2005 Annual Report

of the President of the Industrial Court of Queensland

in respect of the

Industrial Court of Queensland, Queensland Industrial Relations Commission and Queensland Industrial Registry

Industrial Court of Queensland

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November 2005

The Honourable Tom Barton, MP
Minister for Employment, Training and Industrial Relations
Level 6
75 William Street
BRISBANE QLD 4000.

Dear Minister

I have the honour to furnish to you for presentation to Parliament, as required by section 252 of the *Industrial Relations Act 1999,* the Annual Report on the work of the Industrial Court of Queensland, the Queensland Industrial Relations Commission, the Industrial Registry and generally on the operation of the *Industrial Relations Act 1999* for the financial year ended 30 June 2005. The report relating to the Industrial Registry has been prepared by the Industrial Registrar whose assistance is acknowledged.

D.R. Hall
President
Industrial Court of Queensland

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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.*** *The Act 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 in January 1917. The 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 contained 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 in August 1999.

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)).

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

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 1999* 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. There have been no such applications this year.

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 were two cases stated to the Court by the Commission. (Table 1 shows that last year there was four cases stated.)

Offences under Industrial Relations Act 1999

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: i.e. 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 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 instrument 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.

Appellate Jurisdiction of the Court

Matters filed in the Court are predominantly appeals (see Table 1). Appeals to the Court against decisions of the Commission under the *Industrial Relations Act 1999* 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* [2004] 2 Qd.R. 359 at [366] 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 *Vocational Educational, Training and Employment Act 2000* may be appealed to the Court. Such appeals are available on a question of law only: *Vocational Educational, 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 1999* (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 *Workers' Compensation and Rehabilitation Act 2003:* see ss.561 and 562.

The Court is the final appeal court for prosecutions under the *Workplace Health and Safety Act,* the *Electrical Safety Act* and the *Industrial Relations Act,* and for compensation claims under 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 two appeals filed under this provision during the year.

Table 2 shows a marginal decrease in the number of appeals over last year's figure. Table 3 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 1999* 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.563 of the *Workers' Compensation and Rehabilitation Act.*, if the Court is satisfied that the party made the application vexatiously or without reasonable cause. However, because of the wording of s.563, 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 question of costs is invariably 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 8 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 2003–04 and 2004–05

Type of Matter	2003–04	2004–05
Appeals to the Court	84	75
—Magistrate's decision	43	35
—Commission's decision	39	35
—Registrar's decision	0	0
—Director, WH&S decisions	2	2
Electrical Safety	0	3
Stay order	10	13
Direction to observe/perform Industrial Org rules	0	0
Case stated by Commission	4	2
Prerogative order	0	0
Application for orders – other	6	2
TOTAL	104	92
Number of Court Decisions Released	75	52
—includes decisions on Costs (separately or with substantive decision)	15	8

Table 2: Number of matters filed in the Court 1994–95 to 2004–05

1994–95	60	1999–2000	61
1995–96	89	2000–01	74
1996–97	81	2001–02	102
1997–98	90	2002–03	100
1998–99	95	2003–04	104
		2004–05	92

Table 3: Appeals filed in the Court 2003–04 and 2004–05

Appeals from decisions of Industrial Commission	2003–04	2004–05
IRA s.341(1)		
• Disputes	39	35
• CAs	0	0
• Wages	1	1
• Reinstmt/contr	7	10
• Organisations	20	16
• Awards	3	2
• Trading Hours	1	0
• Whistleblowers	1	0
• Other	6	6
V ET & E Act s.244	0	0
SUBTOTAL	39	35
Appeals from decisions of Industrial Magistrate	2003–04	2004–05
IRA s.341(2)	14	6
WorkCover Act s.509	14	14
VETE Act 2000	0	1
WH & S Act s.164(3)	15	14
SUBTOTAL	43	35
Appeal from review decisions by Director WH & S	**2**	**2**
Electrical Safety Office	**0**	**3**
TOTAL	84	75

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 plays a major role in contributing to the social and economic well-being of Queenslanders through furthering the objects of the *Industrial Relations Act 1999* which are principally to provide a framework for industrial relations that supports economic prosperity and social justice.

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. The Act requires Deputy Presidents to provide assistance to the Vice President in administration of the Commission and the Registry, and in determining the Member who is to constitute the Commission for each matter. 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. AIRC Commissioners 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
Ms DM Linnane	Vice-President 2.8.1999
Ms DA Swan	Deputy President 3.2.2003
Mr AL Bloomfield	Deputy President 3.2.2003
Mr KL Edwards	Commissioner 2.8.1999
Ms GK Fisher	Commissioner 2.8.1999
Mr RE Bechly	Commissioner 2.8.1999
Mr BJ Blades	Commissioner 2.8.1999
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 ordinarily 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 to 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 *Vocational Educational, Training and Employment Act 2000* (considered below).

Industry Panel System

Under s.264(6) of the Act, the Vice President must establish industry panels. 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 2004.

Commission's Powers

As indicated already, the Commission's functions are outlined in Part 2 of Chapter 8 in the *Industrial Relations Act 1999*. 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 and 320.

Table 5: Industry Panels 2005

Deputy President Swan	**Deputy President Bloomfield**
Commissioner Bechly	Commissioner Edwards
Commissioner Blades	Commissioner Brown
Commissioner Thompson	Commissioner Asbury

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

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 and 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 and 138; and orders fixing wages and conditions for employees on labour market programs, and for students in vocational placement schemes: ss.140 and 140A;
- resolve industrial disputes (s.230), or assist parties to negotiate certified agreements (ss, 148 and 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 instrument, 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 industrial 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 $50,000 (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 and 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.
- 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 *Vocational Educational, 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). In certain circumstances, the Commission may review an organisation to determine whether it should be de-registered (see ss.645 and 646). There was no application for de-registration during 2004–05.

Table 6 indicates the volume of matters relating to industrial organisations during the year. More detail is provided in Table 11. More information about industrial organisations and matters relating to them is provided later in this Report

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

Table 6: Applications filed and Matters heard 2003–04 and 2004–05

Section	Type of Application/Matter	2003–04	2004–05
s. 53	Long Service Leave—payment in lieu of	123	71
s. 74	Application for Reinstatement (Unfair dismissal)	1575	1469
s. 74(2)(b)	Application to extend time for filing	1	0
s. 87	Application for severance allowance	5	7
	Exemption from requirement to pay severance or redundancy entitlements	6	8
s. 90	Order re redundancy—over 15 employees	0	0
s. 120	Prohibited conduct—breach	17	10
s. 125	Awards:		
	—New award	6	16
	—Repeal and replace award	4	31
	—Rescind award	2	2
	—Amend award	134	115
s. 130	Review of Award	15	0
s. 132	Exemption from Award	0	0
s. 137	Order—wages & conditions (trainees)	7	7
s. 138	Order—tools (trainees)	0	0
s. 140	Order—trainees' conditions order	0	0
s. 148	Assistance to negotiate a CA	37	32
s. 156	Application to approve a new CA	361	340
s. 156	Agreement replacing existing CA	635	293
s. 163	Designated Award	9	0
s. 169	Amending a CA	10	27
s. 172–173	Terminate a CA	4	15
s. 176	Secret ballot re industrial action	0	0
s. 177	Authorisation to take industrial action	246	192
s. 184	Ballot on CA	0	0
	Dispute—re: ballot for CA	0	0
s. 203	Application to approve a QWA	87	56
s. 229	Notification of dispute	486	534
s. 230	Request for orders to settle/arbitrate dispute	9	5
	—Arbitration	7	4
	—Mediation	0	0
	—Other orders	1	1
s. 231	Application for mediation	0	1
s. 265(3)	Inquiry about an industrial matter	0	0
s. 274	Application for directions/orders	1	5
s. 275	Declare class of persons to be employees	0	0
s. 276	Application to amend/void a contract	29	23

s. 277	Application for injunction	8	3
s. 278	Claim for unpaid wages/superannuation	152	255
s. 279	Representation order (demarcation dispute)	0	0
s. 280	Application to re-open a proceeding	10	6
s. 281	Reference to a Full Bench	0	1
s. 284	Interpretation of industrial instrument	3	3
s. 287	Application for general ruling	2	2
s. 287(5)	Exemption from general ruling	0	0
s. 288	Application for statement of policy	0	0
s. 288	Statement of policy and general ruling	2	3
s. 319	Representation of party/Legal representation	0	0
s. 326	Interlocutory orders	0	0
s. 329	Application to be named as party	0	1
s. 329(h)	Application for adjournment	0	0
s. 331	Application to dismiss/refrain from hearing	16	14
s. 335	Costs	2	1
s. 342	Appeal to Full Bench	3	2
s. 342	Leave to appeal to Full Bench	4	1
s. 408F	Repayment of private employment agent's fee	3	1
s. 409–657	Industrial Organisation matters [Table 11]	65	68
s. 695	Student work permit	6	5
s. 696	Aged and/or infirm permit	49	36
s. 713	Industrial agreement has effect as an award	0	42
T(AH) Act	Trading hours order	9	13
T&E Act s. 62	Reinstatement of training contract	2	4
T&E Act s. 230	Apprentice/trainee appeals	8	3
	—extension of time to appeal	0	0
Whistleblower's s.47	Application for injunction	0	0
TOTAL APPLICATIONS/MATTERS		4099	3728
No. of Decisions released (excl. New Awards; Award amendments)		277	191
—Incl. Reinstatement Decisions released		75	60

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 313 Awards currently in force in Queensland. Table 6 shows that during the year there were sixteen new Awards made.

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. A second review of all awards has now commenced to ensure provisions remain relevant and current. Awards that were not reviewed in round one due to previously being outside the three year time limit are included. On 27 June 2005, the Commission released its Award Review Mark 11 decision. The General Ruling of the same date will lead to some 250 Queensland Awards being modernized to reflect more accurately, adjustments of wages and allowances of previous State Wage Case decisions from 1987 to 2004.

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 no 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 (s.148). As Table 6 shows, there has been a slight decrease 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 633 applications to approve a Certified Agreement. Of these, 340 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 2003–04 and 2004–05

Agreements & notifications filed	2003–04	2004–05
Certified agreements	996	633
Notice: initiation of bargaining period: s.143(2)	1	3
Notice: authorisation to engage in industrial action: s.177	246	189
Queensland Workplace Agreements	87	56

Table 8: Industrial Instruments in force 30 June 2005

Type of Instrument	Number
Awards	313
Industrial agreements	13
Certified agreements	4215
Traineeship agreements	1
Superannuation industrial agreements	136
TOTAL	4678

Industrial Agreements

Industrial Agreements (IAs) were made under the *Industrial Relations Act 1990.* A large number of Industrial Agreements remained in force by virtue of the transitional provisions of the current Act (s.713) and were effectively redundant, contained obsolete terms, or had not been amended since 1997 to reflect State Wage Case decisions. The Full Bench of the Commission issued a Statement of Policy on its intention to declare Industrial Agreements obsolete and compel parties to incorporate provisions into new or existing industrial instruments. Practice Notes 10 and 11 were issued to provide guidance about filing requirements and the format of Awards. The review has been completed with 13 Industrial Agreements remaining out of an original 798.

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 amendments 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.

Unfair dismissals

Table 6 shows that over 39% of matters filed in the Registry during the year were applications for reinstatement or "unfair dismissals". 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 member 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 Table 9. Of the many applications filed, a limited number proceed to formal hearings. Decisions on reinstatement applications made up 31% of the 191 decisions released during the year.

If the parties cannot reach agreement in the conference, the Member 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 Member must state that in the certificate. (Reasons for which an applicant may be excluded include: earning above the amount stipulated in the Regulation; being a short-term casual employee; or having been dismissed during a legitimate probation period.) The Member 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 may be represented by the union/organisation), or in some circumstances by lawyers.

Table 9: Reinstatement Applications 2004–05—Breakdown of outcomes

Reinstatement Applications 2004–05—Breakdown of outcomes	
Rejected by Registrar	24
No jurisdiction found by Commission	0
Application refused following hearing	0
Application dismissed following hearing	10
Application struck out at hearing	0
Application Granted following hearing	19
Application withdrawn	706
Lapsed	163
Inactive	21
Completed	4
Still in progress	471
Adjourned to Registry	51
Total No. of Applications	1469

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.

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 decrease in the number of applications to amend or void a contract during the year. 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 $90,400.

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 directed 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 a slight increase in the number of dispute notifications filed. These made up approximately 14% 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, and 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 slight decrease in the number of these requests during the 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 lower 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 ordered a secret ballot for this purpose.

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 were 2 cases stated to the Court by the Commission.

Full Bench

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.

Jurisdiction under Vocational Education, Training and Employment Act

The Commission has jurisdiction under Chapter 8 Part 2 of the *Vocational Education, 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 three apprentice/trainee appeals.

The Full Bench of the Commission

Under s.256(2) of the Act, the Full Bench is composed of three Members and 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.
- applications for leave to appeal under s.342

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 and from most decisions of the Registrar. 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 has been one application for leave to appeal to a Full Bench from a decision 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 11 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 may relate to workers employed in a particular industry under contracts for services (that is, as "independent contractors").

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 13 applications relating to trading hours. (See Full Bench decisions for more detail).

General Rulings and Statements of Policy

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.*

In making any such determination s.273 (2) of the Act requires that the Full Bench perform its functions in a way that furthers the objects of the Act. Section 320 of the Act requires the Full Bench to consider the public interest. In so doing the Full Bench must consider the objects of the Act and the likely effects of any decision on the "community, local community, economy, industry generally and the particular industry concerned."

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

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.

General Rulings and Statements of Policy are available on the Commission's website at: www.qirc.qld.gov.au

Costs

The Commission has 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. Table 6 indicates how many of these costs matters were dealt with.

Professional activities

During the year 2004–05, the Commissioners attended the following conferences and meetings:

- Commissioner Fisher participated in the *Australian Labour Law Conference in Sydney and the Industrial Relations Society of Queensland Conference.*
- Commissioner Bechly attended the *Europe Pacific Legal Conference* in Italy.
- Vice-President Linnane attended the *Industrial Relations Society Centenary Convention* in Melbourne, the *7th European IIRA Conference in Portugal and the American Congress of Labour Conference* in Mexico.
- Deputy President Bloomfield attended the *Industrial Relations Society Centenary Convention* in Melbourne, the *Industrial Relations Society of Queensland Conference,* and the *McCullough Robertson Conference* and participated in the *Harvard Law School Course* in Boston.
- Commissioner Asbury participated in the *Industrial Relations Society Centenary Convention* in Melbourne and the *Industrial Relations Society of Queensland Conference* and is studying for a law degree.
- Commissioner Blades attended the *Industrial Relations Society Centenary Convention* in Melbourne, the *Industrial Relations Society of Queensland Conference* and the *Australian & Irish Bar Conference* in Dublin.
- Commissioner Edwards participated in the *Industrial Relations Society Centenary Convention* in Melbourne and the *McCullough Robertson Conference.*
- Commissioner Thompson attended the *Celtic Pacific Legal Conference* in Ireland.

In addition, President Hall hosted a function for Mr Hun Soo Kim, the Director-General of the Labour Insurance Bureau and the Central Labour Relations Commission, Ministry of Labour, South Korea and Dr Guo Yue, Senior Research Fellow, Institute of Labour Studies and Chief of Labour Relations Research Division, Ministry of Labour and Social Security, Beijing, People's Republic of China in September 2004. The officials, sponsored by Griffith University, met with members of the Commission and observed a hearing before the Commission.

Commission and Registry Business Plan

The Commission and Registry Business plan continues to underpin the longer-term management of the Commission/Registry. The Business Plan includes how to best access the benefits of information technology that meets the needs of the Commission, Registry and the Queensland public.

The Business plan does not impinge on powers and functions of the Commission. Rather, the Business plan establishes a reference point for all management and administrative activity for the Commission to efficiently and effectively undertake its powers and functions.

The key priorities of the Business plan are listed below:

Priority One:

Contribute to the social and economic well-being of Queenslanders.

Objective: To provide all Queenslanders with independent conciliation, arbitration and agreement approval services, in respect of industrial matters including awards, agreements, prevention and settlement of industrial disputes, unlawful dismissals, unfair contracts and wage recovery matters.

Priority Two:

Business operations that meet the current and future needs of the Commission/Registry and the Queensland public.

Objective: Align the Registry operations to best support the Commission and best assist the general industrial relations community.

Priority Three:

Best practice service delivery for users.

Objective: Adopt service delivery innovation and improvement initiatives that will be effective and efficient, and are accessible and delivered equitably across the State.

Priority Four:

A highly skilled, motivated and adaptable workforce.

Objective: Create a positive and productive work environment that promotes leadership and innovation and ensures that staff capabilities (the right people with the right mix of knowledge, skills and experiences) contribute to efficient and effective work practices.

QUEENSLAND INDUSTRIAL REGISTRY

***The Queensland Industrial Registry** is the Registry for the Court and Commission.*

*The Industrial Registry is an office of the public service. The Industrial Registrar is the head of the Industrial Registry, under the **Public Service Act 1996.***

The Industrial Registrar is appointed under section 297 of the *Industrial Relations Act 1999* and apart from administering the Registry has the functions conferred under that Act and other Acts.

The Court, Commission and Registrar are independent of government and other interests. Funding for the Court, Commission and Registry is provided through the Department of Industrial Relations, with the Department being sensitive to the need to maintain this independence.

The Registry provides administrative support to the Court, Commission and the Registrar and also provides a facilitative service to the general industrial relations community.

Staff of the Registry assists all users of the Court and Commission through:

- responding to public enquiries;
- assisting users with procedures and processes;
- receiving and filing applications to the Court, Commission and Registrar.

Staff of the Registry also provides support to Members (and Associates) through:

- assisting in administrative activities of each application (e.g. tracking matters, notifications to applicants and respondents);
- organising conferences and hearings;
- library research services for Members;
- publishing decisions; and
- corporate services.

Hearings before the Court and Commission are recorded and a transcript is typed by the **State Reporting Bureau** which is part of the Department of Justice and Attorney-General.

Applications filed and processed by Registry

During 2004–05, a total of 3820 applications and notifications were filed in the Registry (see Tables 1 & 6).

In addition to registering these applications, Registry staff processed and tracked tens of thousands of related documentation, such as directions orders, statements, submissions and general correspondence.

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 2005.

Table 10: Registry Performance Indicators 2003–04 and 2004–05

Criterion	Target	2003–04	2004–05
Notify parties to dispute conferences within 5 working hrs	99%	99%	99%
Process applications within 8 working hrs	95%	98%	95%
Initial processing of agreements within 3 working days	90%	100%	95%

Other Registry work

The Registry has demonstrated a capacity to carry out a range of project work in addition to achieving day to day requirements for client service delivery.

In addition the Registry has assisted the Commission in the second round of Award Review, a review of Industrial Agreements and is undertaking an internal examination of all certified agreements to commence a review to ensure relevance and currency.

Accommodation

The Registry with the support of the Department of Industrial Relations investigated options to address a number of emerging accommodation issues involving the Commission and Registry at Central Plaza 2, 66 Eagle Street, (Corner Elizabeth and Creek Streets), Brisbane.

On Tuesday 29 March 2005, the Registry consolidated its operations from levels 2 and 14, by relocating to level 18.

Prior to March 2005 the Queensland Registry shared accommodation with the Australian Industrial Registry (AIR). The Registry and the AIR are still located in the same building and share joint library services. The Registry continues to work cooperatively with the AIR.

Refurbishment of level 13 which is occupied by the Court, Commission, Library including four hearing rooms and 3 conference rooms, was undertaken. This included replacing all carpets and a full repaint. Minor structural work was also undertaken in two Members' Chambers and the Library.

Organisational capability of the Registry

The Registry, through various projects, continues to progress a number of business improvement activities aligned to the Commission/Registry Business plan designed to provide significant benefits to the Commission, Registry and Queensland Public.

An Information Systems plan detailing information and communication technology strategies supports the key priority areas of the Business plan, including accessing "e-court" information systems.

The Commission/Registry Information Systems plan is incorporated into the Department of Industrial Relations Information, Communication and Technology (ICT) Resources Strategic Plan. The inclusion is important because of the information intensive environment in which the Commission and Registry functions. Importantly, the DIR ICT Resources Strategic Plan recognises the independence of the Commission and Registry.

In particular, a program to modernise the information and business systems of the Commission and Registry including adoption of electronic service delivery has been underway for some time.

Phase 1, the development of a new computerised system which will underpin the Commission and Registry judicial and business operations and form the foundation for many future e-court initiatives, is soon to be completed.

The system will provide the Commission and Registry with a J2EE application that integrates current email and fax solutions and providing improved functionality including a process for redefining current work procedures and policies, including electronic lodgement of documents.

The upgrade of the network to cater for the new system has already produced the benefits of remote access for Members and Associates.

The move to a standard operating system, including new email and document management software, has facilitated the capacity to receive and store electronic transcripts so that it is readily available to Members.

The use of the Commission's web site at www.qirc.qld.gov.au has increased markedly and is now integral to the conduct of the Commission's business. **Approximately 55,000 visits were recorded on the web site during the period January–June 2005, an increase of 44% for the identical period 2004.** On average 304 visits per day compared to 210 visits in 2004 for the same period.

Greater emphasis is being placed on the production of electronic information guides and facts sheets specially directed at supporting self-representing parties, industrial organisations, dispute resolution and the unfair dismissal jurisdiction. The web site is being redesigned to reflect survey responses and contains updated full text decisions, hearing lists, procedures, forms, legislation and new initiatives.

The development of an intranet web site for the Commission and Registry will see it become the major internal access point for administrative information and legal research materials further improving the quality and timeliness of advice to clients.

Internal training on the use of the new Industrial Matters System (IMS) and the restructured intranet is continuing for Commissioners, associates and for registry staff to enhance their development and continuous learning.

In 2005 AC Nielsen conducted a client satisfaction survey of the Industrial Registry Office based on a random sample of 150 clients. The overall goal of the survey was two-fold. Firstly, to understand client needs and promote service delivery coverage, innovation and improvement in the Registry. Secondly, to identify opportunities to enhance the delivery of information services and to assess the extent to which the mechanism

for delivery of web services could be improved and integrated. The level of reported client satisfaction was 91% and 76% respectively.

The Registrar initiated a Registry Management Group (RMG) comprising of senior staff of work units from within the Registry. The RMG meets regularly to further the development of an organizational culture, which values client service excellence, workplace improvement through shared leadership, devolved accountability and operational effectiveness.

The Registrar is finalising a reassessment of roles and responsibilities of all Registry staff with a view to implementing a new organisational structure aligned to best support the Commission and the Queensland public. This has been undertaken through examining and testing a range of workflows, and improving the skills of staff to meet identified business requirements in accordance with proposed functions.

The new organisational structure of the Registry together with proposed business improvement initiatives will provide for greater interaction with the industrial relations community, expedite timeframes for conferences and hearings and improve the efficiency and effectiveness of the QIRC system.

Industrial Registrar's Powers

The Registrar exercises a range of powers under the *Industrial Relations Act 1999*.

The Registrar makes certain preliminary decisions about applications and other documents lodged to ensure that they comply with the Act and the *Industrial Relations (Tribunals) Rules 2000.*

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. The majority of applicants excluded are generally those found to be short-term casual employees as defined in s.72(8) or employees still within the probationary period (unless the dismissals are claimed to be for an invalid reason, as stated in s.73(2)).

During the year, the Registrar has rejected 24 applications for reinstatement under s.72 of the Act (see Table 9).

The Registrar's powers 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.

The Registrar's powers also includes the granting of an exemption from membership of an organisation because of the person's conscientious beliefs (s.113) and the issuing of an authority to an officer or employee of an organisation to exercise the powers of an authorised industrial officer under the Act (s.364).

Registrar's Role regarding Industrial Organisations

The Registrar also has important functions and powers with regard to industrial organisations (i.e. unions, or organisations, of employers or employees). These are outlined below.

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.

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).

Industrial organisations must also file in the Registry each year, copies of their registers of officers (s.547).

Elections

Under s.482, the Registrar must arrange for the Electoral Commission to conduct an election of officers for an industrial organisation, when its rules require one, and the organisation has filed the prescribed information in the Registry. Table 11 shows that the number of elections arranged during the year slightly increased.

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 also has an investigative role in relation to organisations' financial records when irregularities or other reasonable grounds for investigation are apparent (s.571).

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.

More detailed information is provided in the next part of this report, under the section headed "Industrial Organisations".

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 2005, there were 43 employee organisations registered in Queensland; and at 31 December 2004 total membership was 3779,553 (compared to 373, 756 members at December 2003). The organisations are listed according to membership numbers in Table 12. Equivalent figures for employer organisations are: 38 organisations registered at 30 June 2005, with a total membership of 40,447 at 31 December 2004 (compared to 40,963 members in December 2003). Table 13 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 was one new registration application filed during 2004–05 with the Queensland Fruit and Vegetable Growers Union of Employers being registered on 15 April 2005. Amalgamations (and withdrawals from amalgamations) are approved under Chapter 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).

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.

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.

During 2004–05, there were 29 applications in respect of industrial organisations' rules, registrations, name changes, and exemptions from requirements of the Act lodged with the Registrar. Eighteen 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.

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 18 applications filed during the year for amendments to rules; two of those were for changes to eligibility rules and one was for a complete set of new rules. This is a slight decrease on the previous year (see Table 11).

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). There were two name change applications for an employee organisation which were still in progress during the reporting period.

Table 11 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 must be taken to be an organisation's election rules if their election rules do not comply with the Act.

Industrial organisations' elections are conducted by the Electoral Commission of Queensland 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 11 lists industrial organisation matters filed in Registry. During the year, 39 requests to conduct elections for office-bearers were filed and dealt with by the Registrar, compared to 36 in 2003–04. 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. Eight organisations sought 'election exemptions' during the year, on the ground that their federal counterparts held elections under the federal *Workplace Relations Act*.

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).

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).

Table 11: Industrial organisation matters filed 2003–04 and 2004–05

Industrial Organisation matters		2003–04	2004–05
s. 413	Registration applications	0	1
s. 422(3)	New rules	0	1
s. 427	Amendment—list of callings	0	0
s. 473	Amendment—Change of name	4	2
s. 474	Part amendment—eligibility rules	2	2
s. 329(j)	Extension of time to object—eligibility rules amendments	0	0
s. 478	Part amendment to rules	19	15
s. 482	Request for conduct of election	36	39
s. 594	Exemption from conduct of election	3	8
s. 582	Exemption—members' register	0	0
s. 447	Exemption—postal ballot	0	0
s. 586	Exemption—branch financial return	0	0
s. 618	Amalgamation	0	0
s. 638	Review union registration—application for de-registration	1	0
TOTAL		65	68

Table 12: Industrial Organisations of Employees—Membership at 31 Dec 2004

Industrial Organisation	Members
The Australian Workers' Union of Employees, Queensland	46,359
Queensland Teachers Union of Employees	40,125
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.	38,111
The Queensland Public Sector Union of Employees	32353
Queensland Nurses' Union of Employees.	30,762
Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees.	26,881
Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland	17,257
Transport Workers' Union of Australia, Union of Employees (Queensland Branch)	15,042
Queensland Independent Education Union of Employees	12,568
The Electrical Trades Union of Employees of Australia, Queensland Branch	12,234
Queensland Services, Industrial Union of Employees	10,751
The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland	10,115
Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees	9,500

Queensland Police "Union of Employees"	8,796
Federated Ironworkers Association of Australia (Queensland Branch) Union of Employees	8,467
Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch	7,230
Australasian Meat Industry Union of Employees (Queensland Branch)	6,776
Finance Sector Union of Australia, Queensland Branch, Industrial Union of Employees	6,050
The National Union of Workers Industrial Union of Employees Queensland	5,953
Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees	5,667
Queensland Colliery Employees Union of Employees	5,293
Federated Engine Drivers' and Firemen's Association of Australasia Queensland Branch, Union of Employees	4,522
The Plumbers and Gasfitters Employees Union of Australia, Qld Branch, Union of Employees	2,575
The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees	2,417
United Firefighters' Union of Australia, Union of Employees, Queensland	1,865
Australian Federated Union of Locomotive Employees, Queensland Union of Employees	1,462
The Bacon Factories' Union of Employees, Queensland	1,319
Australian Salaried Medical Officers Federation Industrial Organisation of Employees, Queensland	1,242
Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees	1,199
Australian Journalists' Association (Queensland District) "Union of Employees"	1,081
Property Sales Association of Queensland, Union of Employees	855
Federated Clerks' Union of Australia, North Queensland Branch, Union of Employees	795
The University of Queensland Academic Staff Association (Union of Employees)	645
Actors, Entertainers and Announcers Equity Association, Queensland, Union of Employees	585
Queensland Association of Academic Staff in Colleges of Advanced Education (Union of Employees)	547
The Seamen's Union of Australasia, Queensland Branch, Union of Employees	466
Australian Institute of Marine and Power Engineers' Union of Employees, Queensland District.	460
James Cook University Staff Association (Union of Employees)	398
The Queensland Police Commissioned Officers Union of Employees	345
Merchant Service Guild of Australia, Queensland Branch, Union of Employees	248
Musicians' Union of Australia (Brisbane Branch) Union of Employees	167
Queensland Fire Service Senior Officers' Association, Union of Employees	70
Griffith University Faculty Staff Association (Union of Employees)	Figures not supplied
Number Employee Organisations	43
Total Membership	379,553

13. Industrial Organisations of Employers—Membership as at 31 December 2004

Industrial Organisation	Members
Queensland Master Builders Association, Industrial Organisation of Employers	9,409
Agforce Queensland Industrial Union of Employers	7,178
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers	3,499
Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)	2,783
Motor Trades Association of Queensland Industrial Organisation of Employers	2,077
Australian Dental Association (Queensland Branch) Union of Employers	1,843
National Retail Association Limited, Union of Employers	1,680
Australian Industry Group, Industrial Organisation of Employers (Queensland)	1,541
Electrical and Communications Association Queensland, Industrial Organisation of Employers	1,366
Children's Services Employers Association Queensland Union of Employers	988
Queensland Hotels Association, Union of Employers	830
Master Plumbers' Association of Queensland (Union of Employers)	789
The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers	757
Queensland Motel Employers Association, Industrial Organisation of Employers	575
Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers	570
The Baking Industry Association of Queensland—Union of Employers.	486
The Registered and Licensed Clubs Association of Queensland, Union of Employers	522
Nursery and Garden Industry Queensland Industrial Union of Employers	417
National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers	412
Hardware Association of Queensland, Union of Employers	401
The Queensland Road Transport Association Industrial Organisation of Employers	356
Queensland Real Estate Industrial Organisation of Employers	342
Queensland Private Childcare Centres Employers Organisation of Queensland Industrial Organisation of Employers	330
Building Service Contractors' Association of Australia—Queensland Division, Industrial Organisation of Employers	243
Furnishing Industry Association of Australia (Queensland) Limited Union of Employers	170
Queensland Mechanical Cane Harvesters Association, Union of Employers	169
UNiTAB Agents' Association Union of Employers Queensland	154
The Hairdressing Federation of Queensland—Union of Employers	151
Association of Wall and Ceiling Industries Queensland—Union of Employers	119
Consulting Surveyors Queensland Industrial Organisation of Employers	101
Queensland Master Hairdressers' Industrial Union of Employers	69
The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited	52

Queensland Cane Growers' Association Union of Employers	25
Queensland Country Press Association—Union of Employers	18
Queensland Major Contractors Association, Industrial Organisation of Employers	15
Australian Sugar Milling Association, Queensland, Union of Employers	10
Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers	Figures not supplied
Number of Employer Organisations	38
Total Membership	40,447

AMENDMENTS TO LEGISLATION

The legislation that principally relates to the work of the Court, the Commission and Registrar is the ***Industrial Relations Act 1999.*** *Associated with the Act are the* ***Industrial Relations Regulation 2000*** *and* ***Industrial Relations (Tribunals) Rules 2000.*** *As indicated elsewhere in this report, the Commission's jurisdiction extends to certain matters under the* ***Vocational Education, Training and Employment Act 2000*** *and the* ***Trading (Allowable Hours) Act 1990.*** *In addition, the Court has appellate jurisdiction under the* ***Workers' Compensation and Rehabilitation Act 2003*** *and the* ***Workplace Health and Safety Act 1995.*** *The following outlines important legislative amendments made during the year which affect the work of the Tribunals.*

Industrial Relations Act 1999 (Qld)

The *Industrial Relations and Other Acts Amendment Act 2005,* assented to 1 April 2005, provided for specific amendments of the *Industrial Relations Act 1999.*

- Increased the jurisdiction of the Commission to deal with applications about unpaid wages and superannuation contributions from $20,000 to $50,000; see s.278 and s.400F for clothing outworkers.
- Allowed the Commission to designate an appropriate industrial instrument for the purpose of assessing aged or infirm person's wages, where no industrial instrument existed in the relevant calling: s.696
- S.129 was amended to enable the Commission to flow on provisions of a certified agreement into the award if the parties to the agreement agreed and were bound by the award. The provisions included in an award must only apply to the parties to the certified agreement.
- Pursuant to amendments to s.126, the Commission must ensure, whenever possible, that awards contain provisions that will facilitate agreement at the workplace about balancing work and family responsibilities.
- Under amendments to s.150, the application process to revoke a determination is clarified. The Commission must now revoke a determination after its nominal expiry date if it is satisfied that the conditions in the determination have been met. Protected action will be able to be taken after the nominal expiry date of the determination made under s.149.
- S.276 which provides the powers of the Commission to amend or void unfair contracts was amended. The Commission can not amend a contract to include, or declare void a contract because it does not contain a provision for accident pay or other payment on account of a worker suffering an injury under the *Workers Compensation and Rehabilitation Act 2003.*
- Clarified the financial and administrative arrangements for the Industrial Court, the Commission, the members and associates.
- Replaced the President's Advisory Committee and the Industrial Relations Advisory Committee with more informal consultation.

The *Private Employment Agents Act 2005,* assented to 27 April 2005, also provided for amendment of the *Industrial Relations Act 1999* at Chapter 11A. Chapter 11A provides sanctions against those private employment agents who do not provide services to the acceptable industry standard. The Commission may order repayment of fees received by an agent pursuant to s.408F. Part 8 of the aforementioned Act provided for consequential amendments to defined terms used in both Acts. In particular, s.408B (3) was amended to reflect the current definition of a person's activities that do not fall within the definition of a private employment agent.

The *Workers Compensation and Rehabilitation and Other Acts Amendment Act 2004,* assented to 18 November 2004, also amended s.267 of the *Industrial Relations Act 1999* which provides that the Commission's original and appellate jurisdiction is exclusive unless otherwise prescribed for by the Act. This amendment extends this exception that the Industrial Magistrate and the Commission have dual jurisdiction for certain appeals under Chapter 13 of the *Workers' Compensation and Rehabilitation Act 2003.* This amendment did not commence prior to 30 June 2005.

Amendments to Regulations and Tribunal Rules

Industrial Relations Amendment Regulation (No.1) 2004

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 $85,400 to $90,400 per annum. The amendment took effect from 20 August 2004.

Industrial Relations (Tribunals) Amendment Rule (No.1) 2004

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 2004. A similar increase for 2005–06 was gazetted on 24 June 2005 to take effect for the year commencing 1 July 2005.

Other Consequential Amendments

The ***Workers' Compensation and Rehabilitation Act 2003*** was amended by the *Industrial Relations and Other Acts Amendment Act 2005* to ensure that workers or prospective workers were not prejudiced in employment because they had sustained an injury under the Act or a former Act. The new provisions applied to the access to documentation relating to workers' compensation by the worker or employer. The provisions also restricted contracts of employment from making provision for accident pay, or other payments on account of a worker sustaining an injury. The insertion of s.585 was to ensure equality between workers under industrial instruments and those under other contracts of employment.

Summaries of Decisions

Decisions of the Industrial Court of Queensland

The decisions summarised below are significant decisions released and gazetted by the Industrial Court during the year.

Wayne Morgan Gant AND Multigroup Distribution Services Pty Ltd trading as Star Track Express
Wayne Morgan Gant AND Multigroup Distribution Services Pty Ltd trading as Star Track Express (No. 2)
(C22 of 2004); Hall P; 13 August 2004; (2004) 176 QGIG 718
(C22 of 2004); Hall P; 30 September 2004; (2004) 177 QGIG 382

Industrial Relations Act 1999—s.282—case stated

Issues: Jurisdiction. Reinstatement. Whether Queensland legislation inconsistent with federal *Workplace Relations Act 1996.* Reference of questions of law.

Background: Mr Gant applied to the Commission for reinstatement pursuant to s.74 of the *Industrial Relations Act 1999.* It was common ground that Mr Gant's former employer was a constitutional corporation, that he was initially employed under the *Transport Workers Award 1998 (Cth)* and subsequently under the Multigroup Distribution Services Pty Ltd (Townsville) Agreement 2000, a certified agreement approved by the Australian Industrial Relations Commission pursuant to the *Workplace Relations Act 1996.* Annexed to the agreement was a copy of the "Fair Dealing Policy" that articulated the company's approach to dealing with the dismissal of its employees. In particular, the policy provided for an internal mechanism of review which allowed a person dismissed by the company to appeal to an internal Committee of Review.

Two preliminary objections to the Commission hearing and determining the application were raised by the company. Firstly, it was submitted that the provisions of the *Industrial Relations Act 1999* vesting the Commission with jurisdiction over the matter of reinstatement were inconsistent with the *Workplace Relations Act 1996 (Cth)* and in consequence, were rendered inoperative by s.109 of *The Constitution.* It was said to follow that, the Commission did not have jurisdiction to hear and determine an application for reinstatement made by a former employee who was employed by a constitutional corporation and under the terms of a federal award. Secondly, it was contended that the internal mechanism of review contemplated by the certified agreement precluded the Commission from hearing Mr Gant's application for reinstatement.

On the effect of the certified agreement, the applicant contended that the "Fair Dealing Policy" was not authorised by the certified agreement because it was contained in an attachment that had not been produced to the Commission at the time of certification and the parties did not intend to be bound by the policy. The company maintained that the policy was both valid and binding.

The questions of law were reserved to the Industrial Court pursuant to s.282 of the *Industrial Relations Act 1999*.

Held: On 13 August 2004, the Court held that it was appropriate to proceed to final hearing on these questions with oral argument on the "case stated" to be heard.

On 30 September 2004, the President accepted that the *Workplace Relations Act 1996* did not cover the field but that inconsistency would arise in the event of a "direct collision" between federal and state laws. A reading of ss.152, 170 HB and 170 LZ of the *Workplace Relations Act 1996* made clear that no such collision had arisen in the present circumstances.

On the second matter, the Court at first rejected the applicant's contentions that the "Fair Dealing Policy" was not authorised by the certified agreement and that it did not bind the parties. Although there were no explicit references to the policy within the agreement, there could be no doubt that it formed part of it. However, on a proper construction of the agreement including the policy, finality was never intended to be visited upon any decision of the Committee of Review. Therefore, there was no substance in the company's contention that s.74 of the *Industrial Relations Act 1999* could not operate concurrently with the internal review process set out in the "Fair Dealing Policy". On that basis, the company's preliminary objections were rejected.

Kenneth John Sheehan AND Department of Employment and Training (C40 of 2004); Hall P; 25 August 2004; (2004) 177 QGIG 82

Industrial Relations Act 1999—s.341 (1)—appeal against decision of industrial commission

Issues: Injunctive relief. Alleged reprisal against whistleblower. Statutory interpretation.

Background: The appellant, an inspector under the *Training and Employment Act 2000,* lodged an application for injunctive relief with the Commission. The applicant sought an urgent interim injunction to prevent immediate reprisals against him in the form of salary reductions, and a permanent injunction to prevent further reprisals and "suspected" termination being taken against him as a whistleblower under ss.47,49,50,51 and 52 of the *Whistleblowers Protection Act 1994.* An appeal against the salary reduction and "show cause" notices had been lodged with the Public Service Commissioner. The respondent alleged the appellant was not a whistleblower.

The Commission found that it was premature to issue an interim injunction based upon incomplete facts and incomplete arguments and that it would be an interference with the appeal processes before the Public Service Commissioner. An application for an interim injunction in terms of the permanent injunction was refused on the basis that injunctive relief, pursuant to s.277 (11) of the *Industrial Relations Act 1999*, was not available in respect to proposed termination. The application for permanent orders was adjourned pending the outcome of processes already in place.

Held: The Court agreed that the Commission was compelled to reject the application for injunctive relief on the following grounds. Section 49 of the *Whistleblowers Protection Act 1994* states that an injunction must be about "conduct" and the purpose of the order is to instruct the person against whom it is directed what that person must or must not do. The Commission is required to go behind the nouns such as "reprisal "and "detriment" and deal with the "conduct". "Conduct" was not imminent at the time of the first hearing. Further, statutory tribunals exercising supervisory jurisdiction are normally loath to exercise the discretionary power to intervene before any alternate appellant scheme is exhausted.

In considering the application for interim relief in terms of the permanent injunction, the Commission dealt with the issue as whether interim injunctive relief was available to protect a whistleblower against reprisal by way of termination of employment. The Commission took the view that s 277(11) of the *Industrial Relations Act 1999* was inconsistent with the provisions of ss.47(1) and 49 of the *Whistleblowers Protection Act 1994,* and that as the latter Act the *Industrial Relations Act 1999* must prevail to the extent of the inconsistency, potentially preventing the granting of an injunctive order for a proposed contravention of s.73 (f) dealing with public interest disclosures. The apparent inconsistency between the Acts disappears if the *Whistleblowers Protection Act 1994* is read down to include only conduct which does not amount to termination of employment.

The Court accepted that the Commission had correctly refrained from granting interim relief. But on the difficulty in the relationship between the Acts pointed out that the difficulty arises out of amendments made to s.47 by s.747 and Schedule 3 of the *Industrial Relations Act 1999*. There is not a latter Act. The Court held that one must look first to the text of the applicable legislation. Whatever the provisions of the *Industrial Relations Act 1999* at which s.47(3) of the *Whistleblowers Protection Act 1994* is directed, that section makes clear that in the event of inconsistency it is s.47 which is to prevail. The appeal was dismissed.

The Queensland Public Sector Union of Employees AND Department of Corrective Services (C65 of 2004); Hall P; 10 November 2004; (2004) 177 QGIG 668

Industrial Relations Act 1999—s.282—case stated

Issues: Right to represent industrial interests. Unregistered organisation.

Background: During an inspection of the Townsville Correctional Centre, the Commission was presented with a written submission about the dispute from the Queensland Prison Officers' Association Inc. (QPOA) purportedly on behalf of an employee who was a member of the QPOA. Neither the QPOA nor the employee was a party to the dispute proceedings. The Commission sought the opinion of the Court on a question of law articulated as follows: "In the absence of registration, pursuant to Chapter 12 of the *Industrial Relations Act 1999* (QLD), of the Queensland Prison Officers' Association Inc. as an employee organisation, can the Queensland Prison Officers' Association Inc. represent the Industrial interests of its members, under the *Industrial Relations Act 1999* (QLD) and before the Commission in relation to the current dispute at the

Townsville Correctional Centre." On the question of law, the QPOA declined an invitation to make submissions as to the Commission's discretion to hear persons to inform itself.

Held: The question about the "right" or "entitlement" of the QPOA to appear was answered in the negative. The employee was neither a party to the dispute proceedings nor a person ordered to be permitted to appear in those proceedings. He could not appoint the QPOA to act as his agent and the QPOA could not appear on its own behalf. Furthermore, the right to be represented is conferred only upon "organisations" as defined by s.409 which confines the meaning to bodies registered under Chapter 12 as an organisation or whose continuity of registration as an industrial organisation or union under the Act has been continued or preserved by the Act.

Margaret Green and Q-Comp Review Unit
(C49 of 2004); Hall P; 11 January 2005; (2005) 178 QGIG 75

Workers' Compensation and Rehabilitation Act 2003—s.561—appeal against decision of industrial magistrate

Issues: Whether "worker" or independent contractor for purposes of workers' compensation. Indicia of control considered.

Background: The appellant was engaged as a contract carrier with TOLL Transport Pty Ltd when she injured her right shoulder and her right arm. WorkCover Queensland rejected her claim on the basis that she was not a "worker" within the meaning of that word at section 12 of the *WorkCover Queensland Act 1996.* Q-COMP, and subsequently an industrial magistrate, affirmed the decision. The first plank of the appellant's case was that the industrial magistrate gave too much weight to the substantive terms of the agreement which stated her engagement to be as an independent contract carrier, and not enough to the exercise of control by TOLL. The driver claimed TOLL exercised a "very high degree of control" over her and that her position was entirely comparable to that of a "company driver".

Held: President Hall noted that the case was "a borderline one" and agreed with the Industrial Magistrate that there were strong indicia favouring a designation of both employee and independent contractor. The President noted that the Industrial Magistrate had found TOLL exercised a "high degree of control", but the omission of the adjective "very" from the assessment did not indicate an underestimation of the extent of TOLL's control. Having regard to the substantive terms of the agreement and its implementation, the Industrial Magistrate's decision was reasonably open. In particular, a motor vehicle was an expensive item of equipment and, "when a person has to provide equipment such as a motor vehicle, the conventional view is that the person is not an employee" *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, at paragraph 58. As well, the fact the driver could appoint a replacement driver and continue to be paid at the normal rate indicated that

the remuneration was not "for labour only or substantially for labour only", under the (then) definition of "worker" in Schedule 2 Part 1 of the Act. The appeal was dismissed.

Young Men's Christian Association of Bundaberg Inc AND Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees
(C74 of 2004); Hall P; 2 March 2005; (2005) 178 QGIG 199

Industrial Relations Act 1999—s.341 (1)—appeal against decision of industrial commission.

Issues: Competency of appeal. Observations within conciliation certificate. Unfair dismissal.

Background: The respondent was an applicant in a reinstatement matter which had progressed through a conciliation procedure. The Commissioner hearing the matter issued a certificate pursuant to s.75 (3) to the effect that all reasonable attempts to settle the matter by conciliation had and were likely to be unsuccessful. The appeal related to the Commission's observations within the certificate about the merits of the application and the future conduct of the matter. The issue before the Court was the competency of the appeal.

Held: A decision of the Commission to issue a certificate or to refuse to issue a certificate pursuant to s.75 (3) is a "decision" within the meaning of Schedule 5 of the *Industrial Relations Act 1999*. Such decisions are subject to appeal under s.341 of the Act. Under Schedule 5, the word "decision" is not restricted to decisions which finally determine the rights and obligations of the parties and may embrace decisions of an interlocutory nature, e.g., on an application for adjournment.

However, the Commission's expressions of opinion regarding merits of relative cases are by way of recommendations or advice to the parties and, consistently with the decision in *QPSU v Department of Corrective Services* (2003) 70 QGIG 422, should be treated as less than a binding "decision" within the meaning of Schedule 5. The appeal was dismissed.

Queensland Public Sector Union of Employees AND Queensland Health Pathology & Scientific Services
(C94 of 2004); Hall P; 9 March 2005; (2005) 178 QGIG 268

Industrial Relations Act 1999—s.341 (1)—appeal against decision of industrial commission

Issues: Underpayment of penalty rates. Interaction of fatigue allowance and overtime on recall. Health service.

Background: The QPSU lodged an application with the Commission seeking to recover unpaid wages relating to eleven occasions when overtime was worked by a member at her employer's request between termination of ordinary work on one day and commencement of ordinary work on the next. On each occasion the amount of overtime did not exceed two hours. Ms Lobegeier claimed the payment of fatigue penalty rates as prescribed in clause 6.9.1 of the District Health Services Employees' Award which provides that where on the instructions of the employer, an employee resumes or continues work without having ten consecutive hours off duty the employee is entitled to be paid double rates until released from duty. Clause 6.8.5 states that the provisions of clause 6.9 shall apply when an employee has actually worked in excess of two hours on one or more callouts. The Commission was satisfied the respondent had interpreted the award correctly. The critical issue at the first instance and on appeal to the Court was the construction of the award provisions, in particular, the interaction of clauses 6.8.5 Recall and 6.9 Rest Period After Overtime and Fatigue Leave.

Held: The Court held that on such an application the Commission sits as a court of construction and not as an arbitral tribunal. The President was satisfied the natural and grammatical meaning of the words used, and the history of the interaction of fatigue leave clauses and recall clauses as extrapolated in *Mechanical Engineering Award—State* (1962) 502 QGIG 78, led to the conclusion reached by the Commission. Further, the decision conformed to the interpretation manual representing the parties' understanding of the operation of the award. The member's situation was identical to an express example given in the manual. The appeal was dismissed.

Brett Holt Plumbing Pty Ltd AND Q-Comp Review Unit
(C87 of 2004); Hall P; 9 March 2005; (2005) 178 QGIG 255

Workers' Compensation and Rehabilitation Act 2003—s.561—appeal against decision of industrial magistrate

Issues: Statutory interpretation. Definition of "worker" for the purposes of workers' compensation.

Background: In October 2003 Mr Henderson applied for workers' compensation for an injury sustained while performing work as a drainer. His application was rejected by WorkCover Queensland on the basis that he was not a worker within the meaning of section 12 of the *WorkCover Queensland Act 1996.* Mr Henderson applied for a statutory review of the decision. The Q-Comp Review Unit subsequently set aside the WorkCover decision stating, "The indicators are that at the time of the injury, you were employed by Brett Holt Plumbing Proprietary Limited under a contract for labour only, or substantially for labour only". The alleged employer, Brett Holt Plumbing Pty Ltd unsuccessfully appealed to the Industrial Magistrates Court. Both before the Industrial Magistrate and on appeal it was common ground that Mr Henderson was not employed under a contract of service. Section 603 of the *Workers' Compensation and Rehabilitation Act 2003* required that the matter be dealt with under the *WorkCover Queensland Act 1996.*

Held: The Court held that on its true interpretation Schedule 2, Part 1, s.1 of the *Workers Compensation & Rehabilitation Act 2003* characterised Mr Henderson as a "worker" for the purposes of the Act. In endeavouring to determine the definition of a "worker" under Schedule 2, Part 1, s.1, the appellant argued that the case law surrounding Section 221A of the *Income Tax Assessment Act 1936* applied. The appellant's argument was rejected. Section 2 needs to be read beneficially and not in a narrow literal sense as this would impede the achievement of the Act's purpose, to give the fullest relief within a fair meaning of its language without straining or exceeding the true significance of the provision. The explicit intention of the legislation was to bring some people within the definition of a "worker" for the purposes of the scheme whether or not the characterisation was apt at common law.

Newmont Pajingo Pty Ltd AND Tomac Enterprises Pty Ltd
(C1 of 2005); Hall P; 11 April 2005; (2005) 178 QGIG 404

Industrial Relations Act 1999—s.341 (1)—appeal against decision of industrial commission

Issues: Unfair contract. Definition of "contract" pursuant to s.276 of *Industrial Relations Act 1999*. Jurisdiction. Error of law at first instance.

Background: On 23 December 2004, the Commission released a decision reported at 178 QGIG 35 on a successful application by Tomac Enterprises Pty Ltd, a drilling contractor, seeking relief under s.276 of the *Industrial Relations Act 1999* against Newmont Pajingo Pty Ltd. The Commission determined that the contract became unfair after it was entered into due to the conduct of Newmont and ordered restitution of $414,250 to Tomac.

The initial thrust of Newmont's appeal against the decision was that the presence or absence of any "industrial taint" to the contract between the parties was relevant to the granting or denial of relief under the unfair contracts jurisdiction. Newmont also argued that s.276 (4) (b) of the Act was aimed at cases in which the conduct of the parties in the exercise of contractual rights had so altered the effect of the terms of a contract to make it unfair. In this matter, no such exercise of rights by Newmont was identified. Associated with this argument, was the proposition that the "true" contract came to an end as the agreed terms had been completed and the failure of negotiations for a future contract did not, retrospectively , make the contract unfair. Critical to the appeal was the definition of "contract" at s.276 (7). Newmont's final contention was that it was erroneous for the Commission to award the compensation which had been awarded when any new contract that would have been made would have been terminable by Newmont on seven days' notice.

Held: President Hall rejected Newmont's arguments. The appeal was limited to error of law or excess or want of jurisdiction. Having considered the history of the arbitral power exercised by the Commission pursuant to s.276 of the Act, the President concluded that aside from employments not subject to industrial instruments, the prerequisite to the exercise of jurisdiction by the Commission was a characterisation of the "contract" as "contract for service". Further, the definition of "contract" in s.276(7) was critical to the appeal in that it included not just "true" contracts for service but also any arrangements, understandings or collateral contracts relating to a contract. The Court was unable to identify any use of irrelevant material, neglect of relevant material, pursuit of irrelevant issues or error of principle in the approach the Commission adopted. The Commission's scrutiny and findings in respect of the appellant's conduct was justified to shed light on the terms of arrangement. Altogether, the Commission's decision was correctly directed at the fairness of the "arrangement" between the parties.

On the issue of quantum, President Hall determined that it would be incompatible with the findings about fairness to assess the compensation amount in the manner suggested by the appellant. Accordingly, the appeal was dismissed. All questions about costs were reserved.

Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland AND Townsville Engineering Industries Pty Ltd (C93 of 2004); Hall P; 18 April 2005; (2005) 178 QGIG 419

Industrial Relations Act 1999—s.341(1)—appeal against decision of industrial commission

Issues: Refusal to enter into certified agreement. Whether Commission had jurisdiction to arbitrate. Interpretation of s.148 and s.149.

Background: On 22 July 2004, the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (AMEPKU) sent a notice under s.143 of the *Industrial Relations Act 1999* to Townsville Engineering Industries, proposing the making of a certified agreement. When the AMEPKU sought to commence negotiations, management advised they did not wish to enter into a certified agreement. On the 26 August 2004 the union filed a request pursuant to r.136 of the *Industrial Relations (Tribunal) Rules 2000* seeking the assistance of the Commission pursuant to s.148 (1) (a) of the Act to help the parties make a certified agreement. After convening unsuccessful conciliation proceedings, the Commission determined that the requirements of s.149 (1) (b) had been met and that the matter should be arbitrated. On appeal the employer contended that its refusal to enter into any negotiations regarding a proposed certified agreement precluded the operation of s.149 (1) (b). The essence of the argument was that there cannot be a "breakdown in negotiations" when there are not negotiations.

Held: The appeal succeeded on two counts. Firstly, the Court accepted that if Townsville Engineering Industries Pty Ltd was dissatisfied with the decision of the Commission that jurisdiction to conciliate had been triggered, or with the subsequent decision that conciliation had failed in the s.149 (1) (b) sense, the company was entitled to bring an appeal under s.341 (1) and, subject to discretionary considerations, may have sought prerogative relief pursuant to s.248 (1) (e). Neither step was taken by the employer.

Secondly, the Court assumed that the employer's argument was correct for the purposes of the decision and further assumed that the interaction between the parties was not "negotiations". The relevant trigger, however, for the Commission's power to conciliate was s.148 (1) (a) which does not in terms establish a "breakdown in negotiations" as a prerequisite to conciliation. Section 148 (1) (a) operates to confer jurisdiction where a request for help comes from a party who has genuinely attempted to negotiate a certified agreement. No more than a declaration is required. The Court considered that it was impossible to assess whether the appellant had attempted to negotiate a certified agreement. In any event, that was the wrong test. The function of determining whether or not a person requesting help had genuinely attempted to negotiate a certified agreement is for the Commissioner into whose hands the request for conciliation comes. This is not a question for the Court although such a decision may be reviewed on appeal, but can only be set aside where shown to involve an error of law or an excess of jurisdiction.

The matter was remitted to the Commission to be dealt with according to law.

Repco Limited AND Lee Hayward
(C6 of 2005); Hall P; 2 June 2005; (2005) 179 QGIG 190

Industrial Relations Act 1999—s.341 (1)—appeal against decision of industrial commission

Issues: Jurisdictional challenge to unfair dismissal application. Remuneration. Bonus and car allowance.

Background: The Commission's decision dealt with a jurisdictional challenge mounted by Repco Limited to an application lodged by Mr Hayward, the National Sales Manager, pursuant to s.276 of the *Industrial Relations Act 1999*. The employer argued that Mr Haywood's annual wage exceeded $85,400 the maximum annual amount then prescribed by the Act, or prescribed under a regulation for unfair dismissal. The two critical issues were whether a bonus of $14,000 paid to Mr Haywood in the year preceding his termination and an amount of $17,500 per annum paid by Repco Limited to a leasing company in respect of a motor vehicle leased by the employee on a novated basis should be included as part of Mr Haywood's annual wage for the purposes of the Act.

The Commission dismissed the jurisdictional challenges finding that whilst there was a bonus system in agreed and enforceable terms, there was no method, immediately prior to the employee's departure, of determining what if any bonus might be paid to the employee in the future. The bonus was therefore not properly characterised as being part of the applicant's annual wages for purposes of s.276. On the second issue, the Commission held that the employee had no enforceable right under a contract of service to revert from novated lease arrangements to receiving payment of a car allowance as wages and dismissed the challenge.

Held: The Commission was compelled to conclude that bonus payments should not be taken into consideration as part of Mr Haywood's annual wage, pursuant to s.276, compare *Lepre v The State of Queensland* (2003) 174 QGIG 740. Bonus payments were not always received and were payable only if particular targets were achieved.

On the second issue, the Court held that although the terms and conditions of Mr Haywood's contract deprived him of the opportunity to elect between the car allowance and a novated lease, the critical issue was whether the loss of entitlement to take the $17,500 as money involved the consequence that that sum could no longer be taken into account in calculating Mt Haywood's annual wage for the purposes of s.276. The Court concluded that the sums paid to a creditor from time to time at the direction of the employee pursuant to a clause in the employment contract and payments agreed to be made by the terms of the contract itself, remain part of the employee's annual wage. Mr Haywood gained the benefit of the discharge of obligations to the lessor by the payment to the lessor of agreed amounts of money by Repco Limited.

The appeal was allowed and the application under s.276 of the Act was dismissed.

Vicki Anne McGuren AND Jason Clifford Gibbons.
(C14 of 2005); Hall P; 1 June 2005; (2005) 179 QGIG 189

Industrial Relations Act 1999—s.341(2)—appeal against decision of industrial magistrate

Issues: Unpaid wages. Recording of conviction. Quantum of fine. Interpretation of s.666.

Background: The appellant was charged with a breach of the *Industrial Relations Act 1999* having failed to pay wages payable under The *Engineering Award—State 2002* to an entitled employee. A conviction was recorded. The appellant was fined the sum of $2,400 for the offence under s.666 of the Act. Additionally, the appellant was ordered to pay arrears of wage in the sum of $2335–37 and allowed three months to pay the wages and nine months to pay the fine. An appeal was lodged against the recording of a conviction and the quantum of the fine.

Held: The President stated that the Court will go behind a penalty set by an Industrial Magistrate only where the case may be brought within the principles in *House v The King* (1936) 55 CLR 499. The appeal against the recording of a conviction lies within these principles. The recording of the conviction was set aside. The Industrial Magistrate had informed the parties that no conviction was to be recorded. There was no utility in speculating about whether there had been a clerical "slip" or an "undisclosed error of law".

The quantum of the fine was another matter. The President held that although there were mitigating factors, such as the appellant being a first offender and having not engaged in a "deliberate course of action", there had been an ongoing disagreement about quantum between the parties, and there had not been an early plea and there had not been cooperation with the investigating authorities. Neither did the claims of "misunderstanding" and "absence of knowledge" go to mitigation. Furthermore, the Industrial Magistrate was correct to meet the alleged financial difficulty incurred by the imposition of the fine by allowing the appellant an extended period of time within to pay. The appeal about the quantum of the fine 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

Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers & Others (No. B1385 of 2004) and The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers & Others (No. B1433 of 2004) Linnane VP, Swan DP, Bloomfield DP 178 QGIG 28

Application for General Ruling in regard to the superannuation contribution amount for award employees.

Issues: Minimum contribution for superannuation prescribed by Awards; Minimum level of earnings for an eligible employee before payment; payment whilst on WorkCover.

Background: On 9 September 2004 the Queensland Council of Unions (QCU) filed an application for a General Ruling (B1385 of 2004) in relation to the Superannuation Contribution amount for award employees. On 21 September 2004 The Australian Workers' Union of Employees, Queensland filed a similar application (B1433 of 2004). Both applications were subsequently amended with the relief being sought in both applications being as follows:

"[1] (a) That the minimum contribution amount for superannuation as prescribed in Awards which make provision for the payment of an amount of '3%' be varied by the deletion in the Award of such an amount of '3%' and by the insertion in lieu into the award the provision '9% (except in relation to contributions made by an employer when an employee is absent on workers' compensation where the contribution level will be 3%)'.

(b) That the minimum level of earnings that an eligible employee earns to require a contribution to superannuation by an employer is an amount of $450 per month."

[2] The applications were ultimately made by consent and at the hearing of the matter on 10 December 2004 we granted the applications and an operative date of 1 January 2005. We indicated at that time that we would deliver brief reasons for our decision. These are those reasons."

Held: The Full Bench held that

"[4] The *Superannuation Guarantee (Administration) Act 1992* (Commonwealth legislation) commenced on 1 July 1992. One of the functions of this Commonwealth legislation is the governance of the

contribution level for superannuation by employers for the overwhelming majority of employees in Australia. The contribution level required under that legislation was set at 9% as and from 1 July 2002.

[5] Section 126(d) of the *Industrial Relations Act 1999* (Act) provides that the Commission "must ensure an award provides for secure, relevant and consistent wages and employment conditions.". Further s.126(f) of the Act provides that the Commission "must ensure an award provides fair standards for employees in the context of living standards generally prevailing in the community.".

[6] As Queensland employers are required, by the Commonwealth legislation, to contribute 9% of ordinary time earnings for employees' superannuation, the 3% level prescribed in the majority of awards of this Commission seems inconsistent with the abovementioned provisions of the Act. It is appropriate that awards of this Commission contain a superannuation contribution amount which reflects the actual amount payable under the Commonwealth legislation i.e. 9%.

[7] A particularly relevant issue is that under the current award provisions employees can only recover 3% superannuation contributions under s.278(1)(d) and s.408 of the Act if superannuation contributions remain unpaid by the employer. The remaining amount must be reclaimed via the Australian Tax Office. By increasing 2 the level of contributions to 9%, employees will be able to recover any unpaid amounts via the procedures provided for in the Act.

[8] The Superannuation contribution for workers absent on workers' compensation will remain at the 3% level although both the QCU and AWU have foreshadowed a further application in 2005 in respect of this matter.

Minimum level of earnings

[9] Clause 2(c) of the Superannuation Statement of Policy issued on 29 September 1989 provides as follows:

"Minimum Level of Earnings—No Employer shall be required to pay superannuation contributions on behalf of any eligible employee whether full-time, part-time, casual, adult or junior in respect of any week during which the employee's ordinary time earnings, as defined, do not exceed 35% of the Guaranteed Minimum Wage for the Southern Division, Eastern District as declared from time to time.".

[10] The current minimum level of earnings as per the Declaration of Policy regarding Occupational Superannuation, issued on 8 August 2000 is 35% of $309.00. This amount equates to $432.60 per month. There has been no application to increase this threshold since 2000.

[11] The Commonwealth legislation provides a minimum earnings amount of $450.00 per month be paid to attract the superannuation contribution from the employer. If the award clauses are to reflect the actual obligations on employers and therefore be relevant as required by the Act then the minimum level of earnings required to attract the superannuation contribution should be $450.00 per month.

[12] In all the circumstances we are of the view that the applications should be granted. The parties seek an operative date of 1 January 2005. We see that as an appropriate operative date."

Retailers' Association of Queensland Limited, Union of Employers (RAQ) AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (B1437 of 2003); Bloomfield DP, Fisher C, Brown C; 176 QGIG 510

Application to amend the *Trading Hours Order—Non Exempt Shops Trading by retail—State* (Order) pursuant to s.21 of the *Trading (Allowable Hours) Act 1990.*

Issues: Special, unique or particularly telling feature about this application which warrants continuous trading over 23–24 December at Westfield Chermside.

Background: Following the success of similar continuous trading prior to Christmas at major regional complexes of Chadstone in Melbourne and Westfield Parramatta in Sydney, the applicant believed that it was appropriate to conduct a 24 hour continuous trading period in one of Brisbane's leading regional shopping centres. The application sort to extend trading hours beyond the midnight closing time to allow for non-exempt shop trading until 8 am the following morning for the Westfield shopping complex at Chermside. The Westfield Chermside complex had recently been subject to a major refurbishment. RAQ provided evidence from 12 witnesses in support of the application from some with direct involvement other similar 24 hour trading to local retailers. The QRTSA, NMMA and the SDA sort to give evidence from the Bar table and did not call any witnesses of their own in support.

A trial of extended trading hours was allowed in 2003, subject to the six conditions:-

(1) Participation will be voluntary for all retailers in the Centre;

(2) **All** retailers to staff extended trading hours through voluntary participation by their employees;

(3) The Queensland Police Service are to agree to staff the Police Beat for the duration of the proposed extended hours, if necessary with officers on "special service" at the expense of Westfield Ltd;

(4) The parties involved are encouraged to meet to discuss the proposed security arrangements and methods whereby all affected employees are made alert to the agreed arrangements.

(5) RAQ is to collect data about:

— Pedestrian traffic levels in Westfield Chermside over the 14 day period up to and including 24 December 2002;

— Pedestrian traffic levels in Westfield Chermside on an hour by hour basis over the 14 day period up to and including Christmas Eve 2003;

— The level of traffic congestion in the parking areas during the whole of the trading period from opening on 23 December 2003 until closing time on 24 December 2003;

— The names of retailers who traded through the whole of the event and the names and times at which other traders who did not trade for the whole of the event may have closed their doors and reopened them on the morning of 24 December 2003;

— Changes in the turnover of individual stores in the period covering 23 and 24 December 2003 versus the same two dates in 2002;

— Any security incidents attended by security personnel during the period 23 to 24 December 2003 inclusive.

(6) Westfield Chermside is to co-operate with any of the current respondent organisations who may wish to visit the centre at any time during the approved period of continuous trade on 23 to 24 December 2003 and where such organisation may wish to take photographs or video, conduct surveys and/or conduct traffic counts."

The Full Bench further indicated it would reconvene the proceedings on 19 March 2004 for the purpose of receiving material relevant to the trial and programming proceedings "in relation to 23–24 December 2004, and perhaps beyond".

Held: We have decided to allow trading over the next 2 years only and not beyond that point at this time, for several reasons, as follows:

Firstly, some teething problems occurred during the first trial in respect of staffing levels and in respect of our expectation that only employees who volunteered (without any pressure whatsoever from their employer) would work between the hours of 12.00 midnight and 8.00 a.m. on 24 December. We believe these issues should be looked at again after a further 2 years to see whether there are any residual issues which may need to be considered and/or addressed.

Secondly, there was only a short lead time between the making of our decision and the actual "event" in 2003. We think the Commission, and the parties, would be assisted by a further 2 years experience before any decision is reached on whether Westfield Chermside (or another location) should be permitted to trade over 23–24 December each year on a permanent basis.

Thirdly, 23 and 24 December in 2006 fall on a Saturday and Sunday. We think those circumstances deserve special consideration before any Order permitting trading is granted. In that respect, we think the results of trading in 2005—when 23 and 24 December occur on a Thursday and Friday—might be particularly relevant.

Retailers' Association of Queensland Limited, Union of Employers (RAQ) AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (B1212 of 2004) (B1213 of 2004); Bloomfield DP, Edwards C, Brown C; 174 QGIG 1339

Application to amend the *Trading Hours Order—Non Exempt Shops Trading by retail—State* (Order) pursuant to s.21 of the *Trading (Allowable Hours) Act 1990.*

Issues: Applications to amend the Trading Hours Order—Non-Exempt Shops Trading By Retail—State —Continuous trade proposed on 23–24 December at Pacific Fair Shopping Complex and Robina Town Centre Shopping Complex—Witness evidence—Nothing special, unique or telling about either application —Both applications dismissed.

Background: This decision relates to 2 applications lodged by the National Retail Association Limited, Union of Employers (NRA) to amend the Trading Hours Order—Non-Exempt Shops Trading by Retail— State (the Order) pursuant to s.21 of the *Trading (Allowable Hours) Act 1990* (the Act).

The first application (Matter No. B1212 of 2004) seeks to amend the Order to allow the Pacific Fair Shopping Complex (Pacific Fair) to trade from 12.00 midnight on 23 December until 8.00 a.m. on 24 December of each year provided that where 23 December falls on a Saturday or Sunday additional hours will operate from midnight on the Thursday prior to Christmas Day until 8.00 a.m. on the Friday prior to Christmas Day.

NRA also lodged an application seeking the Order be amended in an identical way in respect of the Robina Town Centre Shopping Complex (Robina) (Matter No. B1213 of 2004).

The applications were supported by the Hardware Association of Queensland, Union of Employers (HAQ) which chose not to call any evidence. The applications were opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA), the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers (NMAA), and the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA).

The Commission inspected the 2 centres on the afternoon of Wednesday, 6 October 2004. During the course of the inspections the Members of the Full Bench and representatives of each of the parties which participated in the proceedings (above), were given a briefing on the history of each of the centres before being taken on an inspection of the whole of each complex. That inspection has greatly assisted us in understanding the evidence and in arriving at our ultimate conclusion in respect of these applications.

By agreement between the parties the 2 applications were heard concurrently. This was because evidence given by several witnesses was common to the 2 applications and it was convenient to deal with that evidence in a single sitting, rather than have it repeated.

Held: "In the end result, we have decided that there is nothing special, unique or telling about these applications which should cause us to depart from the "standard" trading hours established by the *Trading (Allowable Hours) Amendment Act 2002* or the current Order (see pronouncements of other Full Benches of the Commission, 174 QGIG 912 and 174 QGIG 1339). Overall, the applications seemed, to us, to simply be an attempt to ride on the back of the successful 23–24 December 2003 Chermside shopping centre continuous trading event approved by the Commission at 174 QGIG 1339–1348. It seems to be the classic case of "me too" and "they've got it, why not us?"

If the Commission approved either of these applications based on the case presented by NRA it would effectively be giving the green light to virtually every other centre owner which wished to trade on the evening of 23–24 December to lodge its own application. We believe we should guard against that possibility by dismissing the two applications on their merits and, in doing so, by clearly restating that additional trading hours are not there just for the asking or on the basis they have been granted elsewhere. There must be some particularly special or telling aspect—something distinguishable—about an individual application before it will be granted.

In this regard, whereas the Chermside application was based on a particular concept—a special promotion centred on a *"one centre per city event"*—neither of these applications had any similar compelling feature. Representatives of each of the centre managements who gave evidence suggested they were motivated to support the NRA applications solely because of the success of the Chermside event and their belief that they could successfully replicate such an event within their own centre. Their motivation seemed to be that it was simply a further opportunity to increase sales. There is nothing special, unique or telling about that.

Further, whereas those involved in the Chermside application demonstrated detailed traffic flow analyses showing the number of consumers entering the centre—and various stores within it—during the whole of 23 and 24 December (which showed a considerable number of people in the centre effectively right up until midnight on 23 December), nothing of that ilk was produced in support of these applications. The applications were grounded not so much on what had happened within Pacific Fair and Robina previously which warranted extended trading hours, but, rather, on what had happened elsewhere. There was none of the comparable data, or special features, which convinced the Commission to approve the Chermside trial.

Taking all of the above matters into consideration we believe that the applicant has not established a sufficient case for either of the applications to be granted. As stated above repeatedly, there is nothing special, unique or telling about either application which justifies their granting. We dismiss both applications. In doing so, we note that another Full Bench in Matter No. B1180 of 2004 (released concurrently with this decision) has refused a similar application in respect of Indooroopilly Shopping Centre because of the lack of any special feature in that case, but also because of local traffic issues.

The Commission determines and orders accordingly.

As a post script, we raise our general concern about the applicant's repeated practice of lodging applications of this type well after mid-year. Whilst the Commission has been able to deal with these applications on this occasion, the same guarantee cannot be given in the future should the practice continue."

The Australian Workers' Union of Employees, Queensland. And the Queensland Council of Unions and others ((B724 of 2004) & (B744 of 2004)) Linnane VP, Swan DP, Blades C; 176 QGIG 154

Application for General Ruling

Issues: Arbitrated Wage Adjustment and Queensland Minimum Wage

Background: The application sort to apply the same level of arbitrated wage adjustment determined by the Full Bench of the AIRC in the *Safety Net Review—Wages May 2004* into all State awards by way of general ruling; an adjustment of existing allowances within awards which relate to work or conditions which have not changed and service increments by the percentage equivalent increase associated with the C10 rate of pay within the *Engineering Award—State* i.e. an increase of 3.5%; to apply the arbitrated wage adjustment of $19 per week to the Queensland Minimum Wage as it applies to both award and non-award employees consistent with the outcomes provided for in *Gordon Nuttall, Minister for Industrial Relations v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (The Queensland Minimum Wage Case)* (2003) 172 QGIG 2 and (2003) 172 QGIG 1366; the maintenance of the 2002 Declaration of Policy dealing with the *Statement of Principles* (2003) 170 QGIG 438 except for changes in operative dates, the quantum of wage adjustment and consequential amendments to ensure the currency of the Principles; and an operative date of 1 September 2004. The applications were joined and received support from the LGA and State Government. The AIG did not oppose the applications.

The QCCI opposed the applications insofar as the quantum of $17.00 but not the date of operation of 1/9/05. It instead suggested a quantum of $10.00 and 1.9% for allowances.

Held: "[54] This Commission is required by s.273(2)(a) of the Act to perform its functions in a way that furthers the objects of the Act and further, in making any decision, s.320(5) of the Act requires the Commission to consider the public interest, and to that end the Commission must consider the objects of the Act and the likely effects of its decision on the community, local community, economy, industry generally and the particular industry concerned. The principal object found in s.3 of the Act is to provide a framework for industrial relations that supports economic prosperity and social justice. Section 3 of the Act provides further the means by which the principal object can be achieved. In so far as these applications are concerned the relevant paragraphs of s.3 of the Act are:

> providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers: paragraph (a);
>
> providing for an effective and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness: paragraph (b);

promoting the effective and efficient operation of enterprises and industries: paragraph (f): and

ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community: paragraph (g).

[55] The Commission is also required by s.126(d) and (f) of the Act to ensure that awards provide for "secure, relevant and consistent wages and employment conditions" and provide for "fair standards for employees in the context of living standards generally prevailing in the community".

[56] The decision of the AIRC in the *2004 Safety Net Review* is also a matter that is relevant to consider. The AIRC in its decision concluded that the Australian economy was strong and that the economic outlook raised an expectation that the Australian economy will continue to perform well. The material before this Full Bench would indicate that the Queensland economy is sound and the forecast is for the Queensland economy to remain positive.

[57] Whilst the impact of the drought has probably been felt more in Queensland than in the Australian economy generally, and the Queensland sugar industry continues to face difficulties, we are not persuaded that those aspects of the Queensland economy warrant any departure from the outcome in the AIRC decision. The discrepancy in our view is not large and certainly not consistent throughout industry: see comments of the Full Bench in *Queensland Council of Unions v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (2000) 164 QGIG 372.

[58] Around one quarter of Queensland employees rely on the Queensland Industrial Relations Commission award system to provide wage increases. There continues to be a wage disparity between those employees who are able to bargain either individually or collectively for wage increases and those who rely upon the award system. An inability to negotiate wage increase with their respective employers should not, in our view, deprive such workers of a wage increase such as that sought in these applications.

[59] This Full Bench has considered the evidence of Mr Ballantyne and all of the submissions before it. We are of the view that the proper course is to flow the increases granted in the *2004 Safety Net Review* to awards of the Queensland Industrial Relations Commission in so far as the increases relate to arbitrated wage adjustments and the adjustment of allowances that relate to work and service increments. There will be consequent amendments to the *2003 Statement of Principles.*

[60] Section 287(1)(c) and (2) of the Act require the Commission to make a general ruling about a Queensland Minimum Wage for all employees at least once each calendar year. The last general ruling was made in August 2003 with an operative date of 1 September 2003. As we have decided to grant the $19.00 per week increase in award wages it is, in our view, appropriate to also grant the applications to increase the Queensland Minimum Wage to $467.40 per week for full-time employees and a proportionate amount for junior, part-time and casual employees regulated by industrial instruments (excluding industrial agreements).

[61] The operative date for all increases arising from this decision will be 1 September 2004.

Ergon Energy Corporation Ltd and Another AND The Electrical Trades Union of Employees of Australia, Queensland Branch and Others (No. CA140 of 2005) Hall P, Linnane VP, Thompson C; 179 QGIG 21

Industrial Relations Act 1999—s.156—Application for approval of certified agreement

Issues: The proposed Ergon Energy—Certified Agreement 2005, was lodged for certification. The Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees (hereafter AMACS) is not a proposed party. AMACS is a "relevant employee organisation". It has the "right to be heard" described at s.155 of the *Industrial Relations Act 1999* (the Act).

Background: "By an application for directions lodged on 19 April 2005, AMACS sought orders for discovery against certain proposed parties to the certified agreement. When the application for certification was mentioned on 19 April 2005 the proposed parties opposed the grant of orders for discovery on the ground that Rule 38 of the *Industrial Relations (Tribunals) Rules 2000* (the Rules) did not authorise the Commission to make such an order in favour of a participant other than to the proceedings. That issue was listed for hearing on 22 April 2005. Immediately prior to the hearing AMACS advised that on the matter being called, it would seek an order pursuant to s.329(b) (1) of the Act that it be a party to the proceedings. That in fact occurred. "

Held: "Section 329(b) distinguishes between "parties to the proceedings" and persons who, as a matter of discretion, "may be heard". Section 322 recognises yet another possible participant, viz. an intervener.

Whilst the full rights of an "intervener" under the *Industrial Relations Act 1999* have not been exhaustively determined, one has to take as a starting point that as a general proposition a person accepted as an intervener becomes a party to the proceedings, compare *Corporate Affairs Commission v Bradley* [1974] 1 NSW LR 391 at 396 per Hutley JA and *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534. Given that the right to intervene is confined to the Minister and Peak Councils, we are reluctant to treat those given a "right to be heard" as having comparable rights. Further, if the legislature had intended "related employee organisations" to be parties to proceedings for the certification of an agreement, one might have expected the legislature to say so. In our view the purpose of s.155 is to give "related employee organisations" the opportunity to be heard without the necessity to seek leave pursuant to s.329(b) (v).

AMACS's principle argument is not that it is a party but that it should be made a party pursuant to s.329(b) (i). As a matter of first impression, s.329(b) (i) appears to be directed to the determination of the "parties" where the identity of the parties is an issue, e.g. where there is a dispute about the identity of the employer in the case of a "loaned" employee. However, on the assumption that s.329(b) (i) vests power to make a person a party to proceedings when the person is not, it would be wrong to do so where the explicit purpose of the order is to give an opportunity to seek orders for discovery to a person not otherwise entitled to such orders.

AMACS's real problem is not Rule 38. If it was simply a matter of inadequacy in the rules, waiver pursuant to s.329(k) would be available. The real difficulty is that the discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs, compare *Harman v The Secretary of State for the Home Department* 1983 [1 AC 280 at 308 per Lord Keith of Kinkel, followed *Mackay Sugar Cooperative Association Limited v CSR Limited* (1996) 137 ALR 183 187 Spender J. It is very much a creature of superior courts of record with ample powers to ensure that information gleaned on inspection of discovered documents is not utilised for an extraneous purpose.

The Queensland Industrial Relations Commission, howsoever constituted, is but a court of record, s.255 of the Act. It has limited capacity to intervene where a party misuses information obtained on discovery. It has no effective power to come to the aid of a litigant whose information is misused by a person who is not a party. It would be wrong to resort to stratagems to expose litigants to such risks. The convenient fiction of allowing AMACS to assume the persona of a "party" would not avail a party discovering documents seeking a remedy against the misuse of information. The statutory discretion at s.326(f) is constrained by the requirements of justice. We note, that with the possible exception of the orders made by Einfield J at first instance in *United States Tobacco Co v Minister of Consumer Affairs and Others* (1988) 520 FCR 79 520 a review of the literature does not disclose examples of orders for discovery in favour of persons with a right to be heard and Einfield J's order was described by the Full Court of the Federal Court as "unusual (at 539)".

It was for those reasons that we dismissed AMACS's application to be made a party."

Queensland Council of Unions and Queensland Chamber of Commerce and Industry Limited (B600 of 2004) Swan DP, Fisher C, Asbury C; 179 QGIG 412

Application for General Ruling

Application for declaration of Policy

Wage and Allowance Adjustment

Issues: "The Queensland Council of Unions (QCU) filed an application seeking:

(1) a General Ruling in regard to wage and allowance adjustments for award employees; and

(2) a Statement of Policy in regard to a Principle pertaining to the adjustments of Wages and allowances from previous State Wage Case decisions from 1987 to 2004.

The application arises from the review of awards required by s.130 of the *Industrial Relations Act 1999* (the Act)."

Background: "On 2 July 2004 the Commission convened a conference of interested parties to begin the second round of Award Review in accordance with s.130 of the Act. At that time the Agenda for the Review, which had been arrived at by discussions with the key players from Award Review Mark I, contained six items.

Parties attending the July 2004 conference were invited to comment on the appropriateness of the Agenda and given the opportunity to add items.

Further conferences in respect of Award Review Mark II were held on 17 September 2004, 16 November 2004 and 18 March 2005. During the course of these conferences, in principle agreement was reached on one issue to take forward, viz., that awards that had not been adjusted for previous wage and allowance increases available under State Wage Case decisions would have such adjustment applied. In the submissions of the QCU, this was to ensure that such awards did not contain provisions that were obsolete or needed updating (s.126(c) of the Act) and thus establish current wage rates and allowances in awards.

At the commencement of the Award Review process in July 2004, the parties were provided with spreadsheets that had initially been prepared by the Department of Industrial Relations (DIR) for the first round of Award Review. The spreadsheets were subsequently reviewed by the QCU. These spreadsheets listed all awards that existed at the time and, on an award by award basis, showed whether an award had received all wage and allowance adjustments that had been granted for the period 1989 to 1997. The parties attending the conferences were asked to check the spreadsheets for accuracy as these would be used as a basis for the process of adjusting wages and allowances.

DIR undertook such process in respect of Crown awards and as a result some changes were made. The QCU and the Registry also reviewed the spreadsheets to ensure that the list of awards remained current. As some awards had been rescinded during the Award Review Mark I process, the list was updated to reflect these changes. Regrettably no other party reviewed the documentation.

At the conference of 17 September 2004 the QCU distributed a proposal regarding the wage and allowance adjustment. The proposal was that the Commission issue a General Ruling relating to the adjustments together with a Principle guiding the mechanics of the process. The QCU also provided a table of adjustments sought showing such matters as the quantum of the increases that had been granted, whether they had been granted by General Ruling or Statement of Policy and whether allowances had been capable of adjustment. Responses were sought from the parties by 15 October 2004 and were discussed at 16 November 2004 conference.

Responses were provided by a number of organisations including Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI), Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) (QRTSA), Registered and Licensed Clubs Association of Queensland, Union of Employers (RLCA), National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers (NMAA), Hardware Association of Queensland, Union of Employers (HAQ), Queensland Hotels Association, Union of Employers (QHA), The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers (RCEA), Queensland Cane Growers' Association Union of Employers (QCGA) and from two consultants viz. Employer Services and John Redsell. Some of the responses had been provided earlier and were relied on.

During the conference process DIR made two amendments to the proposed Principle. Following discussions between the QCU and DIR the amendments in relation to allowing access to the Economic Incapacity Principle of the Wages Principles and reference to a single Member in the case of disputes were accepted by the QCU and were incorporated into their draft Principle.

The parties agreed to the process adjusting wage rates and allowances. It was agreed that the rates and allowances should be "decomposed" to those that applied as at 1 January 1987 and all available increases applied to that rate. 1 January 1987 was selected as it was from 1987 (to 1996) that wage increases were made

available by Statement of Policy rather than by General Ruling. Under the successive Statements of Policy, wage increases had to be accessed on an award by award basis.

The major point of difference between the parties at the conferences and at the hearing was whether the wage increases should be granted by General Ruling or accessed on an award by award basis, as was the case when the increases were first made available. Largely because this difference could not be resolved at the conferences, the QCU decided to bring its application. This would allow the competing parties to argue their respective positions and have the Commission determine the matter."

Held: "This application is brought pursuant to s.130 of the Act. In essence it requires awards to be reviewed within three years of having been made or last reviewed under this section. By reference to s.126 of the Act, the Commission must ensure, amongst other things that an award provides for secure, relevant and consistent wages and employment conditions. In our view an application that seeks to ensure that awards provide for all relevant wages and allowance adjustments that have been made available by the Commission over the years as general wage movements is appropriate for consideration in the context of s.130 of the Act.

In this matter we note QCCI's concerns that the application, if granted, will bypass Principle 4 of the current Wage Principles and further, that the increases being sought are available on application. Of course had award parties kept their awards current by accessing all wage and allowance adjustments when made available, no need would exist for this application. For various unexplained reasons, the applications for increases were not made at the time when they were first made available nor have they been made subsequently under Principle 4 and its predecessors. We think it timely and appropriate for the matters to now be dealt with. In effect, the application is seeking increases that were made available some nine to eighteen years ago.

We further accept that the requirements that were imposed by the Statement of Policy issued between 1987 and 1996 have now been incorporated, if not totally, then certainly, substantially into awards affected by this application as a result of Award Review Mark I and other legislative processes. In the circumstances we do not require awards to have any other clauses inserted into them as a result of this process, except that which identifies that increases have flowed as a result of this application. To this end we propose to adopt the Standard Clause included in the QCU Draft Application together with the following sentence at the end of the first paragraph as follows:

"The adjustment to wages made on 15 August 2005 (or such other date as the Commission may determine after dealing with a dispute) arises from the second round of Award Review undertaken pursuant to s.130 of the *Industrial Relations Act 1999* in 2005.".

In our view while not separately identifying each adjustment that had not been previously granted, the clause shows the source of the adjustment sufficiently. We consider that this sentence should be contained in subsequent clauses issued as a result of State Wage Cases, however, the form of the clause emanating from a State Wage Case is a matter to be determined by that Bench.

At the hearing of the application, the major point of contention between the QCU and QCCI (and some of the other employer parties) was that the outcomes of the exercise were unknown. Since the parties had agreed in principle to the wage and allowance adjustment exercise being undertaken under the purview of s.130 of the Act, the Commission was able to secure funding from DIR for the Registry to undertake the calculations. This has required a computer program to be written and the secondment of a dedicated officer to input the information. The project commenced in the Registry in April 2005. A substantial number of

awards have been processed but the project has not been completed. Although we think that a review of the spreadsheets by employers would have shown the increases likely to flow from the process, we acknowledge that precise wage and allowance increases were not included in the QCU application and are not fully known at this time.

We consider that the proposal put forward by DIR, and accepted by the QCCI and the QCU, of a two week grace period, helps to overcome this problem and provides an opportunity for disputes to be notified. We consider however that releasing all results on 1 August 2005 as proposed by the QCU may inhibit proper consideration by employer parties in particular. In discussions with the Deputy Industrial Registrar, it appears that some calculations will be completed prior to that date. At this stage it is proposed to release one section of the calculations on 18 July 2005 with any disputes in relation to those being required to be notified by 1 August 2005. A second and final round will be released on 1 August, with disputes to be notified by 15 August 2005. In both cases, subject to the application of the Economic Incapacity Principle, the increases will be operative from 15 August 2005.

As a dispute may result in a particular award being removed from the operation of the General Ruling until it is resolved, the party notifying the dispute bears the onus of establishing the grounds upon which the General Ruling should not operate or be deferred.

General Ruling

Although differential results will flow from the review and calculation process, we are satisfied that the matter is best dealt with by way of General Ruling. As we have already said, the increases in question are generally many years old and the activity that was required at the time to secure them has been undertaken under other guises. In the circumstances we are prepared to issue the General Ruling as sought with the operative date as indicated above.

Statement of Policy

We are also prepared to issue a *Statement of Policy: Principle for Adjustment of Wage and Allowances from Previous State Wage Case Decisions—1987 until 2004 inclusive.* In addition to the amendment to the Standard Clause noted above, the word "Commissioner" will be replaced by "Member" wherever it appears in point two. This reflects the current nomenclature.

Given the General Ruling is to operate from 15 August 2005, even allowing for disputed claims to be processed, we consider the Principle should operate until 31 December 2005.

Disputed cases will be referred to a nominated Member.

Wage Principles

In light of our decision we would raise for the parties' consideration the continued relevance of Principle 4 of the current Statement of Principles. This might be a matter best canvassed before the next State Wage Case Bench."

Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. 3) (No. B209 of 2002) and The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. 3) (No. B308 of 2002) Linnane VP, Bloomfield DP, Blades C; 178 QGIG 25

Industrial Relations Act 1999—s.329—powers incidental to exercise of jurisdiction

Issues: Removal of the small business exemption (less than 15 employees) in relation *Termination Change and Redundancy*

Background: "[8] On 23 July 2004 the QCU wrote to the Industrial Registrar referring to the fact that the AIRC had released its decision on 26 March 2004 and requesting an opportunity to be further heard on matters raised in their application. Ultimately the only matter sought to be opened was the small business exemption aspect of our decision of 18 August 2003.

[9] We received extensive written submissions from the QCU. The AWU adopted and supported those submissions. The Queensland Government's position did not change from that before us in the original hearing i.e. the Government opposed the removal of the small business exemption.

[10] In addition we also received extensive written submission from the Australian Government represented by the Department of Employment and Workplace Relations. The Australian Government's position also did not change from that put before us in the original hearing i.e. they strongly opposed the removal of the small business exemption.

[11] Written submissions were also received from the following organisations opposing the removal of the small business exemption:

- AIG;
- National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers NMAA;
- Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI);
- Queensland Cane Growers' Association, Union of Employers (QCGA);
- Queensland Hotels Association, Union of Employers (QHA);
- Queensland Motel Employers Association, Industrial Organization of Employers (QMEA);
- The Registered and Licensed Clubs Association of Queensland, Union of Employers (RLCA);

- Employer Services Pty Ltd for: Bowls Queensland, Queensland Community Services Employers' Association, Australian Dental Association (Queensland Branch) Union of Employers, Consulting Surveyors Queensland, Industrial Organisation of Employers and Queensland Master Hairdressers', Industrial Union of Employers; and
- Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA).

[12] Each of the organisations also made oral submissions. We have considered all the submissions, both written and oral, in coming to our conclusion.

[13] The only additional evidence before this Full Bench that was not before us when we released our decision on 18 August 2003 was the decision of the AIRC released on 26 March 2004. However, we did not have before us the evidence that was presented to the AIRC i.e. the evidence that it used to decide to remove the small business exemption."

Held: "[14] We based our decision of 18 August 2003 on the evidence that was before us on that occasion. There are substantial reasons for a small business exemption and we again adopt those reasons referred to in our previous decision.

[15] Further, it is important to note the QCU and the AWU had the opportunity to have the matter before us adjourned to await the decision of the AIRC. They opposed that application and were successful in that opposition. Had consistency of outcomes been a priority then the logical position would have been to await the outcome of the AIRC deliberations. Instead, the QCU and the AWU decided to pursue their applications before this Full Bench in the knowledge that the AIRC was in the process of hearing the matter before it and in the knowledge that different outcomes might result.

[16] To now change our position because the AIRC adopted a different view on the (apparently different) evidence before it would be tantamount to saying we made the wrong decision on the evidence before us originally. We are of the view that our original decision was correct given the material and evidence before us on that occasion.

[17] We have not been persuaded by the QCU and AWU sub to remove, or vary, the small business exemption"

Decisions of the Commission

Mark Martin Smith AND CreditLink Services Limited
(B1923 of 2003); 27 July 2004; (2004) 176 QGIG 643

Industrial Relations Act 1999—s.74—application for reinstatement

Issues: Extension of time. Delay due to representative error. Salary in excess of exemption limit. Resignation or termination.

Background: The applicant sought reinstatement to his former position as Senior Manager—IT with CreditLink Services Limited. The applicant's employment came to an end on 11 September 2003 when he elected to resign rather than be terminated for alleged gross misconduct arising out of unauthorised use of an office and business telephone facility. Upon approaching a solicitor on 17 September 2003 concerning what he perceived to be his unfair dismissal, the applicant was informed that because his salary was in excess of the exemption limit under s.72(1)(e) of the Act it would be best to pursue the matter in the common law jurisdiction. The applicant was subsequently advised by another legal representative that he could bring an application for unfair dismissal in the Commission because his employment was governed by the terms of a certified agreement. After consulting with his solicitor again, an application was lodged on 21 November 2003. As the application for reinstatement was lodged 49 days out of time an extension of time was also sought.

Held: In the first instance, jurisdiction was established because the salary cap under the Act does not apply to persons covered by certified agreements. The Commission decided to extend time to the applicant within which to lodge his unfair dismissal application because the delay was not significant and was largely attributable to error by the applicant's representative. Further, granting an extension would not prejudice the respondent, which might well have been pursued by the applicant in another jurisdiction.

It was noted that s.77 of the Act requires the Commission to consider a number of elements in deciding whether a dismissal is harsh, unjust or unreasonable. Predetermination of an outcome prior to a termination interview does not, in itself, make a termination fall within that category. The termination was unfair because of the ostensible grounds relied on by the respondent to justify the decision to summarily dismiss the applicant, or give him the option of resigning. The Commission took the view that the misuse of the telephone facility was essentially a pretext to terminate the applicant for poor performance in a management role. The applicant was not given a proper opportunity to respond to the employer's accusations about poor management nor was he made aware of the importance of the allegations he had under-declared his personal mobile phone calls. The applicant was also unaware of his impending summary dismissal at the meeting at which his misdemeanours were raised.

Reinstatement or re-employment was found to be impracticable. The Commission held one approach to considering compensation was that, had the respondent provided a reasonable period of notice to the applicant it would have been required to give somewhere in the order of four month's notice. Instead it paid two weeks in lieu. On this approach around 14–15 weeks compensation was due. Using another approach, the applicant had been wrongfully dismissed and would be entitled to compensation for his actual loss up to the maximum of 26 weeks. However, the applicant had failed to mitigate his loss by refusing to take up a lesser role in alternate employment. Consequently, the maximum available should be reduced significantly. The Commission ordered the respondent to pay 13 week's compensation to the applicant at the wage rate he was earning as at 11 September 2003.

Tomac Enterprises Pty Ltd AND Newmont Pajingo Pty Ltd
(B782 of 2004); 23 December 2004; (2005) 178 QGIG 35

Industrial Relations Act 1999—s.276—application to amend or void contract

Issues: Unfair contract. Breach of contract or collateral contract. Unconscionable and unfair behaviour. Common sense approach adopted.

Background: Tomac Enterprises Pty Ltd (Tomac) sought a determination under s.276 that the contract between itself and Newmont Pajingo Pty Ltd (Newmont) was unfair. Newmont operated a mine near Charters Towers and in April 2002 negotiated with Tomac to perform underground drilling at the mine. Newmont allegedly made representations to the contractor that following an initial 30,000 metres of drilling (after which Tomac's performance and safety would be reviewed) that "you'll be drilling here a long time" and "you'll be here for years". On the basis of such representations, Tomac bought a task specific drill and began drilling in July 2002.

Once the initial 30,000 metres had been drilled, Tomac sought to confirm the drilling rate and the scope of further works to be carried out at the site. It was not until April 2003 that Newmont provided Tomac with a draft Letter of Intent. Tomac replied shortly afterwards with suggested amendments (including an increase in its drilling rate) to that document but received no reply in relation to those amendments, despite numerous attempts to contact Newmont's representatives. In June 2003, Tomac was informed that future drilling would be put out to tender. Despite registering its disappointment with Newmont, Tomac tendered for the drilling work but was unsuccessful.

Held: Although both parties accepted that corporations and partnerships can make applications under s.276 of the *Industrial Relations Act 1999,* they did not agree on whether the contract was an unfair contract within s.276 (4). The Commission stated that it was well settled that unfairness can arise not just from the parties' initial negotiations but also from later events, such as the conduct of one party or another during the life of the contract. In relation to the appropriate test for unfairness, the common sense approach was adopted; see *Reilly v TDG Logistics Pty Ltd* 166 QGIG 430.

The Commission found that Tomac's argument that the contract between itself and Newmont was unfair within s.276 was overwhelmingly sustained. The contractor had been led to believe it was entering a long-term relationship and calculated costings, purchased equipment and organised infrastructure accordingly. During the whole of the contract, Newmont had clearly abused its position of power by refusing to acknowledge, or discuss legitimate issues raised by Tomac. The respondent's refusal to meet with officers of the applicant and inaction also meant no notification or consultation of alleged performance issues. The tender process was farcical and predetermined.

Relevantly, s.276 of the Act provides the Commission power to grant relief in an unfair contract claim. Any payment for unfairness is to be appropriate to the circumstances of the case. The Commission made orders varying the contract and requiring Newmont to pay $414,250 to Tomac.

Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (for Vincent Fenech) AND CHR Group Pty Ltd
(B2110 of 2003); 24 December 2004; (2005) 178 QGIG 64

Industrial Relations Act 1999—s.117—application for remedy under Chapter 4

Issues: Termination of employment. Freedom of association. Labour-hire company.

Background: An application was lodged by the AMEPKIU on behalf of an employee of a labour-hire company under s.104 and s.105 of the Act, alleging that his employment had been terminated for a prohibited reason or for reasons that included a prohibited reason. In particular, the employee alleged that his employer CHR Group Pty Ltd had terminated his employment at the request of its client, at whose premises he worked, after the client took exception to his union involvement.

The union submitted that CHR was responsible for the prejudicial conduct of its client and could not hold itself out as the employer then abrogate employer responsibilities. When the client complained about the employee's conduct, CHR should have conducted a proper enquiry into the allegations made against the worker. The union noted that no issue had been raised about the employee's performance until he became a union member. The warning issued about productivity was unsubstantiated and not valid and the worker's dismissal occurred only after he requested leave to attend a union training course.

CHR argued that it could not be held liable for the actions of its client. CHR was unaware of its client's motives and had no knowledge of any reason that the client was unhappy with the worker other than his lack of productivity. The relationship between it and the client was a new type of relationship. Unlike a normal working relationship, in which the employer had direct control over the employee and the premises in which the employee worked, CHR was in a contractual position whereby if the host employer (the client) required them to withdraw a staff member from its premises, it had no choice but to comply with that requirement. Furthermore, even if the Commission accepted that the client was culpable, CHR was not implicated in the scheme and culpability could not be transferred from a third party to the respondent.

Held: The Commission accepted that the contract that existed between CHR and their client was a new type of arrangement through which a third party assumed many of the former responsibilities of the employer. However, a party to an employment contract cannot avoid its common law and legislative obligations arising out of it by contracting with a third party outside the employment relationship. Moreover, the current industrial relations framework makes it more difficult for an employee to challenge a third party than it does a traditional employer.

The AMEPKIU had alerted CHR to its allegations that the client had directed that the warning be issued because of the employee's role as a delegate and that the productivity claims had no basis. There was also ample evidence of antipathy between the client and the union and the reasonable inference would have been that the labour-hire company should have been aware of this history of antipathy. Because of this knowledge, CHR was obliged to make full and proper inquiries about the client's productivity measurement system, rather than merely accepting at face value a denial by the client's representative. The Commission found also that the client's productivity measurement system did not provide a reasonable basis for concluding the delegate wasn't sufficiently productive.

Accordngly, the Commission held that the employee had suffered disadvantage and injury for a prohibited reason under the Act. The respondent was ordered to pay to the employee the amount of $7500 within 28 days.

Sunshine Coast Events Centre Pty Ltd AND Queensland Council of Unions and Another

Sunshine Coast Events Centre - Certified Agreement 2004
(CA608 of 2004); 6 January 2005; (2005) 178 QGIG 85

Industrial Relations Act 1999—s.153—application to certify agreement

Issues: Jurisdiction. Distinction between contract of employment and employment relationship. Right to be heard.

Background: On 2 December 2004, the Sunshine Coast Events Centre filed an application, under Chapter 6 Part 1 of the Act, seeking certification of an agreement made with persons said to be employees of the company. The Sunshine Coast Events Centre Pty Ltd was owned and operated by the Caloundra City Council which had seconded employees to work at the Centre. The Centre attempted to make an agreement directly with those employees after previous negotiations had stalled with the Australian Municipal, Administrative, Clerical and Services Union (AMACS), a union registered under the Workplace Relations Act 1996. The proposed agreement was based on the document developed through negotiations between the AMACS and Caloundra City Council.

On 29 October 2004 employees working at the Centre were sent the proposed agreement, a notice said to comply with s.144 of the *Industrial Relations Act 1999* and a letter of offer of employment with the Sunshine Coast Events Centre. The offer of employment was subject to the Commission's approval of the proposed

agreement. There was evidence that all employees to whom those documents had been sent had signed them indicating that they accepted the offer.

The Queensland Council of Unions (QCU) was granted intervention rights under s.322 (2) of the Act on the basis that one of its members had sufficient interest in the proceedings. The QCU submitted that the application for certification should be dismissed on the following grounds. Firstly, the Commission could not be satisfied that the agreement had been approved by a valid majority of employees due to insufficient information supplied by the company. A requirement under s.156 (1) (g) of the Act. Secondly, the Commission had no jurisdiction as at the time the agreement was put to a ballot of employees for approval, the company had no employees. Further, there were no employees at the date of the hearing into certification. Finally, the QCU contended that the Commission should refuse to certify the agreement on the basis of s.157 of the Act as the requirements for certification set out in s.156 had not been met, and that the letters to persons employed by the Caloundra City Council could constitute a breach of the provisions of Chapter 4—Freedom of Association—of the Act.

In response to the QCU's submission, the company argued that the letters of offer and their acceptance amounted to an employment relationship sufficient for making a certified agreement between the parties.

Held: The Commission commenced by noting that Chapter 6 Part 1 of the Act, dealing with certified agreements, was effectively a code and the Commission had very limited discretion in deciding whether to certify an agreement. After considering the distinction between a contact of employment and an employment relationship, the Commission expressed the view that the scheme of Chapter 6 Part 1 of the Act generally required that an employment relationship exists between the parties proposing to make a certified agreement. Furthermore, the point at which an agreement with employees is made is when a valid majority of relevant employees signify their approval of its terms by way of a ballot or some other mechanism.

The Commission was satisfied that an employment relationship did not exist between Sunshine Coast Events Centre and the persons proposed to be covered by the agreement and dismissed the application for certification. Since there was no evidence that employees could have their employment terminated, the Commission did not consider if the conduct amounted to a breach of freedom of association obligations.

Adrian Victor Plant AND Pyrotronics Fire Protection Pty Ltd (in liquidation) (W144 of 2004); 17 January 2005; (2005) 178 QGIG 91

Industrial Relations Act 1999—s.83 (4) (b)—what employer must do to dismiss employee;
—s.278—power to recover unpaid wages

Issues: Application for unpaid wages and superannuation contributions. Respondent in liquidation. Practice and procedures.

Background: The applicant sought to recover unpaid wages and superannuation contributions under the Act from the respondent which had, by resolution of creditors, been wound up on 2 February 2004. Pursuant

to s. 471B of the *Corporations Act 2001,* the respondent's liquidator challenged the applicant's ability to further proceed with his application in the absence of an order from the Supreme Court of Queensland allowing him to do so.

Held: At the first instance, the Commission found that there was no basis for distinguishing s.83 (4) (b) applications from applications about severance allowance and other separation benefits made pursuant to s.87 of the Act. As such, the current application was a "proceeding" for the purposes of s.471B of the *Corporations Act 2001.*

The Commission stated further that the weight of case authority both inside and outside of Queensland, supported the view that s.471B of the *Corporations Act 2001* requires a party to seek leave of a relevant Court in relation to proceedings such as that presently before the Commission. The Commission has been constituted as a "court of record" pursuant to s.255 of the *Industrial Relations Act 1999,* and is not restricted to performing arbitral functions and is invested with many judicial functions (e.g. wage recovery applications, unfair contract applications and reinstatement applications).

The Queensland Industrial Relations Commission is a "court" for the purposes of s.471B of the *Corporations Act 2001.* As a result the applicant must seek leave of the Supreme Court before further proceeding with his application under s.83 (4) (b) and s.278 of the Act.

The Australian Workers' Union of Employees, Queensland (for Darryl Moate and Kenneth Allison) AND James Hardie Australia Pty Ltd (No. 2)
(B1087 and B1088 of 2004); 24 January 2005; (2005) 178 QGIG 114

Issues: Unfair dismissal applications. Failure to agree on remuneration ordered. Gainsharing arrangements.

Background: In a decision of 29 October 2004, the Commission ordered the reinstatement of the applicants and further ordered in accordance with s.78 (a) of the Act that their continuity of service be maintained and the respondent pay remuneration lost, or likely to have been lost, due to the dismissal. The parties were directed to take into account any monies or benefit received by the applicants in the period between their termination and reinstatement. On 1 December 2004, the parties advised the Commission they had failed to reach agreement on the quantum of monies to be paid to the applicants.

The Union argued that the applicants were entitled to the payment of the Gainsharing arrangement for the quarters ending June and September 2004 and had they not been terminated they would have received a percentage of the overall dividend. Whilst the Gainsharing system was not seen as a part of the parties' Certified Agreement, the process was undertaken through an attachment to the Certified Agreement and the respondent had a legal obligation to make the payments. The Union also submitted that even if the Commission was of the opinion that Gainsharing is not an express term of the employment contract, it is at the very least an implied term as a result of custom and practice in place prior to the certification of the current Certified Agreement.

The respondent submitted that the bonuses, as a generalised topic, are not subject to the contract of employment and by their very nature within the discretion of the relevant employer. In this particular instance, the wages and other entitlements of the employees are set out clearly in the Certified Agreement which must be the basis upon which the obligations of the parties must be measured.

Held: The Commission held that whilst Gainsharing arrangements had operated unabated since inception of the certified agreement, and may in fact form part of the employee's wages, it was not appropriate for the Commission to exercise discretion that would facilitate those payments to the applicants. The arrangement was outside the provisions of the certified agreement and the Commission's orders of 29 October 2004 went to payment of remuneration and envisaged such payments being made in line with direct provisions of the certified agreement and as outlined in the table of payments presented in those proceedings. The Commission dismissed the application and confirmed that monies paid to that date accurately reflected the orders previously released.

Lester Marriage AND Devine Limited
Bob Bugden AND Devine Limited
Jon Titeica AND Devine Limited
John Tetlow AND Devine Limited
Warren Walsh AND Devine Limited
(B904, B905, B906, B907, B908 of 2003); 25 January 2005; (2005) 178 QGIG 118

Industrial Relations Act 1999—s.335—application for costs

Issues: Unfair dismissal. Whether application vexatious or without reasonable cause.

Background: By a decision published at 176 QGIG 724, applications under s.74 of the *Industrial Relations Act 1999* brought against Devine Limited were dismissed. The applicants had alleged the dismissals, on the grounds of redundancy, were unfair because of the quantum and calculation of severance payments.

Devine Limited sought an order for costs, under s.335 (1) of the Act, on the basis that the unfair dismissal applications were made vexatiously or without reasonable cause and that there were unreasonable acts or omissions connected with the conduct of the applications.

Held: The parties' evidence and submissions were considered. The Commission held that the employees had made manifestly unreasonable and excessive demands for compensation prior to conciliation and further ignored all offers to settle the matter after the conclusion of conciliation. The applicants had also engaged in unreasonable acts of omission in connection with the conduct of the applications. Statements were vague and imprecise and contained significant amounts of irrelevant material. As such, the Commission's discretion to award costs under s.335 (1) had been enlivened.

Rule 66 of the *Industrial Relations (Tribunals)* Rules 2000 gives a wide discretion with respect to determining the quantum of costs. The Commission found that given the quantum of the claims and complexity and length of the proceedings, the District Court scale was the appropriate reference point for the assessment of costs. The Commission awarded costs to Devine Limited in the amount of $40,000. An amount of $20, 0000 was incurred by the employee who had contributed to a greater degree to the cost incurred while the remaining applicants were made jointly and severally liable for the residual amount determined.

Raymond Alan Eisenmenger AND Lutheran Church of Australia, Queensland District (B1662 of 2003); 2 March 2005; (2005) 178 QGIG 203

Industrial Relations Act 1999—s.74—application for reinstatement

Issues: Termination of employment. Substantive and procedural fairness. Jurisdiction. Separation of secular and religious duties.

Background: The applicant, a pastor and school chaplain at a church college submitted an unfair dismissal application following allegations of three incidents of unnecessary physical contact with students while he was engaged in teaching duties. Prior to these allegations, he had an unblemished record. The applicant contested both the substance of the allegations that were made against him and the procedure by which they were investigated and determined.

While contending no substantive or procedural unfairness attached to the loss of appointment held by the applicant, the primary argument of the Lutheran Church of Australia Queensland District (LCAQD) was to the jurisdiction of the Commission to determine the applicant's claim. The respondent argued that Pastor Eisenmenger had been "called" to his position at the college and that consequently there had never been an intention to create legal relations. There had never been a contract of employment in existence between the parties and consequently, the applicant was not a person who could be dismissed or seek a remedy pursuant to the unfair dismissal provisions of the Act. To substantiate this proposition, the LCAQD, which was a body with independent legal status, registered pursuant to the now repealed *Religious Education and Charitable Institutions Act (Qld),* adduced copies of its own constitution and by-laws.

Held: The Commission found that the evidence pertaining to the substance of two of the allegations weak and uncorroborated. The Commission did find however, that one of the incidents had occurred but was of a relatively minor nature and did not represent a pattern of violent behaviour to warrant the applicant's dismissal. Secondly, the Commission stated that the process by which the allegations were investigated was not clear, transparent or objective leading to deficiencies in the manner in which the formal review had been conducted. Those deficiencies compelled the Commission to find that the applicant's dismissal had been procedurally unfair.

The Commission then addressed the LCAQD's jurisdictional objection. In the first instance, the Commission noted that the constitution and by-laws of the Lutheran Church evinced no intention to create legal relations between the parties. However, the decision of the High Court of Australia in *Ermogenous v Greek Orthodox Community of South Australia Inc.* (2002) 209 CLR 95 dictated that whether there was an intention to create legal relations between a minister of religion and a church was to be determined by reference to all incidents of the relationship and not just its spiritual aspect. The evidence clearly demonstrated that the bulk of the duties and functions performed by the applicant at the college were those of a teacher. That being so, when he was performing those duties he was indistinguishable from any other teacher who was engaged pursuant to a contract of employment. The LCAQD's jurisdictional objection was dismissed.

The Commission held that the applicant was entitled to be reinstated. Although the applicant had substantial support of his teaching colleagues, the Commission was concerned about his coming into contact with the students who had made allegations against him. The Commission directed the parties to confer to find a mutually acceptable resolution and provide written advice to the Commission within 22 days of the date of release of the decision. The Commission also recommended that the applicant undertake a professional development course in classroom behaviour management to assist that process.

Following further hearings, the Commission ordered Pastor Eisenmenger's re-employment to another Church college.

Karen Rebecca Koppe AND Compass Group (Australia) Pty Ltd t/a ESS Support Services (B460 of 2004); 23 March 2005; (2005) 178 QGIG 348

Industrial Relations Act 1999—s.74—application for reinstatement

Issues: Unfair dismissal. Relationship between contractor and client. Obligation of employer to treat employee fairly.

Background: The applicant was employed by Compass Group (Australia) Pty Ltd, a company engaged in the business of providing catering and ancillary services under contract at mine sites operated by Birla Mt Gordon Pty Ltd (BMG). In the performance of her duties, the applicant was required to reside in accommodation provided by BMG. The dismissal occurred following the decision by BMG to withdraw access of the employee to accommodation on site. No enquiry was made by Compass Group in relation to the client's reasons for withdrawal of accommodation.

Jurisdictional questions and preliminary points had been determined in an earlier decision; see 177 QGIG 41. Compass Group had been declared the applicant's employer and appropriate respondent as the control exercised by BMG was merely incidental and routine and was not in respect of the essential terms of employment. The hearing of the substantive aspect of the s.74 application proceeded. The respondent argued that it could not be held responsible for the actions of BMG who had the right to remove accommodation rights without given reasons pursuant to s.403 of the *Mineral Resources Act 1989 (Qld).*

Held: The Commission held that Compass Group could not rely on the actions of BMG as a defence to the unfair dismissal application. The respondent could not avoid obligations under the *Industrial Relations Act 1999* to treat employees fairly and lawfully by arguing that they were complying with directions of clients. The respondent was unreasonable in failing to make enquiries or discuss with the client reasons for withdrawing the employee's accommodation rights. This unreasonable failure meant the applicant was not "notified" of the reason for her dismissal nor given an opportunity to respond. Finding that reinstatement was impracticable, the Commission awarded compensation of $16,415-74.

Nicole Pender AND Specialist Solutions Pty Ltd
(B599 of 2004); 17 May 2005; (2005) QGIG

Industrial Relations Act 1999—s.335—application for costs

Issues: Unreasonable acts and omissions by applicant. Costs awarded to respondent on an indemnity basis.

Background: On 18 March 2005, the Commission dismissed an application by Ms Pender pursuant to s.331 (b) (ii). During the course of those proceedings, Ms Pender made a number of "unreasonable acts or omissions" in the prosecution of her unfair dismissal claim. The first unreasonable act was to insist that the application proceed to trial, over very strong objections of the respondent, rather than await the outcome of other possible litigation. The second unreasonable act involved the applicant's repeated failure to meet a number of adjusted deadlines for the lodgement of her witness statement in response to the very considerable material the respondent had been forced to prepare in its defence of the matter. Thirdly, the applicant failed to keep her then legal representatives informed of her whereabouts, such that they could take instructions and properly inform the Commission of reasons why the applicant sought an unquantified adjournment of her reinstatement application. The final omission occurred when the applicant simply failed to appear on 18 March 2005 and also failed to provide medical evidence which she had been directed to obtain to support her various claims about why earlier proceedings had to be adjourned. Specialist Solutions Pty Ltd made an application for costs totalling $109,609.98.

Held: Whilst the Commission noted that the respondent's costs might appear to be excessive, the schedule of costs recorded only those matters associated with preparing the employer's defence. The Commission also noted that it too was exposed to unnecessary costs and delays due to the many omissions and unreasonable acts of the employee. The Commission was satisfied that the applicant's behaviour indicated that she was not really interested in taking her matter to trial but was more interested in avoiding her "day of reckoning". Therefore, it would be an "act of oppression" if the employer was not awarded its costs on an indemnity basis. The Commission ordered the applicant to pay the respondent's costs of $109,609.98 within 22 days.

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