2001 ANNUAL REPORT OF THE PRESIDENT

OF THE
INDUSTRIAL COURT
OF QUEENSLAND

in respect of
The Industrial Court of
Queensland,
The Queensland
Industrial Relations
Commission,
The Industrial Registry.

Industrial Court of Queensland

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

December 2001.

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

Dear Minister,

In accordance with the provisions of section 252 of the *Industrial Relations Act 1999*, it is my pleasure to report on the operation of the Act and the working of the Industrial Court of Queensland, the Queensland Industrial Relations Commission and the Industrial Registry for the period 1 July 2000 to 30 June 2001.

D.R. Hall
President
Industrial Court of Queensland

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FEATURES OF THE YEAR UNDER REVIEW

The Minister appointed two new members of the Queensland Industrial Relations Commission on 21 September 2000 – Ms Ingrid Asbury and Mr John Thompson. On 31 October 2000, Vice-President Linnane and Commissioners Brown, Asbury and Thompson were appointed as members of the Australian Industrial Relations Commission. Consequently all members of the Queensland Commission now hold dual appointments as federal Commissioners.

On 5 June 2001, as part of the centenary of federation celebrations, the President, Mr Hall, participated in a special ceremonial sitting of the Australian Industrial Relations Commission in Sydney. The heads of all Australian industrial tribunals participated in the sitting. The date marked exactly one hundred years after Prime Minister Barton introduced legislation to the Commonwealth Parliament to establish the Conciliation and Arbitration Court.

Commissioner Fisher was appointed by the Minister for Employment Training and Industrial Relations to conduct an Inquiry into Pay Equity in Queensland. The Inquiry ran for six months from October 2000 and reported to the Minister on 30 March 2001.

Matters filed in the Industrial Court of Queensland between 1 July 2000 and 30 June 2001 increased by almost 19% compared to the previous year.

There was an increase of almost 25% in applications filed for consideration by the Commission between 1 July 2000 and 30 June 2001 compared to the previous financial year. The increase consisted of 236 additional reinstatement applications, an extra 117 claims for unpaid wages, 113 additional award, contract and other matters and 10 appeals against decisions of the Training Recognition Council in relation to apprenticeships and traineeships.

There was no significant change in the notification of industrial disputes nor in applications in relation to industrial organisations. The number of agreements filed for certification by the Commission increased by 42 and Queensland Workplace Agreements (QWAs) continued to decline as an industrial instrument, with 86 fewer QWAs approved this year compared to the 1999-2000 financial year.

THE LEGISLATIVE ENVIRONMENT

The *Industrial Relations Act 1999* governs the jurisdiction, functions, powers, procedures and composition of the Industrial Court of Queensland, the Queensland Industrial Relations Commission, the Industrial Registry and Industrial Magistrates. The Act also provides for the minimum entitlements of employees as well as governing the conduct of the affairs of industrial organisations. The subordinate legislation is the *Industrial Relations Regulation 2000* and the *Industrial Relations (Tribunals) Rules 2000.*

The key features of the Industrial Relations Act 1999 were outlined in the President's Annual Report 1999-2000. The principal Act was amended significantly by the *Training and Employment Act 2000* and the *Industrial Relations and Another Act Amendment Act 2001.*

The key amendments brought about by the Training and Employment Act in relation to the general conditions of employment were:

- Clarifying the meaning of a day's sick leave to take account of non-standard working hours;
- Enabling employees to take sick leave for part of a working day;
- Clearly setting out that sick leave accumulates indefinitely unless otherwise provided by an industrial instrument;
- Clarifying that annual leave accumulates indefinitely unless otherwise provided by an industrial instrument;
- Ensuring the preservation of long service leave entitlements for casual employees who accrued it prior to June 1990, either under an award or the provisions of the *Industrial Conciliation and Arbitration Act 1981.*

The Training and Employment Act also fine-tuned the unfair dismissal provisions by:

- Enabling federal award employees of non-constitutional corporations in Queensland to access the reinstatement jurisdiction of the Queensland Industrial Relations Commission;
- Clarifying the Registrar's power to reject a reinstatement application where the Registrar considers the applicant is excluded by the Act, for example, short-term casual employees;
- Clarifying that those persons in the private sector who are award free and whose salaries are greater than $71,200 are excluded from the reinstatement provisions;
- Requiring the Commission to issue a written certificate with reasons after an unfair dismissal conference if the Commission considers the applicant to be excluded from the unfair dismissal provisions.

These amendments to the Industrial Relations Act took effect from 23 July 2000.

The Commission also acquired jurisdiction under the Training and Employment Act in relation to apprenticeship and traineeship appeals in September 2000. Pursuant to section 232 of the Training and Employment Act, these appeals are by way of rehearing on the record unless the Commission considers it appropriate to hear evidence in order to effectively dispose of the appeal.

The Industrial Relations and Another Act Amendment Act amended employees' entitlements to long service leave. Section 58(2) of the principal Act required a full bench of the Commission to review entitlement to long service leave before 30 June 2000. On 27 June 2000 the Commission concluded this review and supported the following improvements to long service leave entitlements:

- 8.6667 weeks leave after 10 years continuous service;
- Access to pro-rata payment in lieu of long service leave after 7 years where the employee terminates employment because of illness, incapacity or other pressing necessity, or death, but not where

the employee is dismissed by the employer for a valid reason related to their conduct, capacity or performance;
- Once 10 years continuous service has been worked, all leave not taken shall be paid for on any termination;
- Cashing out of leave should be permitted after 10 years continuous service;
- The formula for payment of long service leave for casual employees should also apply to part-time employees and employees with mixed full-time, part-time and casual employment during their continuous service;
- Part-time employees should be entitled to take full-time equivalent long service leave as is currently the case with casual employees.

The amendments to the Act give effect to the views and conclusions expressed by the Commission. The prohibition on payment in lieu of long service leave except on termination was lifted. Cashing out may be in accordance with a relevant industrial instrument, but if no industrial instrument provides for this to happen, payment may be made only if ordered by the Commission on application by the employee. The Commission may order a payment only if it is satisfied the payment should be made on compassionate grounds or the grounds of financial hardship. The Commission cannot make a general ruling under section 287 to provide for cashing out of long service leave.

The Industrial Relations and Another Act Amendment Act also made the Commissioner Administrator responsible for the administration of the Commission and Registry and the orderly and expeditious exercise of the Commission's jurisdiction and powers. This includes allocating Commissioners to matters and determining who shall comprise a full bench.

The administrative changes and the long service leave amendments took effect from 3 June 2001.

The Industrial Relations Regulation came into effect on 1 December 2000 and replaced the *Workplace Relations Regulation 1997* and the *Industrial Organisations Regulation 1997.* The regulation covers matters such as the wage and salary rate which excludes workers from the unfair dismissal and unfair contract provisions; matters to be covered in an affidavit accompanying an agreement for certification; matters relating to union rules, ballots and amalgamations.

The Industrial Relations (Tribunals) Rules 2000 came into effect on 1 January 2001 and replace the *Industrial Court Rules 1997.* The Rules govern the procedures for making applications to the Registry, Court or Commission. The approved forms for applications are made under the Rules. While the forms are no longer a part of the Rules, they are available from the Registry in hard copy, on disc or by e-mail. The Rules prescribe the various filing fees for different applications.

INDUSTRIAL COURT OF QUEENSLAND

The Industrial Court of Queensland is a superior court of record. It is constituted by the President sitting alone. Section 243 requires the President to have been a Supreme or District Court judge, or a lawyer with at

least 5 years standing and who has skills and experience in industrial relations. The President is Mr David Hall.

APPEALS

The Court hears appeals against decisions of the Registrar, Industrial Magistrates and the Commission (other than a full bench of which the President was a member). Such appeals are limited to appeals on the grounds of error of law or want or excess of jurisdiction.

The Court is the final appeal court for claims for compensation under the *Workcover Queensland Act 1996.* Such appeals are by way of rehearing on the record unless additional evidence is allowed by discretion of the Court.

Appeals lie from the Industrial Magistrates Court to the Industrial Court of Queensland in relation to prosecutions under the *Workplace Health and Safety Act 1995.* Decisions of the Director of Workplace Health and Safety or inspectors may also be appealed to the Industrial Court of Queensland. The latter are by way of a hearing *de novo*.

CASES STATED

The Court determines cases stated to it by the Commission on a question of law that may arise during a proceeding.

OFFENCES AGAINST THE ACT

The Court hears and decides offences against the Industrial Relations Act other than those for which jurisdiction is expressly conferred on Industrial Magistrates. The latter have jurisdiction where the penalty is not more that 40 penalty units.

The Court also hears appeals against decisions of Industrial Magistrates in proceedings for an offence against the Act.

MATTERS FILED IN 2000-2001

The total number of matters filed in the Court in the last ten years is shown in Table 1. Table 2 compares the matters filed in the Court in this financial year and last. A more detailed breakdown of matters filed in the 2000/01 financial year is in Table 3.

Table 1 Total Matters Filed in the Court 1991/92 to 2000/01

1991/92	43	1996/97	81
1992/93	55	1997/98	90
1993/94	51	1998/99	95
1994/95	60	1999/00	61
1995/96	89	2000/01	74

Table 2 Matters Filed in the Court 1999/00 and 2000/01

Matter	1999/00	2000/01
Appeals against decision of Industrial Magistrate	38	34
Appeals against decision of Industrial Commission	15	32
Stay of order	0	0
Order for performance of industrial organisations rules	0	0
Appeals against decision of Registrar	0	0
Appeals against decision of Deputy Registrar	1	0
Extensions of time in which to appeal against decision	0	1
Case stated by Industrial Commission	1	0
Order for case to be struck out	0	0
Appeal against review of Director of Workplace Health and Safety	3	3
Show cause	0	0
Application for costs	0	0
Application to search documents	0	1
Prerogative order	0	3
Application for orders – other	3	0
TOTAL	**61**	**74**

Table 3 Matters Filed in the Court 2000-01

Matter	Filed	With-drawn
Appeals from Industrial Magistrate		
…Workcover	26	4
…Workplace health & safety	3	
…Wages	5	
Appeal from Commission	32	2
Appeal from Director Workplace Health and Safety	3	2
Appeal from Deputy Registrar	0	
Other	5	1
TOTAL	**74**	**9**

PRESIDENT'S ADVISORY COMMITTEE

The Industrial Relations Act provides for a President's Advisory Committee comprised of the President, the Commissioner Administrator, the Chief Executive, two representatives each of employee and employer organisations, two persons who have a knowledge of or experience in industrial relations and one person representing the Anti-Discrimination Commission.

The Committee members in addition to the President, Mr Hall are:

- Mr M. Belfield, Australian Industry Group;
- Mr A. Bloomfield, Commissioner Administrator;
- Ms S. Booth, Anti-Discrimination Commission;
- Professor M. Gardner;
- Mr P. Henneken, Acting Director-General, Department of Industrial Relations;
- Mr W. Ludwig, Australian Workers' Union;
- Mr S. Nance, Queensland Chamber of Commerce and Industry;
- Ms K. Prior, Industrial Relations Consultant;
- Ms G. Grace, Queensland Council of Unions.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

The Queensland Industrial Relations Commission is a court of record. The members of the Commission are:

President	Mr D.R. Hall
Vice-President	Ms D.M. Linnane
Commissioner Administrator	Mr A.L. Bloomfield
Commissioners	Mr K.L. Edwards
	Ms G.K. Fisher
	Mr R.E. Bechly
	Ms D.A. Swan
	Mr B.J. Blades
	Mr D.K. Brown
	Ms I.C. Asbury
	Mr J.M. Thompson

Dual appointments with the Australian Industrial Relations Commission (AIRC) facilitate cooperation and coordination between the State and federal industrial tribunals. The President and Vice-President of the Queensland Commission, Mr Hall and Ms Linnane, hold commissions as Deputy-Presidents of the AIRC. All Queensland Commissioners have been appointed as members of the AIRC. AIRC members holding dual commissions with the QIRC are Commissioners Bacon, Hodder and Hoffman.

For most matters, the Commission is constituted by a single Commissioner sitting alone. A Full Bench to determine matters relating to de-registration of industrial organisations or for hearing an appeal is constituted by the President and two or more members. Otherwise a Full Bench is constituted by three or more members.

Full Bench matters, unfair contracts and reinstatement hearings are allocated on a case by case basis. Unfair dismissal conferences are allocated on a rostered basis. The remainder of the Commission's work is organised on the basis of industry panels with two Commissioners assigned to each industry.

The industry assignments as from 26 March 2001 are as follows:

INDUSTRY PANEL	**MEMBERS**
Electricity	Bloomfield C Brown C
Building construction (including construction catering), cement, concrete, quarries	Brown C Swan C
Sugar, bulk sugar, sugar transport	Edwards C Swan C
Hospitality, fast food, non-construction catering	Bechly C Asbury C
Brewing and beverages	Fisher C Edwards C
Local government including water, sewerage, drainage and including BCC	Asbury C Bloomfield C
Education and childcare	Blades C Brown C
Printing and publishing	Bloomfield C Edwards C
General transport including marine	Swan C Edwards C
Rail including rail interpretation	Bechly C Asbury C
Mining and associated bulk handling, gas and oil	Bechly C Fisher C
Forestry products (timber/ sawmilling)	Swan C Bechly C
Arts, entertainment, racing, sports, beauty including hairdressing	Asbury C Swan C
Professional services	Fisher C Thompson C
Health (including welfare and associated residential accommodation and pharmaceuticals)	Swan C Blades C
Prisons	Swan C Thompson C
Fire services	Thompson C Swan C
Ambulance	Blades C Thompson C
Police	Thompson C Blades C
Miscellaneous (including cemeteries and funerals, dry cleaning and laundry)	Linnane VP Edwards C
Public sector and statutory authorities not otherwise allocated	Blades C Bechly C
Security	Fisher C Asbury C
Meat and poultry	Bloomfield C Brown C
Agriculture and associated bulk handling	Fisher C Edwards C
Metal industry, technical drafting and professional engineers	Brown C Fisher C
Sales and wholesale warehouses, stores and distribution stores	Fisher C Asbury C
Retail	Asbury C Blades C
Clerical, banking and insurance	Brown C Fisher C
General manufacturing including food and other than meat and poultry	Linnane VP Brown C
Shearing	Thompson C Fisher C

ROLE OF THE COMMISSION

The Commission's jurisdiction under section 265 of the Act is to hear and decide:

- All questions of law and fact brought before it or that it considers expedient for the regulation of a calling;
- All questions arising out of an industrial matter or involving the rights and duties of a person in relation to an industrial matter;
- An industrial dispute referred to it by a Commission member who has held a conference at which no agreement was reached.

An "industrial matter" is defined in section 7 of the Act as a matter that affects or relates to:

- Work to be done;
- The privileges rights or functions of an employee;
- A matter that the Court or Commission considers a contributory cause of an industrial action or dispute;
- A matter referred to in Schedule 1.

A Commissioner sitting alone exercises the following powers and functions of the Commission:

- Resolving industrial disputes through conciliation and arbitration;
- Ordering a secret strike ballot;
- Making or approving industrial instruments such as awards and agreements;
- Interpreting awards and agreements;
- Determining applications for reinstatement by employees who believe they have been unfairly dismissed;
- Determining claims for unpaid wages where the total claim does not exceed $20,000;
- Voiding or amending unfair contracts for services or contracts of service not covered by an industrial instrument;
- Determining applications to amend the name or eligibility rule of an industrial organisation;
- Conducting enquiries into a claimed irregularity in an election for office bearers of an industrial organisation;
- Approving amalgamations of industrial organisations;
- Hearing appeals by an employee stood-down under section 98 of the Industrial Relations Act 1999*;*
- Hearing appeals against the Registrar's decisions on student work permits under section 695 of the Industrial Relations Act 1999*;*
- Hearing appeals about apprenticeships and traineeships under the Training and Employment Act 2000.

The following powers and functions of the Commission are exercised by a Full Bench:

- Making declarations of General Ruling or Statements of Policy;
- Declaring a class of persons performing work under a contract for services to be employees;
- Imposing penalties on industrial organisations for non-compliance with an order of the Commission in relation to an industrial dispute;
- Deregistering an industrial organisation;
- Settling demarcation disputes between unions by making representation orders;
- Hearing appeals from decisions of a Commissioner sitting alone on

grounds other than error of law or excess or want of jurisdiction;
- Hearing appeals from decisions of the Registrar on grounds other than error of law or excess or want of jurisdiction and other than decisions mentioned in section 287(9) and 695 of the Industrial Relations Act 1999;
- Determining applications to vary trading hours of non-exempt shops under the *Trading (Allowable Hours) Act 1990.*

General rulings are made pursuant to section 287 as follows:

- For employees bound by an industrial instrument, about an industrial matter to avoid a multiplication of inquiries about the same matter;
- About a review of general employment conditions under Chapter 2 of the Act;
- About a Queensland minimum wage.

During the year under review, the Full Bench decided applications for General Rulings and Statements of Policy in relation to the following: occupational superannuation (minimum level of earnings); the State Wage case; union encouragement provisions; and the casual loading.

PAY EQUITY INQUIRY

On 1 September 2000 the Minister for Employment Training and Industrial Relations appointed Commissioner Fisher to conduct an Inquiry into Pay Equity in Queensland.

The terms of reference were to consider:

1. *The extent of pay inequity in Queensland. In doing so the Commission is not required to examine all industries and occupations, but is to include an examination of the findings of the New South Wales inquiry into pay equity and their relevance for Queensland. The examination is to consider*
   - *Whether the relevant Queensland and New South Wales legislation differs and the extent to which any such difference may impact on pay inequity in Queensland; and*
   - *The relevance of the case studies into the undervaluation of women's work examined as part of the New South Wales inquiry for Queensland.*

2. *The adequacy of current legislative arrangements for achieving pay equity.*

3. *The New South Wales Equal Remuneration and Other Conditions principle and the Tasmanian Pay Equity Principle and their relevance for a pay equity principle for Queensland. The Commission is to prepare a draft principle which may be adopted in Queensland.*

The Inquiry ran for 6 months from October 2000. The Inquiry conducted its own research, heard submissions about the terms of reference from interested stakeholders and conducted a case study on dental assistants. The case study aimed at elucidating how work might be undervalued on the basis of gender. Considerable witness evidence was heard.

The Inquiry's report *Worth Valuing* was brought down on 30 March 2001. The Inquiry found that gender based pay inequity continues to exist and it made

a number of recommendations for legislative amendment as well as drafting an Equal Remuneration Wage Fixation Principle. It is expected that Commission workloads will increase as a result of the Inquiry with an application to the Full Bench to consider the draft wage principle and applications from stakeholders for equal remuneration orders. The report is posted on the internet at www.detir.qld.gov.au/qirc/finalreport.htm.

TRADING HOURS

An important area of the Commission's jurisdiction is to determine trading hours applications pursuant to the *Trading (Allowable Hours) Act 1990.* The Commission fixes the trading hours of non-exempt shops. These applications must be determined by a Full Bench.

In the reporting period there were 4 applications compared to 15 in the previous financial year. Two significant decisions in 2000-01 were to permit Sunday trading in the Newfarm area of Brisbane and to permit trading on the four Sundays leading up to Christmas in specified tourist areas and inner city Brisbane.

INDUSTRIAL DISPUTES

"Industrial dispute" is defined in Schedule 5 of the Industrial Relations Act as a dispute, including a threatened or probable dispute, about an industrial matter or situation that is likely to give rise to a dispute about an industrial matter.

The parties are required to genuinely attempt to settle the dispute but if the dispute cannot be resolved each party is required to notify the facts to the Industrial Registrar. Once a dispute is notified, the Commission is empowered to prevent or settle the dispute by conciliation. This may be done by way of compulsory conference. If conciliation fails, the Commission may arbitrate the dispute.

During 2000-01, the Registrar was notified of 406 disputes, the same as in the previous year. Table 4 compares the total number of disputes notified over the last ten years.

Table 4Total Dispute Notifications 1991/92 to 2000/01

1991/92	431	1996/97	485
1992/93	441	1997/98	371
1993/94	330	1998/99	343
1994/95	368	1999/00	406
1995/96	469	2000/01	406

INDUSTRIAL INSTRUMENTS

"Industrial instrument" is defined by Schedule 5 of the Act as an award, certified agreement, QWA, industrial agreement, EFA or order setting minimum wages and conditions for apprentices, trainees or participants in a labour market program.

The Commission may regulate a calling by an award and may consolidate an award. Section 130 requires the Commission to review awards every three years to ensure that the award does not contain discriminatory provisions, is in plain English, does not contain obsolete provisions, provides secure wages and conditions and fair standards of living and is suited to efficient work performance.

The Commission also has an important function in supervising enterprise bargaining and certifying agreements. The Commission may assist negotiations between the parties. During the peace obligation period of 21 days, the parties are required to negotiate in good faith and not take industrial action or seek the assistance of the Commission.

At the end of that period the Commission may exercise its powers of conciliation to help parties reach agreement. If conciliation is unsuccessful and industrial action poses significant damage to the economy or local community or endangers personal health, safety or welfare of the community, the Commission may determine the matter

Section 156 requires the Commission to certify an agreement if it is satisfied of certain matters including:

- A valid majority of relevant employees approved the proposed agreement;
- The relevant employees had at least 14 days access to the written agreement and the effect of the terms of the agreement was explained before they were asked to approve it;
- The agreement passes the no-disadvantage test.

Queensland Workplace Agreements (QWAs) are agreements between an employer and an individual employee. A QWA cannot be made with an employee under 18 years. A QWA must be approved by the Commission where it passes the no disadvantage test and is not contrary to the public interest. QWAs are declining as an industrial instrument. In 1998-99 1004 QWAs were filed but only 205 were filed in 2000-01.

Tables 5 and 6 provide statistics about industrial instruments filed and operative in 2000-01 compared to the preceding year. As at 30 June 2001 there were 4563 industrial instruments of the Queensland Industrial Relations Commission in force in Queensland. Table 6 compares the industrial instruments in force over the last two years.

Table 5 Agreements Filed 1999/00 and 2000/01

Type	1999/00	2000/01
Certified agreements	665	707
Notice of initiation of bargaining period	5	5
Notice of authorisation to engage in industrial action	99	281
QWAs	336	205

It should be noted that notices of initiation of bargaining period are no longer filed in the Registry except with respect to project agreements.

Table 6 Instruments of the Commission 1999/00 to 2000/01

Type	1999/00	2000/01
Awards	329	331
Industrial Agreements	823	812
Certified Agreements	2788	3082
Traineeship Agreements	169	169
Superannuation Industrial Agreements	136	136
Superannuation Awards	3	3
Superannuation Certified Agreements	1	1
Enterprise Flexibility Agreements	29	28
Superannuation Enterprise Flexibility Agreements	1	1
TOTAL	4279	4563

MATTERS FILED

There has been a 25% increase in matters filed in the Commission in 2000-01 compared to the preceding year. It is important to note that this figure excludes applications about industrial organisation rules or elections, dispute notifications and agreements filed for certification or approval. Matters filed for the past ten years are compared in Table 7.

Table 7 Matters Filed in the Commission 1991/92 to 2000/01

1991/92	1310	1996/97	2362
1992/93	1216	1997/98	2196
1993/94	1862	1998/99	1839
1994/95	2101	1999/00	1999
1995/96	2378	2000/01	2491

A breakdown of matters filed in the Commission is found in Table 8.

Table 8 Matters Filed in the Commission 1999/00 to 2000/01

Matter	1999 /00	2000 /01
Applications for reinstatement	1594	1832
Amendments to awards	84	203
Applications for orders	34	25
New awards	9	5
Interpretations	7	1
Repeal and new awards	8	7
Application for repeal of award	0	1
Trading hours applications	15	4
Review	3	0
Applications for general ruling		
Wage fixation	4	2
Training wages	0	0
Shift allowance	1	0
District allowance	0	0
Other	3	0
Applications for order of stay	0	0
Applications for reopenings	4	1
Application for certificate of invalidity	0	0
Appeals to Full Bench	0	1
Statement of Policy	1	0
Injunctions	9	7
Severance allowance	8	5
Extension of time	3	0
Exemption from award provisions	0	2
Application to dismiss application	9	6
Application to intervene	1	1
Arbitration	0	6
Dismissal of case	0	0
Application for directions	1	1
Application vary/void contract	20	45
Application for costs	1	3
Application to revoke authorisation	0	1
Application for joinder	0	1
Aged/infirm persons permit	22	29
Conference	1	0
Determination	3	4
Mediation	1	0
Payment of notice	1	0
Request under s.148	4	19
Wages	148	265
Application to be legally represented	0	1
Application for leave to appeal	0	1
Payment of cash for long service leave entitlement	0	1
Termination of agreement	0	1
Apprenticeship/traineeship appeals	n/a	10
TOTAL	**1999**	**2491**

REINSTATEMENT APPLICATIONS

The Registry received 1832 reinstatement applications. The additional 238 applications reversed the steady three year decline in reinstatement applications. Table 9 shows the total numbers of reinstatement applications made over the last ten years.

Table 9 Reinstatement Applications 1991/92 to 2000/01

1991/92	255	1996/97	1960
1992/93	415	1997/98	1928
1993/94	772	1998/99	1682
1994/95	1504	1999/00	1594
1995/96	1849	2000/01	1832

Table 10 shows the outcomes as at 30 June 2001 for the 1832 reinstatement applications filed between 1 July 2000 and 30 June 2001.

Table 10 Outcomes of Reinstatement Applications As at 30.6.01

Outcome	No.	%
Settled at conference	746	40.7
Heard - dismissed	15	0.8
Heard – granted	8	0.5
Withdrawn	364	19.9
Before conference	137	
After conference	153	
After call-over	74	
No jurisdiction	39	2.1
Found by Registrar	15	0.8
Found at conference	24	
Otherwise rejected as excluded by Registrar	59	3.2
Proceeded to call-over	140	7.6
Withdrawn after call-over	74	
Still in progress	43	
Heard	23	1.3
Otherwise still in progress	286	15.6
Out of time	272	14.9

PROFESSIONAL DEVELOPMENT ACTIVITIES OF THE COMMISSION

During the reporting period, members of the Commission continued to participate in professional development activities and to contribute to enhancing the professional skills of advocates appearing before the Commission.

From 11 to 12 May 2001, all members of the Queensland Industrial Relations Commission attended the Commission Conference at Stanthorpe. An important item of business was benchmarking.

The President, Vice-President and Commissioners Bloomfield, Edwards, Bechly, Blades, Brown and Asbury attended the AIRC Conference in Sydney from 3 to 5 June 2001. The ceremonial sitting of the AIRC to mark the centenary of federation was held on 5 June.

The Vice- President addressed various industry organisations' seminars as well as the Industrial Relations Society Advocacy Skills Course in 2000. Commissioners Bloomfield, Bechly, Asbury and Thompson also participated in the IRS skills course. Commissioner Fisher addressed the ZONTA conference on 2 June 2001 about advocacy.

Commissioner Fisher addressed a number of groups about the Pay Equity Inquiry: the IRS Seminar 21 November 2000 and the Equal Opportunities Practitioners Association on 16 May 2001.

In September 2000 Commissioner Blades, at his own expense, attended the Commonwealth Judges and Magistrates Association Conference in Edinburgh. Commissioner Blades also attended the Bar Association Industrial Law Conference at the Gold Coast 20 to 22 April 2001

INDUSTRIAL REGISTRY

The Industrial Registry is a public service office under the *Public Service Act 1996*. Its functions under the Industrial relations Act are to:

- Act as the Registry of the Court and Commission;
- Provide administrative support to the Court and Commission;
- Any other functions conferred by the Act.

These other functions include important functions regulating the affairs of industrial organisations, such as rule amendments, elections and financial accountability.

The Registry also performs registry services for the Australian Industrial Relations Commission on a fee for service basis.

The Registrar is Eric Ewald and the Deputy Registrars are Ms Pamela Scott-Holland and Ms Lyndall Soetens.

PERFORMANCE EVALUATION

The Registry' Strategic Plan requires the Registry's performance to be evaluated by a number of means, including a survey of clients of the Registry. The Registry Performance Evaluation questionnaire was distributed to the following clients: 82 industrial organisations, 25 industrial advocates and 35 solicitors who had dealt with the Registry. Of the 142 distributed, only 30 were returned – a return rate of slightly more than 20%.

The benchmark for each operational area is positive feedback (a rating of satisfied or better) from at least 90% of responses. In six operational areas, 100% of responses recorded positive feedback:

- Quality of administrative support;
- Usefulness of handouts;
- Accuracy of advice - filing applications;
- Accuracy of advice - filing appeals;
- Accuracy of advice - utilisation of dispute procedures;
- Accuracy of advice - Act requirements for Court;
- Accuracy of advice - Act requirements for Commission.

The other four areas had positive feedback from 95% or more of responses:

- Accuracy of advice – operation of the Rules (96%);
- Standard of service – response time to queries (97%);
- Standard of service – processing documentation filed (97%);
- Standard of service – assistance with compliance with Act re industrial organisations (95%).

EEO

The Registry's EEO statistical picture in respect of occupants of classified positions is shown in Table 11.

Table 11 Registry Staff by Gender
At 30.6.2001

Classification	Female	Male
SO-1		1
AO6	1	1
PO-5	1	
AO-4	9 (7 full-time equivalent)	
AO-3	1	
TO-2	1	
AO-2	6	3

STAFF TRAINING AND DEVELOPMENT

Ms Elise Narramore and Ms Sarah Smith received training as relieving associates at the principal Australian Industrial Registry in Melbourne.

WEBSITE

Registry staff have been working with staff from the Department of Industrial Relations to improve the database which is to replace the IRIS (Industrial Relations Information Service) database as well as developing a website for the Court, Commission and Registry. This will improve the service to IRIS subscribers and will provide some free on-line public access to information, including recent decisions of the Court and Commission. While it is not possible to provide on-line lodgment of applications, all the prescribed Forms used by the Registry will be able to be downloaded from the website. It is hoped that the website will be up and running by the end of the calendar year. The URL for the website will be www.qirc.qld.gov.au.

INDUSTRIAL ORGANISATIONS

The provisions governing registration, rules and elections for industrial organisations are in Chapter 12 of the Industrial Relations Act.

Applications by an industrial organisation to amend the name of the organisation or the eligibility rule are determined by the Commission, while all other applications are determined by the Registrar. Where an organisation resolves to adopt without change the model election rules made by regulation under the Act, it notifies the Registrar who must register the model rules as an amendment to the rules.

Organisations with counterpart federal bodies which have complied with the provisions of the *Workplace Relations*

Act 1996 (Cth) may apply to the Registrar for exemptions with respect to membership, elections and accounting procedures.

An organisation can apply for an exemption from the accounting or audit provisions of the Act. One ground is that the organisation has a counterpart federal body which has complied with the federal Act. The other ground relates to employer organisations that are corporations subjected to accounting and audit obligations under another Act or law. In both cases, copies of the accounts and reports are required to be lodged in the Registry.

During the reporting period one application for exemption was filed on the basis of compliance with the federal Act by the counterpart federal body. It is still in progress. Two applications carried over from the previous year were approved.

In 2000-01, 31 applications were lodged with the Industrial Registrar in respect of matters concerning industrial organisations' rules, registrations, exemptions and name changes. This was 6 fewer than in the previous year.

Elections for industrial organisations must be conducted by the Queensland Electoral Commission unless an exemption has been granted. Once notified by an industrial organisation that it proposes to conduct an election for office bearers, the Industrial Registrar examines the rules of the organisation and if satisfied that an election is required to be held, arranges for the Electoral Commission to conduct the election. The State of Queensland bears the cost of the election. During 2000-01, 44 election requests were lodged with the Industrial Registrar. This was 2 more than in the previous year.

In 2000-01, 6 applications were filed by industrial organisations seeking exemption from having elections on the grounds that the organisations' counterpart federal organisations had elections for corresponding offices conducted pursuant to the provisions of the federal Act. The Registrar conducted hearings after the members of each of the industrial organisations concerned were given an opportunity to lodge objections to the application. During the reporting period, exemptions were granted to 5 industrial organisations.

The number of industrial organisations of employees registered as at 30 June 2001 was 45. Total membership as at 31 December 2000 was approximately 377,913. Table 12 lists all industrial organisations of employees registered as at that date and ranks them according to their membership numbers.

The number of industrial organisations of employers registered as at 30 June 2001 was 37. Total membership as at 31 December 2000 was 50,213. Table 13 lists the employer organisations according to membership numbers.

There were no new registrations and no amalgamations. The Queensland Timber Association Industrial Union of Employers applied for deregistration and the application was granted effective from 28 November 2000.

Table 12 Industrial Organisations of Employees - Membership At 31.12.2000

Industrial Organisation	Members
The Australian Workers' Union of Employees, Queensland	62,250
Queensland Teachers Union of Employees	37,067
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees	34,246
The Queensland Public Sector Union of Employees	26,141
Queensland Nurses' Union of Employees	25,650
Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees	24,963
Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland	19,326
Transport Workers' Union of Australia, Union of Employees (Queensland Branch)	16,649
The Electrical Trades Union of Employees of Australia, Queensland Branch	14,503
Queensland Services, Industrial Union of Employees	12,069
Queensland Independent Education Union of Employees	10,414
The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland	9,885
Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees	8,936
Federated Ironworkers Association of Australia (Queensland Branch) Union of Employees	8,584
Queensland Police "Union of Employees"	7,495
The National Union of Workers Industrial Union of Employees Queensland	6,973
Finance Sector Union of Australia, Queensland Branch, Industrial Union of Employees	6,860
Australasian Meat Industry Union of Employees (Queensland Branch)	6,581
Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees	6,156
Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch	6,151
Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees	4,699
Queensland Colliery Employees Union of Employees	4,047
The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees	2,801
The Plumbers and Gasfitters Employees Union of Australia, Queensland Branch, Union of Employees	2,492
United Firefighters' Union of Australia, Union of Employees, Queensland	1,782
Australian Federated Union of Locomotive Employees, Queensland Union of Employees	1,516
The Bacon Factories' Union of Employees, Queensland	1,238
Federated Clerks' Union of Australia, North Queensland Branch, Union of Employees	1,072
Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees	1,049
Australian Journalists' Association (Queensland District) "Union of Employees"	929
Australian Salaried Medical Officers Federation Industrial Organisation of Employees, Queensland	845
The University of Queensland Academic Staff Association (Union of Employees)	705
Queensland Association of Academic Staff in Colleges of Advanced Education (Union of Employees)	692
The Seamen's Union of Australasia, Queensland Branch, Union of Employees	593
Property Sales Association of Queensland, Union of Employees	557
Australian Institute of Marine and Power Engineers' Union of Employees, Queensland District	512
James Cook University Staff Association (Union of Employees)	320
Musicians' Union of Australia (Brisbane Branch) Union of Employees	302
The Queensland Police Commissioned Officers Union of Employees	300
Actors, Entertainers and Announcers Equity Association, Queensland, Union of Employees	248
Griffith University Faculty Staff Association (Union of Employees)	216
Queensland Fire Service Senior Officers' Association, Union of Employees	79
Queensland Blind Workers Union of Employees	20
The Australian Stevedoring Supervisors Association (Queensland) Union of Employees	Figures not supplied
Merchant Service Guild of Australia, Queensland Branch, Union of Employees	Figures not supplied

Table 13 Industrial Organisations of Employers Membership at 31.12.2000

Industrial Organisation	Members
Retailers' Association of Queensland Limited, Union of Employers …….	14,503
Agforce Queensland Industrial Union of Employers……..	8,348
Queensland Master Builders Association, Industrial Organisation of Employers……..	5,437
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers ……..	3,530
Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)…….	2,507
Motor Trades Association of Queensland Industrial Organisation of Employers …….	2,105
Australian Dental Association (Queensland Branch) Union of Employers……..	1,730
Australian Industry Group, Industrial Organisation of Employers (Queensland)……..	1,709
National Electrical and Communications Association Queensland, Industrial Organisation of Employers……..	1,473
Master Plumbers' Association of Queensland (Union of Employers)……	862
Childrens Services Employers Association Queensland Union of Employers……..	845
Queensland Hotels Association, Union of Employers……..	675
The Baking Industry Association of Queensland – Union of Employers……	647
The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers …	617
Queensland Motel Employers Association, Industrial Organisation of Employers……..	564
The Registered and Licensed Clubs Association of Queensland, Union of Employers …….	525
Queensland Nursery Industry Association Industrial Union of Employers……..	465
Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers……..	423
National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers……..	421
Hardware Association of Queensland, Union of Employers……..	397
The Queensland Road Transport Association Industrial Organisation of Employers……..	376
The Hairdressing Federation of Queensland – Union of Employers……	308
Queensland Private Childcare Centres Employers Organisation of Queensland Industrial Organisation of Employers …	269
Queensland Real Estate Industrial Organisation of Employers……..	238
Queensland Mechanical Cane Harvesters Association, Union of Employers……..	230
Furnishing Industry Association of Australia (Queensland) Limited Union of Employers……..	228
Australian Building Services Association – Queensland Division, Industrial Organisation of Employers….	203
Consulting Surveyors Queensland Industrial Organisation of Employers….	128
T.A.B. Agents' Association of Queensland Union of Employers……	114
Association of Wall and Ceiling Industries Queensland - Union of Employers……..	85
Queensland Master Hairdressers' Industrial Union of Employers…….	81
The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited …….	52
Queensland Country Press Association – Union of Employers……..	39
Queensland Cane Growers' Association Union of Employers…….	26
Australian Federation of Civil Engineering Contractors, Queensland Branch, Industrial Union of Employers..	22
Australian Sugar Milling Association, Queensland, Union of Employers……..	18
Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers……..	13

PUBLICATION OF DECISIONS

Judgments of the Court and decisions of the Commission issued from the bench and recorded on transcript are made available to the parties to a matter immediately after they have been released. Signed judgments and decisions are supplied to relevant parties upon release by the Registry and before publication in the *Queensland Government Industrial Gazette* (QGIG). As a general rule, all judgments and decisions are gazetted within 13 working days of the decision being released.

All released decisions and judgments are available for perusal in the Court library. The QGIG is held in the library. Judgments, decisions and other documentation of the Court, Commission and the Industrial Registrar are also published in an

electronic format through the Industrial Relations Information Service (IRIS) accessible by subscription through the internet at www.detir.qld.gov.au/iris/. Decisions of the Court and Commission from 1 July 1999 are also published on the free Austlii data base at www.austlii.edu.au.

Categories of information accessible on IRIS include:-

- Awards
- Agreements (includes certified agreements)
- Decisions (includes General Rulings, Judgments and Interpretations)
- Orders
- Notices
- Lists of matters set down before the Court, the Commission, and the Industrial Registrar;
- Weekly lists of applications to the Court, the Commission and the Industrial Registrar.

STORAGE AND MAINTENANCE OF CASE FILES

The Registry maintains and stores case files for all Court and Commission matters in the preceding 10 years. Files relating to matters prior to the last ten years are held in storage at the Queensland Archives repository at Runcorn. Retrieval of these case files is controlled by the Registry and prior arrangements need to be made to ensure that files are available when they are required. Enquiries about access to Commission files in the custody of the archives should be directed to the Registry in the first instance.

LIBRARY

The library of the Court and Commission has a good collection of industrial law and employment law resources. The library staff provide research services to the Court and Commission and assist members of the public, including advocates, in locating information.

STATE REPORTING BUREAU

The State Reporting Bureau is responsible for recording and transcribing matters before the Industrial Court of Queensland, the Queensland Industrial Relations Commission, and the Industrial Registrar. Transcripts are kept on individual case files and may be read by practitioners and other interested individuals by arrangement with the Registry unless the Commission has ordered that the transcript be released to the parties only.

Transcripts of formal hearings are records of public proceedings and can be purchased from the State Reporting Bureau which owns the copyright in the transcripts. In some instances the Court or Commission will limit access to the transcript under section 679(5)-(9) of the Industrial Relations Act. Transcripts of dispute conferences are not records of public proceedings and are endorsed "Not Released" or "Released to Parties". Unfair dismissal conferences are not recorded or transcribed.

FREEDOM OF INFORMATION (FOI)

Pursuant to section 18 of the *Freedom of Information Act 1992,* a Statement of Affairs for the Industrial Court of Queensland, the Queensland Industrial Relations Commission and the Industrial Registry has been published. A copy of the Statement of Affairs may be obtained from the Registry or perused in the Court library. Four FOI requests were made in 2000-01.

Requests for access to documents under the Freedom of Information Act should be made in writing and forwarded with the prescribed fee to the

Industrial Registrar. The street address of the Registry is 14th Floor, 66 Eagle Street, Brisbane, Queensland, and the postal address is GPO Box 373, Brisbane, Queensland, 4000. Telephone enquiries for assistance with making applications should be directed to the Freedom of Information Contact Officer on telephone (07) 32251857.

SIGNIFICANT JUDGMENTS OF THE COURT AND COMMISSION

COSTS

Golden Video Pty Ltd AND Chief Executive, Department of Employment, Training and Industrial Relations

C26 of 2000

The appellant filed an appeal against an Improvement Notice which had been issued under the Workplace Health and Safety Act 1995. The respondent revoked the Improvement Notice within 24 hours of being served with the application to appeal. The appeal was dismissed because the decision complained of had been set aside. The appellant spent some $6000 in professional fees in an effort to have the decision set aside and asked for costs.

The Court expressed the tentative view that section 335 vests a limited costs power in the Court in relation to appeals as well as to when the Court exercises its original jurisdiction. The Court said the word "application" was an appropriate generic word for proceedings in the Court including appeals. The Court said that in any event, if the appeal is treated as an application and the appellant is treated as the applicant, section 335 permits an applicant to recover costs where the respondent has caused the applicant to throw away costs only in an application for reinstatement. The matter was not a reinstatement application and costs were refused.

COSTS

Marfleet AND Brisbane City Council

C13 of 2000

The Court dismissed an appeal against a decision of an Industrial Magistrate. The Court was invited to abandon its view expressed in *Golden Video* that section 335 does not confine the Court to awarding costs only when it is exercising original jurisdiction. It was contended that the Court could not award costs in an appeal.

The Court traced the history of the statutory costs power in detail from the *Industrial Arbitration Act 1916* to the present. The Court observed that, because of the change in language, it is arguable that lay agents costs are no longer recoverable. The Court confirmed its view expressed in *Golden Video* that the Court has power to award costs in an appeal.

COSTS

MIM Holdings AND Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland

C36 of 2000, C37 of 2000

The Australian Workers' Union of Employees, Queensland AND Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland

C39 of 2000.

In dismissing an appeal against a decision of the Commission, the Court had reserved the question of costs. The Court said that it is immaterial whether the application is shown to have been made "vexatiously or without reasonable cause" at first instance or on appeal. The Court noted that it would be difficult for an appellant against a decision of the Commission to show that an application which was successful

below was made "vexatiously or without reasonable cause", but if that hurdle may be overcome the power to award costs arises.

The Court noted the division of opinion about the counterpart federal provision - whether the phrase "vexatiously or without reasonable cause" is to be read as a composite phrase or read as permitting an award of costs (1) where the application was made vexatiously and (2) where the application was made without reasonable cause.

The Court held that, amongst other things, section 335(1) is aimed at the case which is objectively recognisable as one which could not succeed at the time when the application was made. This was not such a case because the legislation had not been tested. The Court found it was not necessary on the facts to resolve the issue whether "vexatiously" meant a party was not acting *bona fide* or whether it has the connotation of an element of malice. The application for costs was dismissed

COSTS

Beaverson Pty Ltd AND Black

C2 of 2001

In proceedings for reinstatement before the Commission, the appellant did not take the opportunity to appear, to cross-examine, to call evidence or to make submissions. The basis of the appeal on quantum was that the Commission had failed to take certain matters into account. The Court said that the appeal was instituted vexatiously and without reasonable cause. The respondent, who was represented by an advocate, not a lawyer, applied for costs.

The Court adopted the view tentatively expressed in *Marfleet* that Parliament had indicated an intention to exclude recovery of costs by lay agents. The respondent relied on the definition of "costs" to "include legal and professional costs and disbursements and witness expenses". The Court said that this ignored the meaning traditionally given to "disbursements" when juxtaposed with "legal and professional costs", which is those payments only made in pursuance of professional duty undertaken by a solicitor or those sanctioned by general custom and practice of the profession.

The Court held that fees paid to a lay advocate are not recoverable pursuant to section 335 of the Act.

COSTS

WorkCover Queensland AND Markwell

C64 of 2000

The Court had previously dismissed an appeal by WorkCover Queensland against a decision of the Industrial Magistrate's Court and had reserved the question of costs.

Section 518 of the WorkCover Queensland Act provides for appeals from the Industrial Magistrate's Court to the Industrial Court of Queensland. Prior to 1 July 1999 that section provided an express power to the Industrial Court to award costs. That express power was deleted by the 1999 amendments.

It was submitted that the previous words were mere surplusage and the Court had an inherent power to award costs. The Court held that the Industrial Court of Queensland is a Court of statutory creation and has no inherent power. While it may be accepted that the Court has power to do that which is incidental to the exercise of its power, it is impossible to imply a power to award costs wider than the express power to award costs

in s.335 of the Industrial Relations Act 1999. Applications for reinstatement apart, the Court may only award costs where the application (here appeal) was made "vexatiously" or "without reasonable cause".

Here the case made out by the unsuccessful applicant was not made vexatiously or without reasonable cause. There had been other litigation involving Mr Markwell and the outcome of proceedings in the Industrial Magistrate's Court was not wholly compatible with outcomes in certain other "proceedings". The language of one of the medical experts might have caused the appellant concern. The Court said that the appeal was properly brought.

Reliance was then placed on s.248(2)(a) of the Industrial Relations Act (the discretion to make decisions the Court considers appropriate irrespective of the relief sought by the party). The Court said that, as established by *Marfleet,* the sole source of the power to award costs is s.335. The Court dismissed the application for costs.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS' COMPENSATION

Lackey AND WorkCover Queensland

C38 of 2000

The appellant had sustained a traumatic injury to her leg on 17 December 1996 and her claim for benefits under the *Workers' Compensation Act 1990* was allowed. Subsequent to the physical injury she developed an anxiety condition. She cold not prove that the anxiety condition arose earlier than 1 February 1997. WorkCover Queensland declined to issue a damages certificate and her appeal to the Industrial Magistrate was dismissed.

As a matter of history the Workers' Compensation Act 1990 was repealed and replaced by the WorkCover Queensland Act 1996 and there were a series of amendments to the meaning of "injury".

Relevantly, if the anxiety condition arose between 1 February 1997 and 1 July 1999, it was necessary for the appellant to show that the anxiety condition arose out of or in the course of her employment and that the employment was the major significant factor causing the injury. The Industrial Magistrate had applied the earlier test – whether the employment was a significant factor contributing to her condition. If his conclusion of fact was correct, the appeal could not succeed. If the employment was not a significant contributory factor it could not be the major contributory factor.

The Court accepted the appellant's contention that the injury did not have to have a temporal connection to the employment and that "arising out of" has a wider meaning than "caused by". Although there must be some consequential relationship between the employment and the injury the relationship does not have to be as direct or proximate as "caused by".

The Court found that the physical disability, the disruption to the appellant's family life, the feeling of being abandoned by the lack of diagnosis were caused by and certainly arose out of the injury to her leg. By the same reasoning the employment was the major contributory cause. The Court allowed the appeal and awarded costs.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – OFFENCE UNDER INDUSTRIAL RELATIONS ACT – WHEN OFFENCE CAME TO COMPLAINANT'S NOTICE

Thiele AND Harry John Davis

C21 of 2000

The appellant was an industrial officer employed by the Department of Employment Training and Industrial Relations. She had laid a complaint against Harry John Davis for failing to pay wages payable under an industrial instrument.

The Industrial Magistrate dismissed the complaint because the proceedings had not been commenced within 6 months of the matter coming to the complainant's knowledge. The Magistrate accepted the argument that an industrial inspector knew of the offence more than 6 months prior to the complaint and that this knowledge could be attributed to Ms Thiele. No submission was made to the Magistrate about when Ms Thiele acquired actual knowledge of the offence.

The Court said that the matter must be returned to the Magistrate's Court and if Mr Davis showed that Ms Thiele had actual knowledge of the offence more than 6 months before the complaint, he was entitled to succeed.

The Court discussed the issue of the complainant's constructive knowledge. The Court said the complaint was not made by the Department and there is nothing in the Act which requires the attribution to Ms Thiele of the knowledge of other members of the Department. The Court said it was understandable that the legislature adopted a scheme which would corral the mind of the natural person making the decision to proceed with a complaint from the opinions and views of other members of the Department.

The Court allowed the appeal and remitted it to the Industrial Magistrate's Court to be determined according to law.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – SEVERITY OF PENALTY FOR BREACH OF THE WORKPLACE HEALTH AND SAFETY ACT

Master Ryane (Qld) Pty Ltd AND Graham Anthony Thuoard

C22 of 2000

The appellant had pleaded guilty to a failing to ensure the risk of injury to workers was minimised. One of the employees of the appellant had died after a fall from a roof. The appellant had not followed any of the safety measures in the two relevant advisory standards. The fine imposed on the appellant was 11.67% of the maximum penalty ($35,000 fine with a maximum of $300,000). The appellant claimed the Magistrate had erred in failing to take into account the fact that a director had also been fined and mitigating circumstances such as the company's good record.

The Court observed that the clear policy of the Act is to establish safe standards of work and the primary consideration is the nature and quality of the offence. In relation to the subsequent remorse, dislocation of business and introduction of not wholly adequate safety measures, the Court also observed that the Act is not directed at *ex post facto* measures. The Court said too much may not be made of mitigating factors lest the gravity of the offence is diminished and the purpose of the Act is frustrated. The Court noted that the fine exceeds most of those imposed in the last ten years but also noted that the

legislature has taken an increasingly serious view of these offences.

The Court dismissed the appeal and the application for costs.

APPEAL AGAINST DECISION OF INDUSTRIAL COMMISSION – PROBATIONARY PERIOD OF TEACHER FOR PURPOSE OF EXCLUSION FROM THE REINSTATEMENT PROVISIONS OF THE ACT

Vidler AND Education Queensland
C24 of 2000

Section 72(1)(b) of the Act excludes from the remedies for unfair dismissal employees serving a period of probation longer than 3 months where the period is decided by written agreement between the employer and the employee before the employment started.

Pursuant to section 73 of the Public Service Act the Director-General of education determined that the probationary period for teachers would be 8 months, with a possible further maximum extension of 4 months. Mr Vidler commenced employment on 3 March 1999 and was dismissed on 10 January 2001. Mr Vidler had been informed of the Director-General's determination.

The Court held that Mr Vidler's engagement did not fall within s.72(1)(b) of the Industrial Relations Act because the period of his probation had not been determined by agreement.

The respondent argued that the general provisions regarding probation of the Industrial Relations Act should yield to the special provisions of the Public Service Act. The Court referred to the proposition that where there is a general provision which, if applied in its entirety, would neutralise a specific provision, the general provision insofar as it is inconsistent with the special provision, must be deemed not to apply.

The Court observed that a consequence of Education Queensland's submission would be that a person appointed for an unreasonable period of probation and dismissed for an invalid reason would have no remedy under the Industrial Relations Act. The Court said that the submission contends for a remaking of section 72(1)(b) and the Court was not prepared to take that step.

The Court allowed the appeal with respect to the Commission's decision that Mr Vidler was an excluded employee. The Court upheld the Commission's decision to strike out two paragraphs of the dismissal application on the ground that the invalid reason alleged in the two paragraphs could not be made out.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS COMPENSATION – PSYCHOLOGICAL INJURY

Groos AND WorkCover Queensland
C43 of 2000

On 14 January 1997 the appellant had been involved in a life threatening incident in which he sustained serious injuries. During his stay in hospital he suffered sleeping difficulties and nightmares in which he re-lived the incident. WorkCover Queensland disputed that he suffered a psychological injury that was compensible under the Act.

Proceedings before the Industrial Magistrate had been conducted on the common understanding that the relevant definition of "injury" was the form which it took before the

amendment of December 1996 took effect on 1 February 1997; that is, "personal injury arising out of, or in the course of, employment if the employment was the significant contributing factor". In those proceedings, no particular significance was attached to when the condition first arose.

In the appeal proceedings WorkCover argued that the appellant's condition arose after the commencement of the WorkCover Queensland Act 1996. Relevantly, as from 1 February 1997, "injury" was defined as "an injury arising out of or in the course of employment if the employment is the major significant factor causing the injury." The Court permitted WorkCover to put its submission that this definition applied and allowed the appellant to give evidence about when symptoms first arose.

The Court accepted expert evidence that the appellant suffered a changing and fluctuating condition which commenced when the appellant was hospitalised. Accordingly, the Court held that the relevant definition of injury was the one on which the matter was litigated in the Industrial magistrates Court.

The Court then considered if there had been an injury. The appellant's doctor had worked backwards from assessing the degree of impairment, noticing the causal nexus with the incident on 14 January 1997 and concluding that the appellant was "injured" by the incident. The Court held that while the Act does not require that the existence of an injury must be determined by assessing impairment under the AMA Guide, where there is no evidence to the contrary, the existence of injury may be inferred from the existence of impairment.

The Court followed the meaning of "arising out of the employment" adopted in *Lackey v WorkCover* 164 QGIG 22 and said that every consideration of cause and consequence linked the appellant's current condition to the incident on 14 January 1997. The Court had no hesitation in characterising the incident as a significant contributing factor. The Court allowed the appeal.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WHETHER PROCEDURES FOR APPEAL ARE MANDATORY OR DIRECTORY

McQuade & Hayes AND WorkCover Queensland

C50 and C51 of 2000

Section 499 of the WorkCover Queensland Act 1996 sets out procedures for appeal to an Industrial Magistrate. Subsection (1) requires the appeal to be made within 28 days of the decision appealed against. Sub-section (6) requires the appellant to serve notice of the appeal on WorkCover within 14 days of filing the appeal in the Magistrate's Court.

The appellants had complied with s.499(1) but had failed to comply with s.499(6). The delay was minimal. The Industrial Magistrate below had held that he was constrained by the decision of the Court in *Meredith v Workers' Compensation Board of Queensland* (1979) 101 QGIG 391 to hold that the Magistrate's Court lacked jurisdiction. The Magistrate held that compliance with s.499(6) was a condition precedent to the right of appeal.

The Industrial Court turned to the decision in *Hattan v Beaumont* (1978) 20 ALR 314 upon which the Court relied in *Meredith.* In *Hattan* the High Court observed that to say that

procedural requirements are usually *prima facie* mandatory in character cannot gainsay the primary necessity of examining the framework and language of the statute or regulation.

The Court then considered s.499 and observed that the legislative intent is not clear. On the one hand there are relaxations in relation to some of the sub-sections but not in relation sub-section (6). The time limit imposed by sub-section (1) may be extended by sub-section (3). By sub-section (7) a breach of sub-section (5) may be corrected. On the other hand the various relaxations are suggestive of procedure rather than jurisdiction. The Court concluded that sub-section (6) is merely directory and not mandatory but it still had to be observed in substance.

The Court held that s. 499 is directory and that on that view, s.505 vests power to extend time. The Court allowed the appeals and remitted the matter to the Industrial Magistrate.

APPEAL AGAINST DECISION OF INDUSTRIAL COMMISSION – CLAIM FOR PAYMENT OF MEAL BREAK ALLOWANCE

QNU v Bethlehem Nursing Home

C56 of 2000

Clause 9(8)(b) of the *Nurses Aged Care Interim Award – State* provides for the payment of an allowance where the employee is required to remain on the premises during a meal break whilst engaged on night duty. The clause also provides that where the employee's meal break is interrupted by work then the meal break is paid at the overtime rate.

The Union claimed payment of the allowance with respect to four employees of Bethlehem Nursing Home. The issue turned on the meaning of "required". The Court observed that the verb has no clear and ordinary meaning and is entirely ambiguous.

At first instance, the Commission held that "required" meant

- Required by the employer, or
- Required by special circumstances prevailing at the time in the workplace, namely an emergency or incident where the individual employee assesses the personal safety to residents or the risk of serious damage to property is likely.

The Court observed that the Commission was concerned to construe the clause in the factual circumstances in which it operates, which entails the care of dependant people.

The Court said "required" refers to a situation where the employee is required to remain at the direction of the employer, but that direction may be implied or given by conduct. The Court dismissed the appeal.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – PENALTY FOR BREACH OF WORKPLACE HEALTH AND SAFETY ACT

Newman AND James Glass & Aluminium Pty Ltd

C25 of 2000

The Court had allowed an appeal against a decision of the Industrial Magistrate dismissing a complaint that James Glass had breached section 24 of the Workplace Health and Safety Act in failing to ensure the workplace health and safety of each of its employees at work. The matter now before the Court was whether a conviction should be recorded and what penalty should be imposed.

The incident complained of was that an employee engaged upon the construction of a glass awning fell through the glass. He was not injured. The respondent had developed a system of work which, if observed, secured the employees from risk of falling. The employee contributed to the incident by failing to use the safety harness provided. The Court noted that while liability arises from a breach of the Act and not from injury, this is probably the first case of a complaint being brought where there was no injury.

The Court found no justification for recording a conviction and fined the company $2,500.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS' COMPENSATION

Johnson AND WorkCover Queensland

C55 of 2000

The appeal arose from WorkCover's decision to cease payments for a back injury after a fall at work. There had been a conflict in the medical evidence presented before the Industrial Magistrate.

The evidence favourable to the appellant was based on the appellant's recollection of symptoms after the incapacity had ceased. The evidence favourable to WorkCover was of a discrepancy between what the specialist found on examination and the symptoms described by the appellant. The Court said that formation of a view about the appellant's credibility was critical to a determination of whether the benefits were terminated prematurely.

The Magistrate had made a finding of credibility based on observations of the appellant's behaviour when she was in the back of the Court. The Industrial Court said that such observations may only be relied on when the Magistrate draws the attention of the parties to the observations and permits them to call evidence if necessary. This rule was established by a number of authorities and was based on fair play and common sense. The Court said it may be conceded that the rule need not be observed when the Magistrate's observations could not possibly have made any difference. This was not such a case.

The Industrial Court set aside the Magistrate's findings on credibility but had no basis for substituting that the appellant was credible. The Court remitted the matter to the Industrial Magistrate's Court for re-hearing.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKCOVER PREMIUM

Austrak Pty Ltd AND WorkCover Queensland

C58 of 2000

The employer's past claims performance is one of the factors relevant to the calculation of premiums payable under a policy with WorkCover. Both common law claims and statutory claims performance are taken into account. Materially, when determining the premium for the 1998-99 year, the years for evaluating common law claims performance are 1995-96 and 1994-95. The years for evaluating statutory claims performance are 1997-98 and 1996-97.

The appellant said it was not legitimate to look at common law claims in 1994-95 because, as from 1995-96, it had entirely revised and improved its safety performance. By s.58(2) of the WorkCover Queensland Act 1996, the

premium must be assessed according to Notice No 1 of 1998. One effect of the notice is that a multiplier is used to estimate the costs of claims which have not yet reached finality.

Clause 8 of Schedule 6 of that notice provides, *inter alia,* that where an employer can satisfy WorkCover that in the employer's particular circumstances the common law claims should be assessed in an alternative manner, WorkCover shall assess the factor in the alternative manner. WorkCover declined to revise the calculation and statutory review did not alter that decision. There was an appeal *de novo* in the Industrial Magistrate's Court which failed.

The Court held as beyond power the proposals that the common law claim experience for 1994-95 be treated as nil or that the 1995-96 experience be treated as true of 1994-95 year as well. The proposals did not assess the 1994-95 experience in an alternative manner. The proposals did not assess the 1994-95 experience at all. The Court dismissed the appeal.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS COMPENSATION – PSYCHOLOGICAL INJURY

Avis AND WorkCover Queensland

C54 of 2000

The appellant teacher suffered a major depressive illness and ceased work. His application for workers' compensation was rejected. His appeal to the Industrial Magistrate's Court was rejected on the ground that the illness was not an "injury" within the meaning of s.34 of the WorkCover Queensland Act 1996. Section 34(4)(a) excludes an illness which "arises out of" reasonable management action taken in a reasonable way.

The Magistrate found that the dominant cause of the applicant's illness was student discipline problems. On the applicant's own case the discipline problems arose because of the school's adoption of a new behavioural management plan which the Magistrate regarded as a "reasonable management action taken in a reasonable way". Accordingly the illness was excluded from the definition of "injury".

The appellant argued that s.34(4)(a) will only attach where the management action itself triggers the psychiatric disorder. The appellant contended that in the wake of management decision, circumstances arose in which the appellant could not do his job with a consequential feeling of inadequacy, helplessness and ineffectiveness.

The Court adhered to its view in *Lackey* (2000) 165 QGIG 22 that the tests posited by the phrase "arising out of" is wider than that posited by "caused by". The former requires some consequential relationship but does not require that direct or proximate relationship which would be necessary if the phrase were "caused by".

The Court dismissed the appeal.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS COMPENSATION – RIGHT OF NON-PARTY TO BE HEARD

Middleton AND Teys Bros (Holdings) Pty Ltd

C66 of 2000

Teys Bros Pty Ltd had appealed to the Industrial Magistrate's Court against a decision of WorkCover Queensland. The claimant Mr Middleton had sought to be heard but this had been refused by the Magistrate. Mr Middleton

appealed to the Industrial Court of Queensland.

The Court observed that s.320 of the Industrial Relations Act gives wide ranging power to the Commission and to Industrial Magistrates including exercising a discretion to hear a person with no right to be heard.

Chapter 9 Part 3 of the WorkCover Queensland Act 1996 lays down the scheme for appeals against decisions of WorkCover. Potential appellants to the Industrial Magistrates Court are a claimant aggrieved by a decision, a worker aggrieved by a decision and an employer aggrieved by a decision. Section 501 designates that appellant and the respondent as parties to the appeal. In this case, the appellant was the employer, Teys Bros Pty Ltd and the respondent was WorkCover.

The claimant did not appeal and was not a respondent to Teys Bros appeal. However his pecuniary interests would be directly affected by the Magistrate's decision and he unsuccessfully sought leave to be heard.

The Court observed that a principle lying deep in the common law is that a decision-maker exercising public power must ordinarily afford a person, whose interest may be adversely affected by a decision, an opportunity to present material information and submissions relevant to such a decision before it is made.

The Court held that Chapter 9 Part 3 of the WorkCover Act does not deny the Industrial Magistrate the powers he otherwise have had under s.320 of the Industrial Relations Act to permit the claimant (by counsel if need be) to speak in his own interests. The Court noted that the discretion to permit the claimant to be heard is the Magistrate's discretion.

The Court set aside the Magistrate's decision and remitted the matter to the Industrial Magistrate's Court to be determined according to law.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS COMPENSATION

WorkCover Queensland AND Teys Bros (Holdings) Pty Ltd

C65 of 2000

Mr Middleton was employed by the respondent at a meat processing plant. He contracted Q fever which is an injury under the WorkCover Queensland Act 1996. He subsequently applied for compensation for a psychological illness in the nature of fatigue said to be consequential upon the Q fever. That claim was disputed.

WorkCover allowed re-opening of the claim and referred the file to the Medical Assessment Tribunal for assessment of the on-going incapacity. The employer sought statutory review of that decision. The Medical Assessment Tribunal published its decision prior to the completion of the statutory review and the review officer took into account the Medical Assessment Tribunal decision. The review officer confirmed the decision to allow re-opening of the claim.

The employer appealed the decision of the statutory review unit to the Industrial Magistrate. WorkCover argued that the appeal was incompetent because the decision of the review officer was based on the decision of the Medical Assessment Tribunal. Section 456 of the WorkCover Queensland Act states that a Medical Assessment Tribunal's decision "about an application for

compensation referred to it is final and cannot be questioned in a proceeding before a tribunal or a court, except under s.454".

By section 454 a claim for compensation which has been decided by a Medical Assessment Tribunal may be re-submitted to a Medical Assessment Tribunal on fresh evidence. None of the other Medical Assessment Tribunal matters listed in s.437 may be re-submitted to a Medical Assessment Tribunal.

The Court compared section 456 with the provision in the Worker's Compensation Act 1990. By contrast with the current provision, the earlier provision preserved the finality of a decision of a Medical Assessment Tribunal in relation to a matter it is required to determine in respect of a claim for compensation.

The Court held that the Industrial Magistrate was correct to conclude that section 456 does not operate to make immune from challenge a reference to a Medical Assessment Tribunal under s.437(b). The Court dismissed the appeal.

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKCOVER PREMIUM – ONUS OF PROOF

Otis Elevator Company Pty Ltd AND WorkCover Queensland

C7 of 2001

This was an appeal from a decision of an Industrial Magistrate determining the industry classification of the appellant for the purposes of assessing the premium payable to WorkCover Queensland. The decision complained of was that the Magistrate required the appellant to discharge an onus on the balance of probabilities.

An appeal from the Industrial Magistrate's Court to the Industrial Court of Queensland is by way of rehearing on the record unless the Court orders additional evidence be heard. By contrast the Court said it is difficult to contend that the appeal to the Industrial Magistrate was on the "record". The decision appealed to the Industrial Magistrate is the decision of the WorkCover Review Unit and there is no provision for the taking of evidence by the review Unit or the preparation of a transcript. The appeal to the Magistrate is a hearing *de novo*.

The Court said the answer to the question of who bears the onus, if any, is to be found in the legislation. The legislative scheme recognises that the industry classification may fall outside Schedule 2 and the Magistrate must decide the rate to be the rate applying to the industry classification which most closely describes the employers industry or business.

The Court regarded notions of onus as inappropriate to determining a premium. There is difficulty with the proposition that a Magistrate decides on the balance of probabilities which of a number of possible classifications most closely corresponds to the employers business. The Court held the Magistrate erred in law.

The Court then reheard the matter. The Court allowed the appeal and ordered that the industry classification was "Electrical Services".

APPEAL AGAINST DECISION OF INDUSTRIAL MAGISTRATE – WORKERS COMPENSATION

MacArthur AND WorkCover Queensland

C16 of 2001

This appeal was taken by the widow of a man who had died of lung cancer. At his workplace he had been exposed to passive smoking and asbestos which have a synergistic effect in the development of lung cancer.

The Court said the appellant would succeed if she could show on the balance of probabilities that her husband's adenocarcinoma arose out of exposure to passive smoking and asbestos. The Court said it is not sufficient for the appellant to argue that Mr MacArthur was exposed to two carcinogens contemporaneously and that there were no lifestyle or genetic factors. The common law test is not satisfied by evidence which does no more than establish possibility. There is a distinction between reasonable deduction from evidence and mere conjecture. The Court must reach a level of actual persuasion.

The Court said that this appeal was a rehearing in the sense explained in *Warren v Coombes*. In general the appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from undisputed facts or facts established by the findings of the trail judge. The Court pointed out that in a case such as this, the opinion evidence of experts stands out from the run of the mill testimonial evidence because only exceptionally, will credibility be an issue.

The Court re-examined the expert evidence and allowed the appeal.

APPEAL AGAINST DECISION OF COMMISSION – REINSTATEMENT – PROBATIONARY PERIOD AFTER TRANSMISSION OF BUSINESS

Chubb Security Australia Pty Ltd AND Chee

C3 of 2001

The respondent security guard had been employed by ARM Security which sold its business to Chubb. He entered into a new contract of employment with Chubb on 30 June 2000 and became a "transferred employee" within the meaning of section 69 of the Industrial Relations Act. The respondent's employment was terminated by the appellant on 4 September 2000.

In the Commission, the appellant had defended the reinstatement application on the grounds that the respondent was a probationary employee and excluded by section 72(1). The employee argued that as a consequence of sections 68 and 69, his employment was longer than 3 months and he was not excluded. The Commission found for the employee.

Sections 68 and 69 prescribe when an employee's continuity of service is not broken by a transmission of business and the period which is taken to be service with the new employer. Section 72(1) excludes an employee during the first 3 months of employment.

The Court held that the language of the sections, the Ministers second reading speech and the Taskforce report all suggested sections 68 and 69 had no role to play.

The Court held that because the respondent's engagement with the appellant commenced on 30 June 2000 when he entered into a new contract of employment, his

employment with the appellant was less than 3 months and he was excluded by s.72(1). The Court upheld the appeal.

REINSTATEMENT APPLICATION – WHETHER DEED OF RELEASE IS LEGALLY ENFORCEABLE – DURESS NOT ESTABLISHED

Staples AND Allen Allen & Hemsley
B47 of 2000

Mr Staples' employment was terminated on 21 December 1999. The following day he signed a deed of release which allowed him to substitute a resignation and which provided full release to Allen Allen and Hemsley. The applicant challenged that deed and sought to have his case heard as an unfair dismissal.

The applicant said that if there was a legally formed contract of compromise it was obtained as a result of economic duress and/or that the pressure on the applicant to sign amounted to unconscionable conduct. It was also submitted that there was no consideration, sufficient to form a legally binding contract, passing from the respondent.

The respondent argued that the deed of release forms a legally enforceable contract and that Mr Staples was estopped from alleging the contrary.

The Commission held that there had been a benefit to both the applicant and the respondent. The employer altered the Statement of Service so that it said that Mr Staples had resigned. This was of benefit to Mr Staples in seeking other employment. The benefit to the respondent was that it was released from all claims.

Further, the employer permitted the applicant to retain the month's salary they had paid in lieu of notice. The applicant was not entitled to that payment in the circumstances of a resignation. The Commission held that this also was good consideration because it was a detriment to the employer and a benefit to the applicant.

The Commission was satisfied that there was valuable and sufficient consideration passing between the parties and that the deed constituted a legally enforceable compromise.

The Commission dismissed the applicant's submission that the contract should not be enforced because it was obtained as a result of economic duress. There was no pressure by the respondent that secured the substitution of a resignation for a dismissal. The applicant secured that substitution to enhance his position in the labour market.

The Commission found no unconscionable conduct on the part of the respondent. The Commission was unable to find that the applicant had been at any special disadvantage or that the respondent knew or took advantage of it.

The Commission held that the applicant was bound by the deed of release and dismissed the application.

APPLICATION TO DECLARE CLASS OF PERSONS AS EMPLOYEES UNDER S275 – SHEARING INDUSTRY

AWU AND Hammonds Pty Ltd
B885 of 1999

The respondent was a company which provided shearing and ancillary labour to graziers. Shearers and other participating workers who obtained work through Hammonds signed a contract which, on its face, clearly

intended to avoid an employer-employee relationship and to maintain the status of the workers as self-employed contractors for whom Hammonds found work. The contract was modelled on the Troubleshooters arrangements in the building and construction industry.
The Commission applied the common law tests and was satisfied that the shearers concerned were not employees of Hammonds Pty Ltd. The applicant contended that Hammonds had utilised the Troubleshooters model in order to avoid the operation of the award (particularly the prohibitions against weekend work) and that the sub-contractors engaged through Hammonds are engaged under significantly less remuneration and conditions than provided in the award. The applicant argued that this in turn would undercut the award because of unfair competitive pressure.

The application was not supported by the evidence. There was no evidence of shearing contractors losing work because of Hammonds. There was no evidence of shearers working weekends when they did not want to. There was evidence that if shearers were unhappy with the rates offered by Hammonds, it would not be difficult to move to other contractors as employees. It could not be said the shearers were in a weak bargaining position.

The Commission dismissed the application.

APPLICATION TO DECLARE CLASS OF PERSONS AS EMPLOYEES UNDER – SECTION 275 – SECURITY INDUSTRY
ALHMWU AND Bark Australia Pty Ltd
B1064 of 2000

Bark Australia Pty Ltd commenced trading as a security contractor on 30 June 1999 under the business name Bark Security which it had acquired from Secure-Co Pty Ltd. Bark Australia also acquired many of the staff of Secure-Co. While Secure-Co had engaged a mixture of full-time, part-time, and casual staff as well as sub-contractors, Bark Australia Pty Ltd offered work only to those prepared to be engaged on a contract for services.

Bark Australia used a standard form contract which was offered on a take it or leave it basis. Hourly rates were on an individual by individual basis and with one exception, none of the putative subcontractors was paid more than $13.50 an hour.

The Full Bench took into account factors such as the parties' intention, the absence of provision for annual leave and sick leave and the omission of Bark Australia to make tax deductions. The Commission held that the relationship was one of principal and independent contractor.

The Commission noted that the subcontractors did not have many of the characteristics of contractors. They did not advertise, have registered business names or employ staff. The Commission also noted that the subcontractors had many of the characteristics of employees under the relevant certified agreement including being paid weekly in arrears at an hourly rate. The work they performed was no different from that performed by employees and they were provided with the same clothing.

The Commission noted the terms of the relevant award and certified agreement which provide benefits for employees that were not received by the sub-contractors. The Commission

observed that the novelty of the power to declare contractors to be employees does not mean that the power is to be exercised only in unusual circumstances or exercised only with caution. Nor is the Commission limited to considering only the matters referred to in section 275(3).

The Commission said that a finding that the subcontractors be more appropriately regarded as employees was inescapable. They had limited bargaining power, were economically dependent on the contracts, and the contracts were designed to avoid the award and the certified agreement. The Commission declared the subcontractors as employees.

REINSTATEMENT APPLICATION – CONCILIATION CONFERENCE – DEED OF SETTLEMENT EXECUTED – APPLICANT ALLEGES BREACH

Holmes AND West Moreton District Health Service

B639 of 2000

The applicant and the respondent had signed a Deed of Settlement and a Notice of Discontinuance after a conciliation conference. The clause in the deed which created problems was "The employee shall return to her casual employment with the employer subject to a medical assessment that the employee is fit to perform all duties of an operational service officer."

The applicant claimed that the discontinuance was conditional on the terms of the settlement being satisfied and that because she had not been offered any work, the application had not been discontinued.

There was medical advice to the employer that the applicant had a previous severe non-work related back injury and that an MRI indicated a prolapsed disc. A number of medical certificates were issued including some which contained restrictions against lifting more than 10 kg. The last received was from the applicant's own doctor which said that she should not engage in duties heavier than normal domestic duties or duties involving continuous bending.

The Commission held that the certificate did not say that the applicant was fit to perform all duties and until such a certificate was forthcoming, the employer was not obliged to offer any casual work. The Commission was of the view that cooking, cleaning and laundry may well not comply with the medical restrictions.

The Commission said that if the applicant produces the appropriate medical certificates and the employer fails to provide work, the applicant may be able to re-open the matter. The Commission recommended that the employer have the applicant assessed by a specialist, but said that in relation to the current application for reinstatement, the deed of Settlement signifies an end to the claim until it is possibly re-opened or re-litigated because of the employer's breach. The Commission said that had not occurred and dismissed the application.

APPLICATION TO VOID OR VARY UNFAIR CONTRACT – SECTION 276

Gleeson AND Gold Coast Bakeries (Queensland) Pty Ltd

B1669 of 2000

Mr Gleeson signed a contract to provide area representative services to the respondent. He was termed a Sales Supervisor. He purchased this contract from a Stephen Bellingham for $18,000, which included $16,000 for goodwill and $2,000 for a vehicle. No money was paid to the respondent except a refundable bond of $2,000.

The initial contract expired on 30 June 1994 and was renewed by the respondent a number of times until 30 September 2000.

By way of letter dated 2 August 2000 the respondent gave the applicant notice that it would not renew the contract. Mr Gleeson sought time to sell the contract but was informed that the contract was personal and not able to be assigned and that goodwill could not be sold.

Twelve months before Mr Gleeson purchased the contract, the respondent prohibited the assignment of such contracts and the sale of goodwill. Mr Bellingham knew that the contract could not be assigned or traded for goodwill. The Commission was satisfied that Mr Gleeson was unaware that the contract could not be assigned and that he thought that he was buying a business.

The Commission applied the principle that "fairness" is determined by the commonsense approach of the juryman. The Commission held that the contract was unfair because the respondent had failed to properly ensure that there was no trading in goodwill. There were circumstances whereby it was reasonably foreseeable that such a payment was being made. The company was aware that goodwill was being traded; it tried to stamp out the practice and Mr Gleeson's was the first contract after the respondent had written to all contractors stating that goodwill could not be traded. Although the respondent was not aware of what Mr Bellingham did, it was the respondent's failure to exercise reasonable care for conduct which was reasonably foreseeable that rendered the contract unfair.

The Commission declared the contract void *ab initio* except for provisions as to the payment of money and ordered the respondent to pay the applicant $8,000, which was one half of the amount paid for goodwill.

APPLICATION TO VOID OR VARY UNFAIR CONTRACT – SECTION 276
P&J Trucking Pty Ltd AND Toll Transport Pty Ltd
B1680 of 2000

The applicant entered into a contract with the respondent to carry groceries for Coles Supermarkets which was a customer of Toll. The applicant was paid a rate per pallet, not an hourly rate as pleaded in the application. The applicant pleaded that the hourly rate was substantially below the award rate and that the shortfall over the two year period was $81,328.74.

Paul Box was the Director and only shareholder in P&J Trucking Pty Ltd. The applicant's case was based on the premise that the income was $16,000 per year. Mr Box gave evidence that the company earned $127,000 in the 1998-99 financial year with expenses of $116,548 including a payment of a directors fee of $16,000 to Mr Box. Mr Box stated that in the following year the company earned $4147,191 with expenses amounting to $148,019 including the directors fee of $16,000. The applicant tendered the tax returns of the company and Mr Box's personal tax returns for the two year period.

The respondent obtained copies of the company's financial statement for the two years which revealed disconcerting discrepancies between Mr Box's evidence and the actual figures. Payments were made to Mr Box and on his behalf which he had not disclosed. Income and profits for the company had been substantially understated. He had used the

accelerated depreciation rates on vehicles claimed for tax purposes in order to inflate his losses in an attempt to establish that the contract was unfair. Other running costs were overstated. The Commission questioned the accuracy of the applicant's taxation returns and that this brought into question the whole of the figures relied upon by the applicant.

The respondent produced records of the payments they had made to Mr Box when he was employed by them as a casual driver. This was less than he earned as an independent contractor. It was Mr Box who had decided to buy a vehicle and work as a contractor even though the respondent's Contracts manager had advised him to stay on wages. It was Mr Box's decision to incorporate as a company. There had been no pressure from the respondent on Mr Box to become a contractor.

The respondent had not misrepresented Mr Box's earning potential as a contractor and Mr Box had been given a fair share of the more profitable runs. There was no pressure from the respondent on Mr Box to upgrade his vehicle, thereby incurring higher expenses.

The Commission was not satisfied that the contract was unfair and dismissed the application. The Commission also commented on the applicant's attempt to use evidence about the "Owner Driver's Costing Manual" as a basis for estimating the costs of owner drivers. There was an attempt to use the Manual to form the basis of a finding of unfairness. This aspect of the claim had not been in the pleadings.

The Commission traditionally declines to place great emphasis on the pleadings, but in this instance the Commission referred to previous decisions in relation to section 275 and equivalents of section 276. In previous matters the Industrial Court had commented that accurate pleadings are necessary to apprise the Commission and the other party of the issues to be addressed.

In the present case the Commission formed the view that reliance on the manual did not assist the applicant's case and declined to rule on whether the applicant should be prevented from relying on the manual or by giving the respondent an opportunity to respond to the new material. The Commission thought it necessary to point out the difficulties that might arise if insufficient attention is paid to proper pleadings.

APPLICATIONS LODGED WITH BOTH THE ANTI-DISCRIMINATION COMMISSION AND THE INDUSTRIAL RELATIONS COMMISSION – WHETHER INDUSTRIAL RELIEF AVAILABLE

Baker AND Stephen Island Community Council

B1509 of 2000

The applicant had been employed as a Community Police Officer. On 11 October 2000 he filed an application in the Industrial Registry alleging unfair dismissal. He alleged that he had been dismissed because of "discrimination for having a political opinion" and for not filing an incident report.

The respondent alleged that because the Anti-Discrimination Commission had received a complaint from Mr Baker on 4 October 2000, section 153 of the Anti-Discrimination Act precludes the filing of an application in the Industrial Commission. The Anti-Discrimination Commission was given leave to appear.

Section 153 provides that a worker may not later apply for industrial relief if he or she has lodged a complaint with the Anti-Discrimination Commission. Under section 154, if the worker has applied for industrial relief before lodging a complaint with the Anti-Discrimination Commission, the worker may proceed with both.

The applicant submitted that the lodgement date with the Anti-Discrimination Commission is the date the Commission determines it has jurisdiction. The applicant referred to section 141 which provides that the Anti-Discrimination Commissioner must decide within 28 days of receiving a complaint whether to accept or reject a complaint. The Anti-Discrimination Commission submitted that it treats the lodgement of a claim as not occurring until it decides whether or not to accept a complaint. Because of the time limits in section 138, the Commission may backdate the lodgement date once it has decided to accept a complaint.

The Industrial Commission distinguished between "filing" and "lodging". "Filing" is the process of placing documents in the records of Courts or Registries whereas "lodging" is to be given its ordinary meaning. "Lodging" is concerned with the act of a party and not of a Court or registry official. The Commission held that a document is "lodged" when it comes into the possession of the Registry. The Commission held that the reinstatement application was precluded by section 153 and dismissed the application for reinstatement.

REFUSAL TO ENGAGE OR TERMINATION OF EMPLOYMENT – PROHIBITED REASONS ALLEGED – APPLICATION FOR COMPENSATION

Ruberry AND Terry White Chemists

B227 of 2001

Ms Ruberry sought work with Terry White Chemists. On 26 September 2000 she had a meeting with Mary White, the owner, and was offered a position. On 4 October she was shown around a Terry White Store by the store manager Ms Strong. On 5 or 6 October she contacted a human resources officer, Ms Telford, and said she would accept the position. On 10 November she received a letter of employment.

The letter did not comply with the relevant award in that it did not detail the hours of work and it stated that the hours could be varied by the employer giving 7 days notice.

On 21 November Ms Ruberry contacted the Human Resources Manager Ms Radford and said she wanted the daily roster detailed in the letter and variation of hours to be by agreement. She also objected to the restraint of trade clause. She was told the pharmacy needed flexibility and the restraint of trade clause would not be removed. In a telephone call later that day she said she didn't think the restraint of trade clause was enforceable but she was prepared to sign the letter. Ms Radford advised her not to sign until she had spoken to Ms White. On 22 November Ms White wrote to Ms Ruberry and withdrew the offer of employment.

Ms Ruberry alleged that her services had been terminated or that there had been a refusal to employ for a prohibited reason. Section 105

prohibits a person from refusing to engage another person as an employee or terminating a contract of employment for a prohibited reason. Section 104 provides that a prohibited reason includes because another person has the right to the benefit of an industrial instrument or is dissatisfied with the person's industrial conditions.

The first issue to be determined by the Commission was whether there was a concluded contract of employment. The Commission held that the "offer" on 26 September was incapable of being accepted because much was yet to be discussed and agreed. The Commission held that the offer and acceptance on 5 or 6 October was an agreement to agree, that is, was subject to a written document being drawn up and agreed to.

The Commission held that acceptance of an offer must be unqualified and correspond to the terms of the offer. If different terms are proposed there is a counter offer. An offer may be withdrawn at any time prior to acceptance. Further, acceptance must adhere to the manner of acceptance specified in the offer. This was not done. Ms Ruberry had not signed the contract and returned it to the respondent before the respondent withdrew the offer.

The Commission held that there was no concluded contract of employment. For a period, Ms Ruberry had a prospect of employment and her award entitlements were prospective. Because there was no concluded contract, she had no existing right to the benefit of an industrial instrument. The conduct prohibited by section 105 only occurs where the person has a present or existing legal entitlement to the benefit of an industrial instrument.

Similarly it could not be said that when the offer was withdrawn the applicant was dissatisfied with industrial conditions. A person does not have industrial conditions until there is contract of employment.

The Commission dismissed the application for compensation.

APPLICATION TO VOID/VARY UNFAIR CONTRACT – WHETHER APPLICANT EXCLUDED BY SECTION 276(6)

Earner AND Queensland Investment Corporation

B775 of 2001

The applicant was a Senior Leasing Executive of QIC. He earned a salary of more than $71,200 and was not a public servant. At the time of the application he was unemployed and not in receipt of any wages. He had not made an application for reinstatement under section 74.

The respondent alleged that the applicant was disqualified from making an application by section 276(6)(b) which provides that a person cannot make an application if the person is not a public service officer employed on tenure under the Public Service Act 1996; an has an annual wage of more than $68,000 or a greater amount stated in, or worked out in a way prescribed under regulation. The regulation prescribes $71,200.

The applicant submitted that, based on a decision of the Commission in Braunack's case which was upheld on appeal, there is an absurdity in the exclusion.

The Commission said that the comment in Braunack's case was *obiter dicta* – it was not necessary to the decision in that case and is not

binding. The Commission said the comment in Braunack's case was wrong and held that section 276(6)(b) excludes an application from a person other than a public servant on tenure and who has an annual wage of more than $71,200.

The applicant also alleged that the applicant was not excluded because the words "has an annual wage" mean that the person must be in receipt of an annual wage at the time the application is made. The Commission held that the word "has" should be read as descriptive of the nature of the remuneration rather than temporal and indicating contemporaneity of the contract. The Commission struck out the application because the applicant was excluded.