of that goal." (at p 3).

Hourly rate
The parties were agreed that an hourly rate should be set: those representing employees' union interests argued that it should be the weekly rate divided by 38; the applicant and those representing employer groups contended the divisor should be 40. The Bench considered the correct divisor to be 40: "in a case conducted largely without evidence and on a "fairness" basis, it would be inappropriate to treat a 38 hour week as a notional minimum in the award free sector" (at p 3). The applicant submitted that full-time employees who work over 40 hours per week should be paid at the hourly rate for additional hours. The Bench was prepared to accept that submission, but rejected the argument that those hours should attract penalty: "On the arguments that have been put, we are yet to be persuaded that hours in excess of normal hours should notionally be treated as overtime hours" (at p3).

Casual loading
There was also argument put to the Bench about a loading to be added to the hourly rate for casual employees. The Bench rejected the claim for recognition of a casual loading, chiefly because it was not included in the application, either in its original or its amended form. While the Commission has power to act on its own motion, it cannot do so without giving relevant parties the right to be heard. To determine the question in this hearing, where the issue had not been part of the application as advertised, would deny natural justice to affected parties who might seek to be heard on the issue.

Operative date
The general ruling was declared to apply to all employees as defined in s 5 of the Act, and to operate from the first pay period after 1 April 2003.

Industrial instruments
In relation to employees covered by industrial instruments, the applicant argued that the Commission should regulate the minimum wage of those employees by a General Ruling under s 287, rather than by a Declaration of

Policy under s 288, which has then to be applied to Awards on a case by case basis (as has been the practice). The Bench accepted there was merit in this argument, but expressed reservations, particularly since some Awards had already been through the process to have the declared minimum wage flowed into the Award. The Bench determined to exempt those Awards, which had already been modified in accordance with the Declaration of Policy, from the General Ruling to be declared in this case. It also delayed the operative date until after 1 April 2003, in order to give industries where the Declaration of Policy had not been flowed into their industrial instruments enough time to bring themselves within the exemption.

'Incapacity to pay' principle
The applicant sought general exemption for persons suffering "incapacity to pay" (Principle 13 of the Statement of Principles 2000). The Bench refused to accept the proposal. The Principles were intended to operate as an exercise of arbitral power; to follow the approach recommended by the applicant would mean that the question of entitlement to an exemption under Principle 13 would be determined by exercise of judicial power. Applications for such exemption should be dealt with under s 287(5).

Declaration of General Ruling
- The Bench declared the minimum wage rate for all full-time employees, as defined by s 5, to be $431.40. (Certain workers are excluded, eg apprentices and trainees. See 172 QGIG 5.)
- Non-Award permanent part-time or casual employees were declared to be entitled to an hourly rate of the minimum wage divided by 40.
- The General Ruling was declared not to apply to employees governed by industrial instruments, other than Awards, on 20 December 2002, during the lifetime of that industrial instrument.
- The operative date was declared to be the beginning of the first pay period after 1 April 2003: see (2003) 172 QGIG 5.

Gordon Nuttall, Minister for Industrial Relations AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers & Ors

(B1106 of 2002; B136 of 2003); Hall P, Linnane VP, Edwards C; 21 March 2003; (2003) 172 QGIG 1366

Industrial Relations Act 1999, s 287 — application for Declaration of a General Ruling about a Minimum Wage for all employees; s 280 — application to re-open proceedings

Because the parties to the application for a General Ruling on a Queensland Minimum Wage could not agree on minimum junior rates of pay, the matter on that issue had been adjourned. This was the adjourned matter.

Minimum junior wage
The applicant submitted two options for a scale of payment for junior employees, both based on age, with an increasing percentage of the full minimum wage. The applicant's preferred option ranged from a rate of 45% for employees under 16, up to 85% for 20 year olds (at 21, the adult rate applies).

The QCU and the AWU opposed any scale based on age, arguing instead for a scale based on age and experience. The scale put forward ranged from: 55% (or $237.27) for employees up to 17 years old or on their first year of experience; up to 85% (or $366.69) for employees on their 3rd year of experience; and then progressing to 100% at 20 years of age and over.

On balance, while it was not without difficulty, the Bench preferred the method proposed by the QCU and AWU. The difference in amounts between the applicant's 'option 1' and the scale proposed by the unions was quite small, but the Bench preferred the latter approach.

Application to re-open General Ruling re: apprentices/trainees
The hearing included an application to re-open proceedings in relation to the previous General Ruling declared in December 2002 (see above). The Ruling excluded apprentices and trainees "registered under the *Training and Employment Act"*. Because of changes to the process and timing of registration of apprenticeships and traineeships under that Act, the applicant sought to amend the Ruling, to have it exclude apprentices and trainees "under the *Training and Employment Act 2000*" instead of "registered under the … *Act*". The application was unopposed and was granted.

Industrial Agreements
There was also an issue relating to employees engaged under an industrial instrument, other than an Award, being excluded from the General Ruling. While the earlier reasons for decision explained the exclusion of workers on Certified Agreements, the issue of workers on Industrial Agreements (IAs) was not dealt with. IAs are continued in force since the previous Act, by virtue of the transitional provisions of the *IR Act*. The applicant now sought an amendment of the General Ruling to exclude workers under those agreements. The Bench refused. It did not have the power to grant the amendment by virtue of s 713(3) of the *IR Act* (written agreement of the parties to the IA is required).

Piece rate workers were also referred to in this decision: the Bench made clear that their exclusion from the General Ruling was not intended to deny relief to such workers whose remuneration was derived from a formula applied to a wage lower than the minimum.

The Bench issued an *Amended General Ruling in Relation to a Queensland Minimum Wage for all Employees*, to take account of the decision on junior rates and other amendments made in this decision: see (2003) 172 QGIG 1367-8. The operative date remained 1 April 2003.

Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND The Australian Workers' Union of Employees, Queensland
Fruit and Vegetable Growing Industry Award — State 2002

(B389 of 2003); Hall P, Linnane VP, Edwards C; 9 April 2003; (2003) 172 QGIG 1847

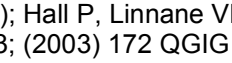
Industrial Relations Act 1999, s 287(5) — application for exclusion from General Ruling

This was an application by the QCCI, representing Queensland Fruit and Vegetable Growers, to defer implementation of the General Ruling about a Queensland Minimum Wage for certain employers bound by the *Fruit and Vegetable Growing Industry Award — State*. The relevant employers were those who operate in drought-declared areas and on individual droughted properties (IDPs). The deferral was requested for a period of 12 months after removal of the drought classification by the Dept of Primary Industries.

The format of the application was said to be exceptional in that it was asking the Commission to grant an exclusion which did not meet the "specified date" requirements in s 287(4). But, more importantly, it expected the Commission to surrender control over its operational date to a decision process undertaken by a government department. In addition, the Bench stated that "the minimum wage is intended to be the rock bottom minimum wage for adult employees …. Persons in receipt of the wage are the poorest paid persons in the Queensland workforce." (at p 1847)
While the application was based on the indisputable circumstance that the industry is suffering from severe and prolonged drought, applications for such exemptions are normally based on inability to pay: in this case, no evidence was led that any particular group of growers, or any particular grower, was unable to pay: "The evidence lacks the precision and rigour which one might expect in an incapacity to pay case." (at p 1847)

The Bench pointed to the fact that increases had been allowed in the sugar industry in the face of "evidence very much stronger than the evidence [presented] in this case". Further, the Bench stated: "The actual amounts of money that the employees will receive if the application for exclusion is rejected is small. The increase looks large when expressed as a percentage because the existing base rate is so low. One may acknowledge that many employees are casuals and that the sum paid will be inflated by the casual loading. But the increase will still be extraordinarily modest." (at p 1847)

The Full Bench rejected the application.



Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) & Ors
Trading Hours — Non-Exempt Shops Trading by Retail — State Order

(B1566 of 2002); Linnane VP, Fisher and Bechly CC; 14 May 2003; (2003) 173 QGIG 341

Trading (Allowable Hours) Act 1990, s 21 — Trading hours orders, non-exempt shops

This was an application by the RAQ to amend the *Trading Hours – Non-exempt Shops Trading by Retail Order* (the Order) to allow

Sunday trading for non-exempt shops in designated tourist and seaside resort areas (set out in Schedule 1 of the Order). The application was opposed by the QRTSA and the National Meat Association of Australia (NMAA). Of the areas subject to the designation, only Hervey Bay and Yeppoon have non-exempt shops. The Bench inspected relevant areas to assess the tourist and holiday infrastructure and the nature of tourism business, particularly in Hervey Bay and Yeppoon.

The RAQ based its application on the tourist characteristics of the areas subject of the application, and pointed to the specific object "to facilitate trading in tourist areas" stated in s 3 which laid down Objects of the Act. The QRTSA submitted that there was no proof of a strong demand for Sunday trading in Hervey Bay and Yeppoon; it said the RAQ was hoping to create a demand, which was a flawed approach, particularly in view of s 26 of the *T(AH) Act* (which lists factors the Commission must consider when making an order under s 21). The NMAA also argued that the application had confused wants with needs: while Sunday trading was seen as an overall strategy to promote tourism, the approach should be, that significant tourism demand would create a need for Sunday trading; Hervey Bay and Yeppoon had not reached a point where it could be justified.

Hervey Bay
The Bench considered the history of regulation of trading hours in seaside and tourist areas, through orders of the Commission and the 1990 Act and associated case law. It examined the evidence given by many witnesses called in the case, and outlined its own observations on tourism in the areas concerned. Based on the evidence of population and tourism growth, the Bench was satisfied that Hervey Bay should be granted Sunday trading for the hours sought. As the gateway to Fraser Island, Hervey Bay was also the obvious place for campers and visitors using self-catering accommodation on the island to buy their food and equipment. Sunday trading would give these tourists greater access to necessary facilities.

The Bench considered the evidence as to the potential effect of the order on the business of exempt shops and independent retailers. While some of those businesses may have their trade affected because of their position close to a shopping centre with a non-exempt shop, the Bench was not convinced that this effect would extend to most of the exempt shops in the area. It found that a number of the exempt shops were in fact located some distance from non-exempt shops; it did not consider that exempt shops and independent retailers in the area would be evenly affected.

Yeppoon
Considering Yeppoon and the Capricorn Coast, the Bench was not persuaded that Sunday trading was warranted in that region. While the area was developing rapidly, there was not the tourism infrastructure, the number of tourists was less that in Hervey Bay, and the type of visitor to Keppel Island off Yeppoon was different from those visiting Fraser Island. Accordingly the application was not granted to cover Yeppoon and the Capricorn Coast.

Operative date
The Bench set an operative date of18 January 2004, to give retailers time to adjust their operations and to get past the period of extended Christmas trading hours. The RAQ made an undertaking to take steps to inform non-exempt traders of their obligations under the *Voluntary Work – Extended Trading Hours – Non-Exempt Shops – Award – State*.

Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND The Australian Workers' Union of Employees, Queensland Uniting HealthCare Enterprise Award — State

(B1923 of 2002); Bloomfield DP, Fisher and Blades CC; 20 May 2003; (2003) 173 QGIG 348

Industrial Relations Act 1999, s 281 — Reference to Full Bench [application for new Enterprise Award under s 125]

An application to make a new Enterprise Award, to be called the *Uniting HealthCare Enterprise Award — State*, was heard by the Commission on 31 March 2003. The Award, with amendments, was approved in principle by the Commission; however two matters were considered to be of sufficient importance to be referred to the Full Bench under s 281(1). Those matters were: cl. 5.2 of the Award, covering "Wage Increases"; and the Operative Date. Referral to the Full Bench was approved by the Vice President.

Wage increases
The application sought to roll up wages and conditions in Certified Agreements into the new

Award. Under s 129 of the Act, the Commission may do that only if satisfied the provisions are consistent with the Statement of Principles established for deciding wages and conditions and it is in the public interest. However, the reason the issue was referred in this matter was that the application went beyond a simple roll up, and sought to provide wage increases up to mid-2004, instead of allowing for wage increases in s 287 Declarations of General Ruling which would be granted during the period.

QCCI argued the prospective increases were necessary for the hospitals' budgetary processes, and the affected employees had agreed to the terms through the AWU. It said that including the prospective rates in the Award would avoid the need to go through the Certified Agreement process. QCCI argued that the Statement of Principles released with the General Ruling declared by the Full Bench in August 2002 (summarised above), was intended to guide Commissioners in regard to Awards; it was not intended as a rigid formula for decisions. It submitted that the Statement of Principles was no impediment to granting prospective wage increases, and that their view was supported by ss 126 and 274 of the Act. That is, by including prospective wage increases, the Commission would be ensuring secure and relevant wages (s 126), it would be doing all things necessary and convenient in performing its functions (s 274); and it would be fulfilling the Principal Objects of the Act as set out in s 3.

QCCI's submissions were generally supported by the AWU. It pointed to the degree of consultation with employees, which it said was similar to that undertaken for Certified Agreements. The AWU submitted that CAs do not hold a superior position to that of Awards, which they stated had been elevated from their "safety net" status and should not be limited.

Prospective wage increases

The Bench acknowledged the intention of the parties in seeking to incorporate prospective wage increases, and the degree of consent between them on the issue. However, the Commission had to consider whether their approach should be approved, in light of the Act, the Wage Principles and other industrial relations considerations. The QCCI referred to the Commission's approval of prospective wage increases in the *Security Industry (Contractors) Award — State*. But the Bench viewed that Award as easily distinguishable from the present case. The various employers in that industry were not all reputable in their practices when competing for business, and there was a need to establish a level playing field with uniform provisions. There were few CAs negotiated in that industry and it was necessary to ensure that award rates of pay kept pace with rates prescribed by CAs. Therefore prospective wage increases could be argued for more persuasively in that industry. In the Bench's view, there was no comparison between the two cases. Two other Awards referred to by the QCCI were also clearly distinguishable in the opinion of the Bench: they related to a genuine inability to reach agreement and an arbitration in the public interest; and an award involving a new and detailed classification structure with a nationally accredited training program to be phased in over time. Here, the parties are simply not prepared to put their agreement through the CA process.

The Commission pointed to four methods for securing wage increases in Awards, including the State Wage Case general rulings; and the roll up of CA rates under s 129 and Principle 10 of the Statement of Principles; as well as the provisions of Principles 7 (Work Value) and 12 (Equal Remuneration). And importantly, parties are able to bargain for wage increases in a CA or a QWA.

For example, the Bench said that wage increases secured for Award workers under the State Wage cases or the Statement of Principles reflect rates endorsed by the Commission as being fair and appropriate, based on a range of factors such as the cost of living. And increases based on the Work Value (Principle 7) are granted where a change in the nature of work constitutes a significant net addition to work requirements such that a new classification or upgrading is warranted.

The Bench considered that the increases sought in this Award after roll up of the CA rates did not fall within any of these standard means for securing wage increases. It seemed that the parties were seeking to avoid the time and effort involved in making a CA. There was no impediment to their entering into an Agreement. In fact, comments before the Commission at first instance indicated that, if this application were rejected, that is what they would do in order to ensure the rates were recorded in an industrial instrument. The parties' reasons for seeking to include the prospective rates were, in the opinion of the Bench, unsatisfactory.

The Bench also pointed to the fact that no provision appeared to have been made in the Award for the possibility that a State Wage general ruling during the relevant time (July 2002 to July 2004) might grant a bigger increase in wage rates than was provided for in this Award.

The Bench considered Principle 10 of the Statement of Principles (Award amendment to give effect to a Certified Agreement) and referred to the case of *Australian Salaried Medical Officers Federation v Queensland Health & Ors* (2001) 166 QGIG 400, where a number of principles were set out as a guide to such applications. These included the history of enterprise bargaining between the parties and whether incorporating CA rates would act as a disincentive to future bargaining. It was the opinion of the Bench that to incorporate rates would not be a disincentive to bargaining between the parties. But it was the practice of the Commission to ensure that remained true, by incorporating CA rates into the Award but omitting the latest increase available under the CA; the Bench saw no reason to depart from that practice. The Bench was also satisfied that to roll up the agreement rates, omitting the latest increase, would be in line with s 129, and would not be contrary to the public interest (especially since the Award was specific to the enterprise).

Operative date
The other point referred by the Commission was the issue of "operative date" of the Award. The date initially proposed by QCCI was 1 July 2002; this was subsequently amended to 1 September 2002. Both dates raise problems, due to the fact that either would create a situation where the Award would commence prior to the nominal expiry date of the CAs; and no application had been made to terminate the CAs prior to that expiry date. The parties had sought to avoid the problem by inserting a provision that the CAs would be superseded by the Award. However this was inconsistent with s 165 of the Act, which states that CAs prevail over Awards while they operate. If the nominated operative date were approved, the only legally enforceable rates of pay would still be those in the CAs, even if rates in the Award were higher.

On account of these concerns, the Bench set an operative date of 1 October 2002.

Decisions of the Commission

ALHMWU Queensland Branch AND Ralph Soutar

(W15, W16, W17 of 2002), 5 August 2002, (2002) 170 QGIG 455

Industrial Relations Act 1999, s 278 — Unpaid wages

A central issue in the application to recover unpaid wages was whether the 3 claimants were employees or independent contractors. The respondent carried on business under the name Efficient Reliable Security. The applicant claims that the 3 workers involved were employed under the Security Industry (Contractors) Award – State. The respondent, S, did not attend the hearing.

Evidence as to 'employee' or 'independent contractor'
The issue as to whether the claimants were employees or independent contractors was contentious because the evidence of 2 of the claimants, Cole and Chancellor, was that they were told on commencing that they were independent contractors; however with the approaching introduction of the GST in 2000, they were told that they would become employees. The third claimant, Kemp, was employed after introduction of the GST and stated that he was never told that he was an independent contractor. He was first told that he was a casual employee and later that he was permanent part-time.

Cole had commenced work as a 'subcontractor' and, on the respondent's request, had got an ABN in order to submit invoices for payment. He had never printed business cards or advertised his services, and had worn a uniform provided by the respondent. He provided his own radio ear pieces and belt clip, torches and baton, but S provided a radio mobile phone, loudspeaker, cards for placing in doors, mop and bucket. He usually drove his own car for patrols, although sometimes used S's car. He had not arranged his own superannuation or insurance and assumed he would be covered by WorkCover. If unable to work at any time, he had not been responsible for providing a replacement. From mid-2000 when the GST was introduced, he and other guards were advised that they would be employees. Thereafter he received fortnightly payslips and tax was deducted from his pay.

Chancellor had commenced work as a 'subcontractor', submitting invoices under a business name he had used prior to

commencing work for S. During this period when he was invoicing S, he paid his own tax. He was told from mid-2000 that he would be paid thereafter as an employee.

Kemp was told when he commenced work in mid-2000 that he was a casual employee and later that he was a permanent part-time employee. He never received holiday pay, overtime or penalty payments.

All claimants had had to fill out time sheets for every day on which work was performed; all had been given detailed instructions on work to be done; all were required to work according to weekly rosters compiled by the respondent, and all were paid a flat hourly rate dictated by the respondent. None of the claimants had signed a contract with the respondent. The applicant submitted that all three claimants had been at all times employees. The applicant pointed to the lack of control exercised by the claimants and other factors such as that they were directed on times to be worked and how to perform the work, they could not delegate their work to anyone else, if they could not work a shift they were not responsible for arranging a replacement, no profit or loss was made by their 'businesses', and they had not worked for other principals during the time they worked for S (although Cole had an extra part-time job, as an employee, for 6 months of the time).

The respondent did not attend, but submitted statements to the Industrial Registrar. These were not sworn and not in affidavit form. The Commission determined that the unsworn statements should not be admitted in evidence particularly in the absence of the respondent to be cross-examined on their contents. The Commission discussed the decision of *Hollis v Vabu* [2001] HCA 44 on the issue of indicia used to determine whether workers are employees or independent contractors. The Commission concluded, in regard to Kemp, that at all times he was an employee. However, the position of Cole and Chancellor had certain elements pointing to their being contractors and certain elements pointing to their being employees. In order to determine the type of relationship, the Commission said "it is necessary to weigh up the various competing indicia and to consider the totality of the relationship between the parties".

Conclusion
After weighing the evidence the Commission determined that Cole and Chancellor were employees during the whole period in question. The express statement from S that they were to be independent contractors was not determinative of the matter. The Commission considered that the claimants were "in a 'take it or leave it' situation when the respondent told them that if they wanted to work for him they would be required to do so as independent contractors. Further it is open on the evidence to find that the arrangement was more about an attempt by the respondent to legitimise the payment of a flat hourly rate, than it was about establishing a relationship of independent contract." It was not fatal to the claim of Cole that he registered an ABN, since that was clearly done at the instigation of the respondent and in the belief that he had to do so in order to be paid; Chancellor's use of an existing business was similarly not determinative of the issue. None of the claimants could negotiate on their rate of pay, which was determined and adjusted at the discretion of the respondent. The Commission also considered the fact that the manner of their work and their remuneration were no different after the supposed change in the relationship in mid-2000 with the introduction of the GST. The Commission ordered that the respondent pay amounts determined to be outstanding to each of the claimants.

Federated Engine Drivers' and Firemen's Association of Australasia Queensland Branch Union of Employees AND Vassallo Constructions Pty Ltd

(W197 of 2001), 23 August 2002, (2002) 171 QGIG 7

Industrial Relations Act 1999, s 278 — Application for unpaid wages

This was an application by FEDFA, on behalf of an employee of the respondent, for unpaid wages in the form of unpaid meal allowance when overtime was worked; wages for periods when the employee was stood down; and for annual leave and loading. The total claim was $10,288.40. Leave was requested to amend the application to include a claim for redundancy payments following cross-examination of a witness for the respondent. Leave was refused because of the need to accord procedural fairness to all parties. In this case, to allow the late amendment would render an injustice to the respondent.

The respondent conceded the claim with regard to meal allowances prior to the hearing, although this was not formally conveyed to the Commission in accordance with the directions order which had been issued. The respondent

also appeared to concede that the employee was entitled to be paid for days on which he had attended for work but had been sent home because of bad weather. The FEDFA did not press the claim insofar as it applied to days when the employee was absent on paid sick leave.

The evidence
The employee was covered by the *Civil Construction, Operations and Maintenance General Award — State*. The respondent's business was such that it was sometimes necessary to cease work because of wet weather. On those days, employees would be stood down without pay. The respondent stated that on those occasions, employees would be contacted and told not to work, or there was a standing practice that employees would contact supervisors to ask if work was available. The employee stated that he was contacted in this way only once, and on two occasions he had phone his supervisor and been told not to report for work. On all other occasions (the days relating to his claim) he stated that he had reported for work and held himself ready to perform work. The respondent maintained that the employee reported to work on a number of occasions when told not to because no work was available; and on other occasions during the period claimed, he was absent on sick or annual leave.

The respondent had established a "flexi-time" system whereby employees could work extra hours in good weather to cover them for periods when it was too wet to work. Initially the employee had agreed orally to this arrangement, but later asked to be paid overtime for the extra hours when they were worked and subsequently used annual leave credits to cover him on days when weather stopped work, so as to avoid being stood down without pay on those days.

The FEDFA claimed that under the Award, the employer was not entitled to stand employees down because of wet weather, and claimed payment for the employee on those days. It also contended that the system of "flexi-time" was outside the terms of the Award and did not meet the employer's obligation to pay employees for ordinary time lost due to wet weather.

The Commission identified the issues to revolve around:

- ❖ the right of the employer to stand down employees without pay when wet weather prevented work;
- ❖ if the right existed, whether the Award operated to require that employees be paid for the period stood down;
- ❖ if the right existed, was it exercised in a manner permitted by the Act or the Award; and
- ❖ if any legislative or Award obligations required the respondent to pay the employee when wet weather prevented work, did payments to him of flexi-time and annual leave meet those obligations?

Permissible stand-down under the Act and the Award
The Commission examined s 98 of the Act (permissible stand-down of employee) and the requirements of the Award as to wet weather and payment for stand-downs. Section 98(1) allows employers to stand-down an employee if the employee cannot be usefully employed because of something for which the employer is not responsible or over which the employer has no control, such as bad weather. Sub-section (2) provides that a stand-down may be without pay, unless an industrial instrument provides otherwise. The *Civil Construction Award* shows in cl 3.5(3) that, subject to the stand-down provisions in the (1990) Act, all time lost through wet weather should be paid, provided the employees attend at the site and make themselves ready to work.

Both the applicant and respondent argued their cases on different readings of s 98 and cl 3.5(3) in terms of the right to stand-down employees and the obligation to pay. The Commission rejected both arguments and explained the correct interpretation of the two provisions and their relationship to each other. The Commission stated that the right to stand down employees in certain circumstances is given by s 98(1) of the Act. Clause 3.5(3) of the Award did not deal with stand-downs but with the circumstances under which employees, permissibly stood down during wet weather under s 98(1) of the Act, should be paid for time lost. This is the correct reading of the word in the clause stating that it was subject to the stand-down provisions in the Act. The employer in this case had the right to stand-down employees in wet weather by virtue of s 98(1). Under s 98(2) they could be stood down without pay unless the Award stipulated for payment. Therefore the issue to be determined was whether the Award entitled the employee to be paid in the circumstances in which he was stood down.
Entitlement to pay during stand-downs
Under cl 3.5(3) employees are to be paid for time lost provided they turn up and hold

themselves ready to work. If the employer has no work and no supervisor available to direct employees in alternative tasks or training, the employees will still be entitled to payment for the ordinary hours of work which would have been performed. However, the Commission did not agree with FEDFA's argument that cl 3.5(3) required the employer to pay employees stood down for wet weather, even when they had been advised not to attend work. The Commission stated that "The right of an employer not to pay an employee stood down under s 98 of the Act is only displaced to the extent that it does not apply when the circumstances in cl 3.5(3) are met. Employers are still entitled under s 98(1) and (2) of the Act to stand-down employees covered by the *Civil Construction Award*, without pay, by determining that work is not available due to wet weather, or for some other reason beyond the employer's control, and advising the employee of this prior to their reporting to the site." (at p 11). What was determinative of the issue was whether the stand-downs of the employee on the days claimed were effected in a permissible manner under s 98(1). The Commission pointed out that the employer does not have a broad common law right to stand-down for wet weather; the right to stand-down was constrained under s 98(1) of the Act to circumstances where the employee cannot be "usefully employed" because of the circumstances falling under subsections (1) or (2). Furthermore, employees have the right under s 344 to challenge the validity of the stand-down and the non-payment.

Were the stand-downs permissible?
The question whether the stand-downs were permissible was considered. The Commission considered cases under equivalent provisions in earlier Acts and determined that the section requires employers to consider the circumstances of individual employees while determining whether useful work is available to occupy them and whether that work would be of net benefit to the employer.

The respondent did not adduce specific evidence to refute the employee's claims that he had attended and been ready to work on days covered by the claim. However the respondent submitted that the employee had failed to prove that he attended on each of the days, and a witness for the respondent expressed a belief that "common sense" should have told him no work would be available in periods of bad weather, he should have known to contact his supervisor, and that he may have attended merely in order to claim payment. There was no evidence from supervisors or other employees about standard practices of the respondent in wet weather, or of a standing instruction to employees to contact their supervisors to ask about the availability of work, there was no evidence of a written direction to that effect. The employer had not satisfied the Commission that the employee had ever been advised not to report for work on the days he claimed. The Commission had not been convinced that the stand-downs were effected because the employee could not be usefully employed

The onus was on the respondent to demonstrate that the stand-downs of the employee in the circumstances were permissible. The Commission considered that the onus had not been discharged. The employee was entitled to be paid for ordinary hours when stood down during the hours claimed.

Allowable 'set-off' against underpayment
The final issue for determination was whether payments for annual leave, sick leave, flexi-time and rostered days off can be set off against the claim for underpayment of wages. The Commission concluded that employer's flexi-time system was not allowable under the Award. The Award allowed for the banking of rostered days off, but not for banking of hours. The respondent did not operate a system of rostered days off as provided for by the Award. The employee was entitled to be paid overtime rates when overtime was worked; those hours could not be banked to offset lack of payment for wet weather days. The flexi-time system as it operated here, resulted in employees being paid ordinary time rates during hours when actually working overtime and eligible for overtime rates. The employee had therefore lost overtime payments.

The question of accessing annual leave payments to cover days on which the employee was not paid for stand-downs, had difficulties because in essence the employee was "cashing in" part of his annual leave entitlement to cover days of stand-down when he should have been paid. Taking payment in lieu of leave entitlements is not allowed under the award. Both employer and employee were in breach of this provision. However, the evidence showed that, had he not accessed his leave entitlements in this way, the employee would not have been paid for those days. On balance, the Commission determined that the employee had lost pay because of being stood down in that the period of his annual leave had

been reduced. Therefore he was entitled to recover the particular days of annual leave which he used to cover periods of stand-down for bad weather.

The Commission was prepared to set off 30.4 hours of sick leave taken, and 68.40 hours of true annual leave taken, against the days claimed. The Commission determined that the employee was entitled to ordinary time pay for the remaining hours he was stood down, plus meal allowances for hours of overtime worked.

East End Hotel AND Employees of East End Hotel
East End Hotel — Certified Agreement

(CA429 of 2002), 10 January 2003, (2003) 172 QGIG 90

Industrial Relations Act 1999, s 156 — Application to certify agreement

This was an application to certify an agreement made between the employer hotel and its employees. Shortly after the application was lodged, a letter was received by the Industrial Registrar alleging that the process followed by the employer with the employees in making and seeking approval for the agreement did not comply with the requirements laid down in the Act, and questioning whether the agreement passed the "no-disadvantage" test. The letter was signed by an employee, who wished to remain anonymous, and purported to be written on behalf of a majority of employees, none of whom was named.

Under s 329 of the Act, the Commission may direct that persons who have not been called to attend proceedings are called if it appears they should be present; it may also direct who may be heard in proceedings and on what conditions. Under s 320, the Commission may inform itself on a matter it considers appropriate in the exercise of its jurisdiction. Exercising these powers, the Commission informed the parties at the first hearing that it had been decided to select a number of employees at random, and have them attend a hearing scheduled for 11 November 2002. Those employees would be asked a series of questions about the process followed in negotiating the agreement and the ballot to obtain majority approval, and about the "no disadvantage" test.
At the conclusion of the November hearing, the Commission indicated that on the basis of the testimony by the employees and other witnesses, as well as written evidence and submissions before the Commission at that time, it was prepared to certify the agreement. The reasons for agreeing to certify it included the following.

Compliance with the Act
The Commission made a close analysis of the agreement in terms of s 156 of the Act and found the requirements in that section were largely complied with. The Commission had reservations about certain provisions, but gained undertakings from the employer to ensure those unsatisfactory aspects were addressed. The Commission found on the evidence that:

- Written notice of intention to begin negotiations had been given by the proposer (the employer) to all other proposed parties (the employees) at least 14 days prior to commencing negotiations, as required under s 143.
- To comply with s 144, the employees had been advised in writing of, and able to attend, a meeting where the agreement-making process was discussed and their questions raised and addressed; they had been given copies of the agreement and had been advised they could have union representation to assist in the negotiations. The ALHMWU attended a conference with the employer and obtained amendments to, and undertakings about, certain provisions. There was no evidence of coercion in relation to union representation during negotiations.
- The agreement was in writing and signed by the general manager of the employer, and by Ms L, on behalf of the employees. There was no requirement in the Act that a person who signs on behalf of a valid majority of employees must be appointed as their agent; accordingly, the Commission considered that the agreement had been signed for all parties as required by s 156(1)(c)
- The agreement included a grievance procedure clause and the ALHMWU had obtained an undertaking that that procedure would include provision for an industrial representative in any disputes procedure. The employer gave a formal undertaking to that effect (included in a schedule to this decision) to the Commission at the hearing

Secret ballot
The question whether a valid majority of employees voted in favour of the agreement was contentious because of certain aspects of

the secret ballot process. The employer had numbered the ballot papers, apparently in order to ensure the integrity of the process. In addition, the employees had had to sign a book before taking a ballot paper. To overcome the obvious problems with the process, the papers had been shuffled, were placed face down so that the number was not visible to the employer, and each employee was free to choose any paper from the pile; the votes were placed by voters into a sealed ballot box. However, some employees were unable to be present on the day of the ballot and had had to cast a "postal" vote prior to the ballot day, signing for and choosing their ballot papers as the other employees would do, and placing their votes into envelopes, which were sealed before placing into the sealed ballot box. The counting was done by the employer's manager in the presence of an employee representative and the employer's solicitor. The employees had been sent a general invitation to attend the count.

The Commission expressed reservations about this process, (including comments made by the employer's manager about hoping for a "yes" vote) and indicated that it was inadvisable for an employer to mark ballot papers in any way. Notwithstanding that, the Commission found no evidence that the numbering was used to identify employees or how they had voted, and no evidence of coercion in the conduct of the ballot. On balance, the Commission was satisfied that the agreement was validly approved by a valid majority.

No-disadvantage test

The issue of whether the agreement passed the "no disadvantage" test, as required by s 160, had also raised concern. Under the "no disadvantage" rule, the Commission must be satisfied that an agreement will not result in a reduction in the affected employees' entitlements and protections, when compared with certain parts of the Act, a general ruling of the full bench, or a relevant or designated award, or industrial agreement. At the hearing, the Commission expressed concerns about aspects of certain clauses dealing with: termination of employment; change, termination and redundancy; annual leave; grievance procedures (referred to above); classification of employees; hours of work; and wages and penalty rates. Undertakings were given by the employer to address the potential deficiencies; those undertakings were published in a schedule to this decision.

The Commission also discussed the "anonymous" communications which had been received by the Registrar and the Commission, in relation to this application (and which were still being received after the hearing). The Commission pointed out that it had sought to investigate the matters alleged in those communications. The Commission had used powers under s 329 of the Act to inform itself about issues raised, by requesting attendance of a randomly selected group of employees to testify under oath about the agreement negotiation and ballot process. It had put the allegations to the employer and the employees at the hearing, in accordance with principles of natural justice. While the Commission is not strictly bound by the rules of evidence, it cannot ignore basic principles entirely. The anonymous communications were not in the form of an affidavit or statutory declaration. The person was willing to be identified to the Registrar and the Commission, but not to the employer. Under those circumstances, the Commission had made attempts to investigate the allegations in accordance with principles of natural justice, while also maintaining the person's anonymity. The Commission is required to act in a judicial manner and must ensure procedural fairness.

The Commission has little basis on which to refuse to certify agreements, and, provided that it is satisfied that the requirements of the Act are met, it must approve certification. Accordingly, following the close analysis of the proposed agreement and on the basis of the sworn evidence and submissions, the Commission determined to certify the Agreement.

The Bacon Factories Union of Employees AND Darling Downs Foods Ltd

(B773 of 2002), 23 January 2003, (2003) 172 QGIG 748

Industrial Relations Act 1999, s 74 — Application for reinstatement

This was an application for reinstatement by the Bacon Factories Union on behalf of a former employee of Darling Downs Foods, who had been summarily dismissed for alleged gross misconduct. The misconduct complained of related to an incident when the employee reacted vehemently to questioning by a supervisor, and used foul language in his responses.

The employee had left his workstation to get more cartons, having run out. He had not told his leading hand where he was going, and had not removed his apron in breach of the company's hygiene policy. He was seen by a supervisor who questioned him, but appeared to be satisfied with his explanation and directed him to sanitise his apron before returning to his station. That is what he did. However another supervisor, advised of the incident questioned him later about it and the reasons for his breach of hygiene rules. He grew angry, believing the matter had been dealt with, and used language that the supervisor found unacceptable and abusive. The supervisor alleged the abusive language was directed at her and took the matter to management.

Employer's investigation
The employee was suspended immediately without pay. This was contrary to an agreement the company had with the union not to suspend people without pay. The union had them change the suspension to "with pay" while the matter was investigated. Following the investigation by the HR manager, the company found the employee guilty of gross misconduct and he was summarily dismissed. The investigation involved interviews with the two supervisors, the shift supervisor, and the leading hand on the employee's process line, and a meeting with the employee and union representatives at which the supervisors were present. No record of the meeting was kept apart from incomplete, handwritten notes made by the HR manager, which were not shown to the employee or the union representatives. None of the workers in the area was interviewed.

Commission's findings on abusive language
The Commission considered the evidence surrounding the events, witness testimony, the type of language used, and the manner in which the company had conducted their investigation. Some of the witnesses called for the company referred to being intimidated by the applicant; some alleged bullying and the presence in the workroom of a gang of which the applicant was a member. The Commission found those allegations unsubstantiated. The applicant admitted to using the particular bad language several times during the altercation, but the Commission accepted his statement that it had been used in frustration generally at the second lot of questioning and embarrassment that it was done in front of other workers; and that the language was not directed personally to the supervisor. The Commission considered the extent of behaviour that amounts to "gross misconduct" and the problem of language, that some people found offensive, being used at the workplace. Cases reviewed indicated that, for conduct to justify summary dismissal, it must be so serious as to amount to a rejection of term(s) of the contract of employment. Although the employee had declared himself to be sick of the rules, there was nothing in his language that expressed an intention not to be bound by them.

The Commission considered decisions where the issue of foul language in particular had been explored and agreed with the statement of Swan C in *Cahill v Big W Ltd* (2000) 163 QGIG 287 at p 289, that "those words may well continue to be offensive to many people and for those people the use of such words under any circumstances in their presence is anathema to them. However, one would not be facing reality if one thought that language such as that described was not becoming more the norm." The Commission agreed also with the subsequent comment of Swan C that abusive language directed *personally* at work colleagues was "fraught with danger" and that community standards would continue to see that as inappropriate. While the Commission found the employee's conduct unacceptable and warranted a warning, his conduct in that work environment on this occasion did not constitute gross misconduct and did not establish grounds for summary dismissal. There was no evidence of a prior history of misconduct apart from a warning about absences in 2001. Accordingly, the dismissal was found to be harsh, unjust and unreasonable.

Investigation process
The Commission thought it was important to review the investigation process the company had undertaken and expressed concerns about its deficiencies. Despite the fact that evidence showed several employees had overheard the altercation, only supervisors were interviewed, leading to the conclusion that an unbalanced account of the facts was gathered. The decision to suspend the employee immediately without pay was against the express agreement signed with the union. That agreement was put in place to give time to the union to investigate the circumstances and review the decision to suspend with the employer, before it was implemented. The Commission also expressed astonishment that a company of this size kept no formal record of disciplinary interviews, and the employee was not given a record of interview to sign.

Remedy
The union sought reinstatement of the employee to his former position and classification, possibly somewhere else in the plant, but preferably on the same shift in order to receive a comparable income. In support of this, the union pointed to an incident in which another employee who abused his supervisor was given a warning an allowed to continue working. In that incident the supervisor was male, and was not offended by the abuse. The Commission was concerned at the differential treatment in terms of penalty, and stated that the central issue in these matters was not personal reaction, although that might be one consideration; the primary issue is whether the abuse of a supervisor occurred, not the gender of the supervisor.

The primary remedy for unfair dismissal provided for in the Act is reinstatement. The company argued that was impracticable because of the alleged bullying manner of the employee. The Commission had not found those allegations substantiated, and, given the size of the company's operation, the length of the employee's service, and the fact that he wished to be reinstated, the Commissioned determined that reinstatement was the appropriate remedy. Since the Act required that reinstatement should be on conditions at least as favourable as those prior to dismissal, the Commission ordered that he be reinstated to a position at the same classification on the same shift. The parties were instructed to confer on issues regarding recovery of lost wages and continuity of service, before those matters were re-listed for hearing.

⬩◈⬩◈⬩◈⬩◈⬩

The Australian Workers' Union of Employees Queensland AND Sunshine Coast Private Hospital

(W140 of 2002), 19 February 2003, (2003) 172 QGIG 1097

Industrial Relations Act 1999, s 278 — Application for unpaid wages [pro rata long service leave]

The was an application by the union on behalf of a former employee of the hospital for payment of accrued long service leave claimed to be due and payable to him on termination of his employment, under s 43 of the Act. The employee had worked at the hospital from July 1993 to May 2002. His employment was terminated by his resignation in circumstances where the employer had given him the option of resigning or being dismissed. He claimed to have been suffering from stress for some time and there was evidence to support this claim from a hospital doctor and others. In fact, he had attended the "performance management" meeting at which his employment was terminated with a medical certificate intending to request a week's sick leave. The respondent had been concerned about the employee's poor work performance in the months since a new computerised system had been installed, and had been conducting weekly performance counselling meetings with him. It was prior to the last of these that the decision to terminate his employment was made.

The respondent claimed that the employee resigned voluntarily rather than be dismissed because of poor performance, and therefore was not entitled to claim pro rata payment of long service leave. The applicant claimed the employee had resigned under duress and that the chief reason for the resignation was his illness, so that he was entitled to payment under s 43(1)(b). The chief issue for determination was whether he had terminated his employment "because of [his] illness or incapacity": s 43(1)(b)(i).

The Commission analysed the evidence in detail and found that, while it showed that he did not expect to be dismissed at the final meeting, the employee had resigned voluntarily; he had not been constructively dismissed for a reason relating to his work performance. Further, there was ample evidence that he had been suffering work-related stress for some time, which should have been apparent to his supervisors. The employer acknowledged his distress at the final meeting, but denied any knowledge of work-related stress. The problem involved determining whether the stress-related illness was what had caused his decision to resign rather than his concern not to have a dismissal on his employment record.

The Commission reviewed cases on the issue, in particular the case of *Computer Sciences of Australia Pty Ltd v Leslie* (1983) 83 AR(NSW) 828. That case considered the matter in terms of the following questions:

❖ *What was the reason for the termination?*
The Commission evaluated the evidence, including that of the doctor who had seen him on a number of occasions, and was satisfied that the employee had an illness at the time of termination, which fell within the meaning of s 43(1)(b).

- *Was the reason genuine and not a rationalisation of another reason for the termination*

The respondent contended that even if the employee had an illness at the time, it was not the real reason for the termination, but a rationalisation of a situation where he would otherwise have been dismissed for poor work performance. The Commission found this argument without substance. The employee had no expectation that the final meeting would be anything other than a performance counselling meeting in line with those of the previous two weeks; he had obviously been suffering physical symptoms associated with stress for some months; he did not make the claim only when faced with dismissal and then produce a medical certificate. The Commission was satisfied that the reason given by the employee was a genuine one.

- *Was illness the real or motivating reason for the decision to resign*

While the employee was also concerned not to have a dismissal on his employment record, the Commission was not satisfied with the respondent's contention that he had no choice other than to resign or be dismissed. The employee was supported at the meeting by a representative of the union. While both were evidently surprised at the turn of events, they could have sought an adjournment or a delay of the decision in order to contest the matter. It was evident that the employee was distressed at the time and the Commission was satisfied that the motivation for his choosing to resign was his illness.

- *Did the illness cause the employee to terminate his employment*

On the question of cause and effect, the Commission stated that the appropriate enquiry was whether the reason claimed was the reason upon which the employee placed the most weight in making his decision. In the Commission's view, the illness did not have to necessitate the termination or that it must be such that he would be unlikely to return to the workforce. After reviewing the specific facts and circumstances, the Commission was satisfied that the illness caused the termination of the employee's employment at the time.

- *Did the illness affect the employee in relation to the particular employment terminated*

The evidence of the doctor who had been treating the employee showed that he had been finding it difficult to cope with his job for some time. His job required him to continue to perform the work that had been causing the stress, and which was the cause of the illness at the time of his resignation. The illness evidently did affect him in respect of the particular service which was terminated

- *Was the decision to terminate reasonable in the circumstances?*

This issue required an assessment of whether a reasonable person in the same circumstances would have terminated the employment. The test of whether the decision to terminate on the grounds of illness was reasonable not a subjective one: the real question is whether a reasonable person in the same circumstances would have terminated his or her employment. On the facts presented the Commission considered that a reasonable person in the position the employee was in at the time of resignation would have resolved the situation by terminating their employment.

Accordingly, the respondent was ordered to pay $8,850 being assessed as the portion due for accrued long service leave under s 43(4)(b)(i).

⬩◈⬩◈⬩◈⬩◇⬩◈⬩

Michael Lazarevich AND Jupiters Casino Group

(B1673 of 2002), 20 February 2003, (2003) 172 QGIG 1141

Industrial Relations Act 1999, s 74(2) — Application for extension of time

The applicant in this case was dismissed in April 2002. His application for reinstatement was not filed until October 2002, 172 days out of time. Section 74(2) of the Act states that an application for reinstatement must be lodged within 21 days after the dismissal takes effect or within a further time period the Commission allows on application.

The respondent dismissed the applicant following an incident in which an item of property went missing from a guest's room. Following an interview at which the applicant was unable to explain his involvement in the affair, he was suspended. On further investigation and review of the applicant's employment history, the employer determined that the incident had irreparably damaged the employer/employee relationship. He was dismissed for "gross violation of company policies".

The Commission reviewed cases dealing with applications for extension. In *Colefax v Jupiters Limited* (2001) 166 QGIG 4, Linnane VP cited *Breust v Qantas Airways* (1995) 149 QGIG 777,

where key factors taken into account were: the length of, and explanation for the delay; prejudice to the applicant if the extension were not granted and prejudice to the respondent if it were; and relevant conduct of the respondent. Linnane VP added 3 caveats: that s 74(2)(b) vests an unlimited statutory discretion in the Commission to allow an extension and this should always be exercised; the 21-day time limit in s 74(2)(a) must be respected; and that the applicant's prospects for success in the substantive matter is always a relevant matter for consideration.

Counsel for the applicant submitted that criminal proceedings following the dismissal occupied his client's attention. Charges were subsequently withdrawn by the police on 29 August. Counsel pointed to the case of *Crawford v Traffic Control (Metro) P/L* (2002) 169 QGIG 263 in which Bloomfield C granted an adjournment until District Court proceedings were determined.

The Commission was not satisfied that the criminal proceedings adequately explained the delay: a further 2 months elapsed after charges were withdrawn. The Commission also did not accept that it was the applicant's role to delay his application until that matter was dealt with: the reference to *Crawford's* case was no argument, since it was up to the Commission to decide on an adjournment pending a matter in another court. The applicant had legal representation; he should have filed an application and sought an adjournment as had been done in that case.

The notice of dismissal provided by the respondent made no reference to police investigations or criminal proceedings and was no impediment to lodgement of an application for reinstatement. The respondent did not appoint a replacement for 21 days and had done nothing to cause a delay in the applicant's lodgement.

The Act fixes a 21-day time limit; in this case the delay was substantial, and, considering the relevant factors and submissions, the Commission found no basis for departing from the statutory limit.

Mackay Sugar Co-Operative Association Limited AND AWU Queensland & Ors

(B255 of 2003), 26 March 2003, (2003) 172 QGIG 1676

Industrial Relations Act 1999 — s 274 — General powers — Application for exemption from severance allowance.

Mackay Sugar sought exemption from the general severance pay prescription in the *Statement of Policy on Termination of Employment, Introduction of Changes and Redundancy* (TCR Statement of Policy). The order sought related to employees who accepted an offer of alternative employment with Transfield Services (Australia) Pty Ltd under a business alliance between Mackay Sugar and Transfield. The employees covered would be those who accepted employment offers under the terms and conditions of the business alliance's Certified Agreement (CA 55 of 2003), prior to the order sought, or within 30 days after it.

"Acceptable alternative employment"
Under the TCR statement of policy, an employer may be exempted from paying severance entitlements where "acceptable alternative employment" is found for employees who are to be made redundant. Transfield and Mackay Sugar entered into a business alliance whereby Transfield would undertake certain maintenance work for Mackay Sugar which had previously been performed by Mackay Sugar's own employees. Transfield would offer alternative employment to relevant employees of Mackay Sugar. That employment would be regulated by the Certified Agreement which had terms and conditions no less favourable than those applying at Mackey Sugar. All accrued employment entitlements such as sick leave, long service leave and other benefits would be retained by the employees who accepted the 'transfer' to Transfield.

The Union raised concerns surrounding any possible future dismantling of the alliance. In that case, Mackay Sugar undertook to re-employ all employees who were involved in this alliance. However, the AWU was concerned that in that event, employees' TCR entitlements were not protected. The Commission was satisfied that the final order sought by the applicants had been made to cover that issue. The application was granted.

QCCI Limited AND ETU Queensland Branch

(B1417 of 2002), 8 April 2003, (2003) 172 QGIG 1869

Industrial Relations Act 1999, s 331(b) — Application to dismiss or refrain from hearing

This was an application by the QCCI to have the Commission dismiss or refrain from hearing an application for payment of wages made by the ETU on behalf of an employee of Sherrin Hire (SH). SH was contracted to do work for Energex. The terms of their contract included a requirement that SH pay its employees rates of pay and allowances which were no less than those applicable to supply industry employees of Energex. The employee claimed he was paid less than the required rate. Since the employee was not a party to SH's contract with Energex, he could not enforce the contractual requirement as to rates of pay. The ETU argued that, despite the fact that the employee was not privy to the contract, it was arguable that s 55 of the *Property Law Act 1974* (Qld) (the *PLA*) applied to make SH's promise (ie to pay the set rates and allowances) enforceable by the employee. Under s 55, when 2 parties enter into an agreement whereby 1 party promises the other party that he/she will do something for the benefit of a third party, that promise may be enforceable by the third party, despite the fact that the third party is not privy to the agreement.

QCCI argued that the *PLA* was restricted to contracts concerning interests in land. It further argued that, even if that Act could apply to contracts for the payment of wages, the contract between SH and Energex was not one for the benefit of the employee, in that no consideration had passed from Energex to SH in return for a promise that SH provide a benefit to the employee. Therefore, it argued, the ETU and the employee had no standing to bring the claim and the application should be dismissed.

The Commissioner was not prepared to accept that the *PLA* could only be applied to contracts relating to interests in land. It was clear from the long title to that Act that it applied to contracts generally; and other specific provisions of the Act would be redundant if the Act were only to apply to real property. Therefore the Commissioner was not prepared to dismiss the application on that basis.

In terms of the argument that the contract in question was not one for the benefit of the third party employee, and therefore not one to which s 55 applied the Commissioner stated that the question could not be decided without first hearing the evidence. This would allow the Commissioner to determine the nature of the contract and whether the employee was a beneficiary or was even required to be a beneficiary under it.

The Commission decided that the argument advanced by the ETU on behalf of the employee was at least open and should be tested in view of all the evidence. Therefore the Commissioner was not prepared to grant the QCCI's application to dismiss or refrain from hearing the wages application.

Paul Cochrane AND Mayne Group Limited (No 2)

(B1779 of 2002); 24 April 2003; not yet gazetted.

Industrial Relations Act 1999 — s 74 — Application for reinstatement — Suppression order.

This application was brought by Mayne to have a decision and transcripts of an application for reinstatement suppressed on public interest grounds. The company was the parent company of Mayne Logistics Armaguard, former employer of Cochrane, which conducted a secure cash-in-transit business. When the former employee filed an application for reinstatement, the company successfully sought a suppression order in the Industrial Court ((2003) 172 QGIG 1139, summarised above, p 35). In the Industrial Court, the President made an interim order under s 679(8) that the reinstatement proceedings be heard *in camera* and that certain documents in the proceedings not be released, searched or published. The President remitted to the Commission the function of determining, after the reinstatement proceedings were complete and a decision issued, which parts of the transcript and what documents should be released from the order.

The s 74 application was heard and that decision released on 20 March 2003 (Decision No 1). The Registrar refrained from publishing the decision in the Gazette pending the current application by Mayne to have significant parts of the evidence, statements, documents and of the decision itself suppressed.

Public interest in justice being public

The Commission examined the schedule of relevant passages provided by Mayne and determined that in view of their extent, it would

be best to either suppress the whole of the evidence and transcript or none of them. The Commission quoted the President's discussion of the need to balance, on the one hand, the public interest in justice being public, and on the other hand, the public interest in maintaining security of the cash-in-transit business and safety of security company personnel, their clients and the public. The President left it to the discretion of the Commission to determine which documents should be released after the matter was concluded. In light of the volume of transcript and documentary evidence, the Commission was of the view that it was not possible to make a detailed examination of all documentary evidence and transcript in order to evaluate what did or did not qualify for suppression. Therefore, in light of the fact that the matter was now virtually concluded, the Commission considered this logistical problem outweighed the public interest in justice being public, and determined that those documents and transcripts should not be available for search or viewing.

Decision No.1 on Reinstatement
However, as regards Decision No 1 released in the matter on 20 March, the question was entirely different. Mayne sought to have 14 of the 30 paragraphs in the decision suppressed. The Commission considered that such extensive deletion would render the decision unintelligible. Mayne had sold its Armaguard business during the course of these proceedings and was no longer in the industry; the Commission assumed therefore that the suppression order was being pursued in the interests of the industry as a whole. The Commission considered that employees in the industry had a right to know under what circumstances their employers could be found liable for unfair dismissal. The matters raised in the case were of public interest across the whole of the industry. The Commission considered each paragraph sought to be suppressed and considered that, while some of them may be embarrassing to the former employer, since they might indicate a failure to supervise staff adequately and failure to ensure implementation of its own policies, that was not a reason to suppress a decision of a public body conducting litigation.

The Commission considered each of the subject paragraphs and determined that, with minimal deletions, Decision No 1 could be published in the gazette. That decision was included as Annexure A with this decision (Decision No 2).

The Commission ordered that the transcript of proceedings exhibits and submissions be withheld from release or search and that the decision be published with deletions as indicated. There was also an application for return of discovered documents. The Commission acceded to that request on an undertaking that Mayne would make available any of those documents that were subsequently required for a costs application which was pending.

ALHMWU Qld Branch AND Quest Security Pty Ltd

(B724 of 2003), 24 June 2003, (2003) 173 QGIG 803

Industrial Relations Act 1999 — s 74 — application for reinstatement — request that leave be granted for legal representation [s 319]

The respondent in this matter sought leave to be represented by a lawyer. The applicant opposed the request. No application for legal representation under s 319(2) had been filed as required under the Rules.

Right to be legally represented
Under s 319(2) legal representation may only be permitted for Chapter 3 matters if there are special circumstances that make it desirable, or if the Commission is satisfied that the party can be adequately represented only by a lawyer.

The ALHMWU argued that the respondent could be adequately represented by a lay advocate, since the matter was no more than a "nuts and bolts" industrial relations matter. It contended that s 319 was a restrictive provision and should not be read to remove the restriction where there was doubt.

The respondent argued that the allegations against it were serious and could involve significant penalty (it was alleged that the termination was for an invalid reason relating to freedom of association), and furthermore that the issues surrounding the matter were complex.

The Commission discussed the arguments put with regard to the comparability of lay advocates and legal representatives in matters such as these. The Commission was not persuaded that the 'restrictive' nature of s 319 was at a level as high as that proposed by the ALHMWU. The Commission also considered the matter involved more than merely 'nuts and

bolts' industrial issues; the allegation of invalid reason for termination was a serious matter, potentially involving significant penalty and would require close examination of witness evidence.

The Commission determined that this was a case where, taking into account matters as outlined in s 319(4), legal representation should be allowed to the respondent.