2002

ANNUAL REPORT OF THE PRESIDENT

OF THE

INDUSTRIAL COURT

OF QUEENSLAND

in respect of

The Industrial Court of Queensland

The Queensland Industrial Relations Commission and

The Industrial Registry

Annual Report of the President
of the Industrial Court of Queensland
2001–2002

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QUEENSLAND'S INDUSTRIAL TRIBUNALS

The Industrial Tribunals constituted under Chapter 8 of the *Industrial Relations Act 1999* are the Industrial Court of Queensland, the Queensland Industrial Relations Commission, the Industrial Registrar and the Industrial Magistrates' Court.

THE INDUSTRIAL COURT

The Industrial Court of Queensland is a superior court of record. It is constituted by the President sitting alone. The Act requires the President to have been either a Supreme or District Court judge, or a lawyer of at least 5 years standing with skills and experience in the area of industrial relations. The current President is Mr David Hall, who was sworn in to the role in August 1999.

The President is also President of the Commission and may preside at a Full Bench hearing. However, for certain matters under the Act, the President *must* preside at the Full Bench hearing. These matters include the hearing of appeals from decisions of the Commission, and deregistration proceedings against industrial organisations under Chapter 12 Part 16 of the Act. Under the cooperative arrangement between federal and state Commissions, the President is a Deputy President of the Australian Industrial Relations Commission.

Original Jurisdiction of the Court

The original jurisdiction of the Court includes the power to try offences under the Act for which the penalty prescribed is greater than 40 penalty units. Most of these offences are contained in Chapter 12, Part 7, conduct of industrial organisations' elections; and Part 8, inquiries by the Commission into elections. There are other offences which must be tried before the Court. For example, if a person causes disruption or disturbance to tribunal proceedings, insults tribunal officials, attempts to improperly influence a tribunal or its officials or to bring any of the tribunals into disrepute, the person commits an offence and may be imprisoned for up to 1 year, or fined 100 penalty units. Non-payment of an employee's wages under an agreement or permit is also a serious offence, the maximum penalty for which is 200 penalty units.

Offences for which the penalty is 40 penalty units or lower are tried before an Industrial Magistrate. Industrial Magistrates are magistrates or acting magistrates of the Magistrates' Court of Queensland.

The Court also has original jurisdiction over certain other matters concerning industrial organisations. For example, on application, the Court may issue declarations regarding whether an industrial organisation's rules comply with restrictions as to content set out in s 435 of the Act; it may also order a person who is obliged to perform or abide by rules of an industrial organisation, to do so. If there is a dispute about a person's membership, or eligibility for membership of an organisation, the Court may decide a question or the dispute, on application by the person or by the organisation

Appellate Jurisdiction of the Court

Appeals to the Court are available only on the grounds of error of law, or of excess, or lack of jurisdiction.

Apart from decisions of a full bench of which the President was a member, the Court hears appeals against decisions of the Commission and of the Industrial Registrar. (Where a full bench decision, in which the President participated, is to be appealed, it must go to the Court of Appeal.) The Court may also hear appeals from decisions of the Commission under the *Training and Employment Act 2000*. Appeals lie on a question of law only.

Appeals lie to the Court from the Industrial Magistrates Court. These are Industrial Magistrates' decisions regarding offences

and wage claims under the IR Act; decisions regarding prosecutions under the *Workplace Health and Safety Act 1995*; and decisions on claims for compensation under the *WorkCover Queensland Act 1996*. The Court is the final appeal court for prosecutions under the *Workplance Health and Safety Act* and *Industrial Relations Act*, and for compensation claims under the *WorkCover Act.* Such appeals are by way of rehearing on the record unless the Court exercises its discretion to allow additional evidence. Appeals from decisions of the Director, or inspectors, of Workplace Health and Safety are by way of a hearing de novo.

Cases Stated

Under s 282 of the Act, the Commission may refer a question of law, relevant to proceedings before it, to the Court for the Court's opinion. The Court may determine the matter raised by the case stated and remit it to the Commission. The Commission must then give effect to the Court's opinion.

Costs

The Court may order costs against a party to an application. However this may only be ordered if the Court is satisfied the party's application was vexatious or without grounds; or, in a reinstatement application, if the party, by some unreasonable act or omission during the course of the matter, caused another party to incur additional costs.

Matters filed in 2001-2002

Table 1 shows the fluctuations in the number of matters filed in the Court in the ten years to 2001/02. The majority of applications to the Court are appeals from decisions. While the annual number of court filings appears to have fallen immediately after the current Act was introduced, the number has risen sharply since then. In the reporting period under review, there were over 50% more court filings than in 1999-2000 and almost twice as many as in 1992-1993.

Table 2 lists the types of matters filed in the Court in this financial year and last. A more detailed breakdown of matters filed in this year is in Table 3.

Table 1 Number of matters filed in the Court 1992/93 – 2001/02

1992/93	55	1997/98	90
1993/94	51	1998/99	95
1994/95	60	1999/00	61
1995/96	89	2000/01	74
1996/97	81	2001/02	102

Table 2 Matters filed in the Court 2000/01 and 2001/02

Type of Matter	2000/01	2001/02
Appeals against decision of Industrial Magistrate	34	52
Appeals against decision of Industrial Commission	32	32
Stay of order	0	12
Order for performance of industrial organisations rules	0	1
Appeals against decision of Registrar	0	0
Extensions of time in which to appeal against decision	1	0
Case stated by Industrial Commission	0	2
Appeal against review of Director Workplace Health and Safety	3	1
Application to search documents	1	0
Prerogative order	3	1
Application for orders – other	0	1
TOTAL APPLICATIONS	**74**	**102**
Number of Court Decisions Released	**69**	**75**

Table 3 Types and number of matters filed in the Court 2001-2002

Type of Matter	Number filed	Withdrawn	Still in Progress
Appeal from decision of Industrial Commission [incl. 1 'Appeal and stay order']	**32**	**6**	**4**
· IRA s 341(1)	26		
· T & E Act s 244	1		
· Stay of decision of Industrial Commission s 347 [incl 1 'Appeal and stay order']	6		
Case stated from Industrial Commission s 282	2		
Application to direct person to perform rules s 459(1)(b)	1		
Application for Declaration [Order – other]	1	1	
Application for prerogative order restraining Commission from hearing + interim stay of Commission proceedings	1		
Appeal from decision of Industrial Magistrate [incl 2 Appeal and stay; 1 Appeal + Time extensn]	**52**	**4**	**3**
· IRA s 341(2)	8		
· WorkCover Act s 509	26		
· Workers' Compensation Act s 105	1		
· Workplace Health and Safety	11		
· Stay of decision of Industrial Magistrate s 347 [incl 2 Appeal and stay]	9		
· Extension of time [lodged with Appeal, above]	1		
Appeal from decision of Director Workplace Health and Safety – prohibition notice	**1**	**1**	

President's Advisory Committee

The President's Advisory Committee is constituted under s 253 of the Act. Members of the Committee include the President, the Commissioner Administrator, the chief executive, a representative of the Queensland Anti-Discrimination Commission, 2 representatives each of employee and employer organisations and 2 persons with knowledge and experience in the area of industrial relations. The Committee meets monthly to discuss issues affecting the work, accessibility, and operational effectiveness of the Court and Commission. During the period under review, matters dealt with by the Committee included the Commission's Benchmarking project; the scale and structure of fees charged by the Registry; and the availability of transcripts of matters before the Commission.

Current members of the Committee are listed below:

Ex officio appointments

Mr DM Hall, President of the Court
Mr A Bloomfield, Commissioner Administrator
Mr P Henneken, Director-General, Department of Industrial Relations
Ms S Booth, Acting Anti-Discrimination Commissioner

Representatives of Industrial Organisations

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

Other appointments

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

INDUSTRIAL RELATIONS COMMISSION

The Queensland Industrial Relations Commission is established and derives its powers and functions from Chapter 8, Part 2 of the Act. It is a court of record.

Current members of the Commission are listed below:

Member	Date sworn in
Mr DR Hall President	2.8.1999 (Chief Indust Commr 1.3.1993)
Ms DM Linnane Vice-President	2.8.1999
Mr AL Bloomfield Commissioner Administrator	2.8.1999 (Commissioner 15.3.1993)
Mr KL Edwards Commissioner	13.4.1988
Ms GK Fisher Commissioner	12.2.1990
Mr RE Bechly Commissioner	10.9.1990
Ms DA Swan Commissioner	10.9.1990
Mr BJ Blades Commissioner	1.3.1998
Mr DK Brown Commissioner	2.8.1999
Ms IC Asbury Commissioner	28.9.2000
Mr JM Thompson Commissioner	28.9.2000

To facilitate the cooperative arrangement between federal and state Commissions, all Members of the Commission are also appointed as members of the Australian Industrial Relations Commission. The President and Vice-President hold concurrent appointments as Deputy Presidents of the AIRC. AIRC Commissioners Hodder, Bacon and Hoffman hold dual appointments on the Queensland Commission.

Industry Assignments

To ensure more effective decision-making on industrial matters, certain areas of the Commission's work are organised on the basis of industry panels with two Commissioners assigned to each industry. Current industry assignments (from 4 February 2002) are as follows:

Panel 1 — AL Bloomfield, JM Thompson
- Agriculture and associated Bulk Handling
- Shearing

Panel 2 — DA Swan, IC Asbury
- Ambulance
- Fire Services
- Police
- Prisons

Panel 3 — AL Bloomfield, KL Edwards
- Arts, Entertainment, Racing, Sports and Beauty (incl. Hairdressing)
- Professional Services
- Miscellaneous (incl. Cemeteries and Funerals, Dry Cleaning and Laundry)
- Security

Panel 4 — DM Linnane, KL Edwards
- Brewing and Beverages
- General Manufacturing – incl. Food (other than Meat and Poultry)
- Pharmaceuticals

Panel 5 — AL Bloomfield, DK Brown, JM Thompson
- Building and Constructing (incl. Construction Catering)
- Cement
- Concrete
- Quarries

Panel 6 — DM Linnane, KL Edwards
- Clerical, Banking and Insurance

Panel 7 — RE Bechly, JM Thompson
- Education
- Childcare

Panel 8 — DM Linnane, DK Brown
- Electricity
- Gas and Oil

Panel 9 — GK Fisher, BJ Blades
- Forestry Products (Timber/Sawmilling)
- Mining and Associated Bulk Handling

Panel 10 — GK Fisher, IC Asbury
- General Transport (incl. Maritime)

Panel 11 — GK Fisher, IC Asbury
- Health (incl. Aged Care, Hospitals, Nursing)
- Residential Accommodation

Panel 12 — DA Swan, BJ Blades
- Hospitality including Fast Food and Non-Construction Catering

Panel 13 — GK Fisher, BJ Blades
- Local Government and Brisbane City Council (incl. Water, Sewerage, Drainage)

Panel 14 — RE Bechly, DK Brown
- Meat and Poultry

Panel 15 — DA Swan, BJ Blades
- Metal Industry, Technical Drafting and Professional Engineers
- Printing and Publishing

Panel 16 — DM Linnane, DK Brown
- Public Sector and Statutory Authorities (not otherwise allocated) incl. Port Authorities

Panel 17 — RE Bechly, JM Thompson
- Rail (incl. Rail Interpretation)

Panel 18 — AL Bloomfield, KL Edwards
- Retail

Panel 19 — DA Swan, IC Asbury
- Sales and Wholesale Warehouses, Stores and Distribution Stores

Panel 20 — RE Bechly, DK Brown
- Sugar, Bulk Sugar, Sugar Transport

Jurisdiction of the Commission

Under s 256 of the Act, the Commission is constituted by a single Commissioner sitting alone. The range of functions and powers of the Commission to deal with industrial matters is largely found in Division 4 of Chapter 8 Part 2. The Act defines "industrial matters" broadly, to include matters affecting or relating to work to be done; privileges rights or functions of employees; matters which, in the opinion of the Commission, contribute to an industrial dispute or industrial action; or a Schedule 1 matter referred to it.

Conferencing role

Because of the emphasis placed on conciliated and negotiated outcomes in disputes, a large proportion of the Commission's work on any matter is conducted at the conference stage. For example, the parties to an application for reinstatement or for payment of unpaid wages will be directed to attend a conference with the Commissioner assigned the matter. In many cases, a settlement can be agreed upon at this stage, or the parties may be able to resolve their conflict. If not, the matter may come before the Commission to be arbitrated in a hearing. If the Commissioner determines at conference that the applicant is excluded from the unfair dismissal provisions of the Act, the Commissioner must issue a written certificate detailing the reasons.

Commission's Powers

The powers of the Commission include the power to:

- resolve industrial disputes through conciliation and negotiation
- order a secret ballot about industrial action, and to specify when, where and how a secret ballot is to be conducted
- make, amend or approve industrial instruments
- interpret an industrial instrument other than a certified agreement or a Queensland Workplace Agreement;
- hear appeals from employees subject to permissible stand-downs
- hear and determine applications for reinstatement or compensation for unfair dismissal
- determine claims for unpaid wages, superannuation contributions, apprentices' tool allowance, and certain other remuneration, where the claim is less than $20,000 (claims above that sum must be heard before an Industrial Magistrate);
- order repayment of fees charged by private employment agents in contravention of the Act, where the total fee is not more than $20,000. This jurisdiction was introduced to the Act in April 2002; there have been no applications for repayment since then;
- amend or void a contract for services, or a contract for service not covered by an industrial instrument, where the contract is found to be unfair;
- declare a person or class of persons to be employees;
- issue permits to 'aged or infirm persons' allowing them to work for less than the minimum wage as set down under an applicable industrial instrument

- conduct an inquiry about an industrial matter (for example the Pay Equity Inquiry)
- grant an injunction to compel compliance with an industrial instrument, permit or the Act or to prevent contraventions of an instrument, permit or the Act
- grant an injunction under the *Whistleblowers Protection Act 1994*, to prevent reprisal action against an employee whistleblower where the reprisals involve a breach of an industrial instrument. There have been no applications under this provision since it was introduced by the IR Act.

The Commission may in fact start proceedings on its own initiative, if it considers there is a need to do so. The Commission commenced proceedings for the Award Review on its own motion during 1999.

The Commission's powers with respect to industrial organisations include:

- the power to determine applications to amend the name, list of callings, or eligibility rules of an industrial organisation
- the power to conduct an inquiry into any alleged irregularity in the election of office bearers in an industrial organisation
- the power to approve amalgamations

In addition, a Full Bench of the Commission must determine any application for de-registration of an industrial organisation.

Training and Employment Act jurisdiction

The Commission acquired jurisdiction to hear and determine appeals from decisions of the Training Recognition Council under the *Training and Employment Act 2000*. These include decisions about training contracts – for example, the Council's refusal to register a training contract, or its decision to cancel a training contract, or to cancel a qualification or completion certificate under a contract, and decisions about disciplinary measures under a training contract. It also includes decisions to stand down an apprentice or trainee, or decisions about declaration of a prohibited employer. The appeals are by way of re-hearing on the record, although the Commission has a discretion to hear evidence if it considers justice and effective disposal of the appeal warrant it. Under the T & E Act, the Commission may order the employer or the apprentice/trainee to resume training. It may order the cancellation of the training contract and if appropriate order the employer to compensate the apprentice/trainee. In 2001-2002 there were 33 apprenticeship or traineeship applications to the Commission. In the period from September 2000, when the additional jurisdiction took effect, until 30 June 2001, there were 10.

Cases stated or referred

The Commission may state a case to the Court for an opinion or determination of a legal question arising in a matter before it. During the year under review there were 2 cases stated to the Court by the Commission. Where a matter before the Commission is of substantial industrial significance, the Commissioner hearing the matter may refer it to the full bench, with approval of the Commissioner Administrator or the President. There have not been any referrals under this provision of the Act since it commenced.

The Full Bench of the Commission

The Full Bench is composed of three Commissioners, and for certain matters must include the President (for example, enforcing an order of the Commission in regard to an industrial dispute, under Chapter 7 Part 2; hearing applications to de-register industrial organisations under Chapter 12 Part 16; and hearing appeals). With the leave of the bench, the Full Bench hears appeals from decisions of the Commission, and from most decisions of the Registrar, on grounds other than an

error of law or an excess or want of jurisdiction (for which an appeal lies to the Court). Leave to appeal is only given where the Full Bench considers the public interest warrants that the appeal be heard.

With regard to industrial organisations, the full bench hears and determines applications for de-registration of an industrial organisation; if an organisation does not comply with orders of the Commission, a Full Bench may order penalties (up to 1000 penalty units) against industrial organisations involved in industrial disputes; it can make representation orders in order to settle demarcation disputes. The Full Bench may also determine applications by non-exempt shops to vary trading hours under the *Trading (Allowable Hours) Act 1990*.

Costs

The Commission may order costs against a party to an application. However this may only be ordered if the Commission is satisfied the party's application was vexatious or without reasonable cause, or if a party to a reinstatement application, by some unreasonable act or omission during the course of the matter, caused another party to incur additional costs.

General Rulings and Statements of Policy

The Full Bench may make general rulings under s 287, about industrial matters for employees bound by industrial instruments, and about general employment conditions. Since the Act was amended by the *Industrial Relations Amendment Act 2001*, a general ruling *must* be made each year under s 287, about a Queensland Minimum Wage for all employees. An application for a general ruling on a minimum wage is expected to be filed in the first quarter of the next financial year.

The State Wage Case for employees covered by industrial instruments, is normally determined each year by a general ruling. The Full Bench may also issue a Statement of Policy about an industrial matter when it considers such a statement is necessary or appropriate to deal with an issue. The Statement may be made without the need for a related matter to be before the Commission.

On 1 August 2001, a Full Bench which included the President and Vice-President issued a General Ruling and Declaration of Policy with Statement of Principles, in response to an application for flow-on of the safety net wage increase (the State Wage Case). On 10 May 2002 a Full Bench issued a Statement of Policy regarding the Equal Remuneration Principle. This was in response to an application by the QCU and the QCCI, and followed on from recommendations of the Pay Equity Inquiry.

Matters dealt with during 2001-2002

Table 4 shows a breakdown of matters filed in this year and last. The Table lists matters filed according to sections of the Act, and includes some matters which are determined by the Registrar.

Overall, there has been an increase in the number of applications and notifications filed in the Registry since the previous year. As the Table shows, there has been a further decrease in the number of Queensland Workplace Agreements, along with a decrease in applications to approve new Certified Agreements. The numbers of unfair dismissal claims and claims of unfair contracts have also declined.

The overall increase in filings is due partly to the Award Review process which got under way during the year. There have also been increases in applications for severance payments, for payment in lieu of long service leave, for aged or infirm workers' permits, and applications to appeal from decisions of the Training Recognition Council. Over the period the number of dispute notifications filed also increased.

Table 4 Applications and Notifications filed

Section	Type of Application/Notification	2000/01	2001/02
s 49	Long Serv Leave – dispute re payment	1	0
s 53	Long Serv Leave – payment in lieu of	1	120
s 74	Unfair dismissal (Reinstatement)	1,824	1,726
s 83	Application for payment of notice	2	0
s 87	Application for severance allowance	5	43
s 90	Order re redundancy – over 15 employees	1	0
s 120	Freedom of association – breach	6	10
s 125	Award – make/amend/rescind	202	78
s 130	Review of Award	0	165
s 132	Exemption from Award	2	10
s 137	Order – wages & conditions (trainees)	14	15
s 138	Order – tools (trainees)	2	1
s 148	Assistance to negotiate a CA	19	17
s 156	Application to approve a CA	706	685
s 163	Designated Award	3	1
s 169	Amending a CA	0	1
s 172-173	Terminate a CA	1	0
s 176	Secret ballot re industrial action	0	6
s 184	Ballot on CA	0	2
s 203	Application to approve a QWA	205	171
s 230	Request for orders/arbitration (dispute)	6	9
s 265(3)	Inquiry about an industrial matter	1	1
s 274	Application for directions/orders	4	0
s 275	Declare person(s) to be employees	2	2
s 276	Application to amend/void a contract	47	28
s 277	Application for injunction	13	12
s 278	Claim for unpaid wages/superannuation	262	216
s 279	Representation order	1	0
s 280	Application to re-open a proceeding	2	7
s 284	Application for interpretation	1	5
s 287	Application for general ruling	2	3
s 288	Application for statement of policy	0	3
s 319	Representation of party	1	0
s 326	Interlocutory orders	5	6
s 331	Dismiss/refrain from hearing	5	3
s 335	Costs	3	0
s 342	Appeal to Full Bench	1	5
s 342	Leave to appeal to Full Bench	1	1
s 409-657	Industrial Organisation matters [see Table 5]	75	67
s 695	Student work permit	3	6
s 696	Aged and/or infirm permit	29	74

Table 4 contd.

Section	Type of Application/Notification	2000/01	2001/02
T(AH) Act	Trading hours order	5	1
T&E Act	Apprentice/trainee appeals	10	33
	Applications sub-total	**3,473**	**3,533**
Notifications filed —			
s 177	Authorisation to take industrial action	281	247
s 230	Notification of dispute	408	486
	TOTAL	**4,162**	**4,266**
No. of Decisions released		**184**	**237**
No. of Amendments to Awards		195	62

Award Review

Pursuant to s 130 of the Act, a Full Bench of the Commission, of its own initiative began the process of reviewing awards within the Queensland jurisdiction during 1999.

A Tripartite Committee of all interested parties was established in May 2000 to assist this Review. The Committee meets regularly and reports to the Commission on a fortnightly basis when the progress of the Review is discussed.

The work of this Committee has been of invaluable assistance to the Full Bench. The Award Review process is important but very time consuming. Parties are to be congratulated for the detailed attention they are collectively giving to the matter.

Educational Activities

The President and Commissioner Fisher both delivered papers at the Annual Convention of the Queensland Industrial Relations Society. Commissioner Swan lectured to Industrial Law students at the University of Queensland. The President continues to serve as the Patron of the Industrial Relations Education Committee.

Benchmarking

In December 2001, the President advanced the Benchmarking project further by presenting to the President's Advisory Committee a 'Benchmarking Interim Protocol'. The Protocol details a number of operational issues for which standards are set and benchmarks established. These include standards and appropriate benchmarks for the following:

- physical access to Commission conference rooms, hearing rooms and facilities for all those needing access;
- cultural access for Aboriginal people and those of non-English speaking background;
- expeditious and timely progression and determination of matters, with benchmarks for managing caseloads at all stages for different categories of matters;
- independence and accountability of the Commission as an institution and of Commissioners personally;
- equality, fairness and integrity of the Commission and Commissioners;
- public trust and confidence in the Commission, including benchmarks for communications with media, those involved in matters before the Commission, and members of the public. In December 2001, the President expanded relations with the media by permitting, for the first time, live television coverage of a Full Bench during its delivery of a decision

The President stressed to the Committee that qualitative standards had priority over the quantitative standards.

INDUSTRIAL REGISTRY

The Industrial Registry is set up under Chapter 8 Part 4 of the Act. It functions as the Registry for the Commission and the Court and also provides important administrative support. In addition, the Registrar deals with applications and acts as a tribunal for certain matters under the Act. The Registrar, Deputy Registrar, and staff of the Registry are officers of the Court and the Commission.

The Registry also serves as Registry to the Australian Industrial Relations Commission. This is done under a fee for service arrangement.

The Registrar's powers under the Act include the power to:

- decide applications for student work permits, for students undertaking tertiary studies requiring a period of work in a particular calling;
- decide applications for exemptions from holding elections or from certain other obligations under Chapter 12, for organisations with counterpart federal bodies, and for organisations which are corporations;
- refer an application for an election inquiry to the Commission. The Commission may authorise the Registrar to carry out certain inspections and investigations for such an inquiry;
- approve applications to amend an industrial organisation's rules, other than by amending its name or its eligibility rules (which must be approved by the Commission). If the Registrar considers an organisation's rules do not provide all the requirements under s 435, the Registrar may act on his or her own initiative to amend the rules to include the requirement. If the Court finds the rules do not comply with s 435, the Registrar may amend the rules to omit the offending provisions;
- decide applications to allow a secret ballot to be conducted other than by postal ballot.

Industrial Organisations Role

The Registrar is responsible for maintaining the register of industrial organisations, along with copies of each organisation's rules. If an organisation wishes to adopt the model election rules without alteration, the Registrar must register them as an amendment to the organisation's rules. However if an organisation has not adopted the model rules and its own election rules do not comply with the requirements of the Act, the Registrar may amend the organisation's election rules to adopt the model rules. The Registrar must arrange to have the electoral commission conduct an election of officers for an industrial organisation when the organisation has filed the prescribed information. Table 5 shows the number of elections arranged during the year increased slightly on the previous year.

Each industrial organisation must also file in the Registry each year a copy of its register of office-bearers and a copy of its audit report and financial accounts, along with records of certain loans, grants or donations . The Registrar may direct an organisation to give its register of members or officers to the Registry or to correct its register of members or officers. The Registrar may direct an officer of an organisation to keep the accounts in a certain way, to make entries of a stated type in the accounts, or to disclose to the Registrar certain information about the organisation's funds and accounts.

Table 5 Industrial organisation matters filed 2000-2001 and 2001-2002

s 409-657	Industrial Organisation matters	2000-01	2001-02
s 422(3)	New rules [Registry approval]	1	2
s 427	Amendment – list of callings	0	0
s 473	Amendment – Change of name	0	2
s 474	Part amendment – eligibility rules	1	2
s 478	Part amendment to rules [Registry approval]	19	11
s 482	Request for conduct of election [Registry]	44	46
s 594	Exemption from conduct of election	6	3
s 582	Exemption – members' register	1	0
s 447	Exemption – postal ballot	1	0
s 586	Exemption – branch financial return	1	0
s 618	Amalgamation	0	1
s 638	Review union registration – application for de-registration	1	0
	TOTAL	**75**	**67**

The Registrar also is required to investigate any irregularities which appear in an organisation's audit report, and may investigate other matters if he or she considers there are reasonable grounds. The Registrar may also engage an auditor to examine an organisation's accounting records over a particular period if the Registrar considers proper records are not being kept.

Registrar's Powers regarding Applications

The Registrar may make other decisions on applications lodged. For example, the Registrar may determine that a reinstatement application should be rejected because the applicant is excluded by the Act. Applicants excluded are those found to be short-term casual employees (unless the dismissal is for an invalid reason); employees still within the probationary period; apprentices and trainees; or employees who are not employed under an industrial instrument or tenured under the *Public Service Act*, who earn more than the statutorily prescribed limit. The Registrar's power to reject applications in this way was clarified by the *Training and Employment Act 2000*.

During 2001-2002, the number of applications and notifications filed, increased over the number filed in the previous year (see Tables 2 and 4). There were more dispute notifications lodged, as well as increases in applications for recovery of wages, long service leave and severance pay, and appeals on apprenticeship and traineeship decisions. In the same period, the Award Review process has been gathering pace. Registry has been providing extensive assistance to the Commission in processing the volume of work involved in the Review, ensuring Awards comply with drafting standards, and clauses meet the requirements established by the Model Clauses. This has been a major undertaking requiring considerable staff hours of the Registry.

Overall, the Registry has been successful in meeting its targets with respect to timely delivery of its services. During the year to 30 June 2002, Registry's published targets were met in respect of notification of parties to dispute conferences within 5 working hours (100% notified); and processing of applications within 8 working hours (99% processed). The published target was exceeded in respect of initial processing of agreements within 3 working days (93% processed, as compared to a target of 90%).

FREEDOM OF INFORMATION

A *Statement of Affairs* under the *Freedom of Information Act 1992* for the Industrial Court, Commission and Registry was produced as part of the Department of Industrial Relations *Statement of Affairs*. During the year there were just three Freedom of Information requests submitted to the Registry.

LEGISLATIVE CHANGES 2001–2002

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 Court. The Act also provides for the minimum entitlements of employees and governs the conduct of the affairs of industrial organisations. The subordinate legislation is the *Industrial Relations Regulation 2000* and *Industrial Relations (Tribunals) Rules 2000.*

Immediately prior to the year under review, the Act was amended to make the position of Commissioner Administrator responsible for the effective and efficient administration of the Commission, including determining the panel responsible for each matter. Commissioner Bloomfield is the current Commissioner Administrator.

Industrial Relations Amendment Act 2001

The Act was amended significantly by the *Industrial Relations Amendment Act 2001* which was assented to on 3 December 2001. An important function of that amending Act was to implement recommendations of the Pay Equity Inquiry. These amendments included amending the Principal Object in s 3(c), to create 2 distinct objects:

> (c) preventing and eliminating discrimination in employment; and
> (d) ensuring equal remuneration for men and women employees for work of equal or comparable value

In addition, it makes clear that a dismissal is unfair if employment is terminated for the following reasons:

> (i) the employee or employee's spouse is pregnant or has applied to adopt a child;
> (j) the employee or employee's spouse has given birth to a child or adopted a child;
> (k) for applying for, or being absent on, parental leave.

These amendments commenced on the date of assent.

The amending Act also inserted requirements that Awards and Certified Agreements must ensure that they provide for equal remuneration for men and women for work of equal or comparable value. Similar amendments were made to provisions for QWAs, to ensure they avoid discrimination and provide for equal remuneration for work of equal or comparable value. Those provisions commenced on 1 May 2002.

In addition, the rights and conditions of casual employees were strengthened by inserting into the Family Leave provisions a definition of "long term casual employee" and by giving those employees access to unpaid parental leave, carer's leave and bereavement leave after 1 year of service. All casual employees were further protected by allowing them to access the dismissal provisions of Chapter 3 if the dismissal was for an invalid reason stemming from discrimination; or relating to the employee's or employee's spouse's pregnancy or childbirth or adoption of a child; or because the employee has applied for, or is absent on parental leave.

Along with these changes, the amending Act imposed on the Commission a requirement that a Full Bench make a

general ruling each calendar year, under s 287 of the IR Act, about a Queensland minimum wage for all employees (not just those employed under an industrial instrument). Previously such a ruling could be made, but the Commission was not required to do so. The ruling can be made in response to an application, for example from an employee organisation or from the Minister, but if no application is filed, the Commission must act on its own initiative.

Amendments designed to clarify the circumstances under which legal representation will be allowed, in proceedings before the Commission, were also introduced by this Act.

Private Employment Agencies and Other Acts Amendment Act 2002

Other key amendments to the Act which were implemented during the year were contained in the *Private Employment Agencies and Other Acts Amendment Act 2002*, which commenced on 26 April 2002. That amending Act introduced a licensing regime for private employment agents. Jurisdiction to hear appeals from refusal of a licence or from a decision to cancel or not to renew a licence was given to the Industrial Magistrates Court. An appeal from the Industrial Magistrate's decision may be brought before the Industrial Court, on a question of law only.

The amending Act inserted into the *Industrial Relations Act*, a new Ch 11A which regulates fees paid to private employment agents. The new chapter makes it an offence for an agent to charge a fee to a person for finding work for that person, unless the person is a model or performer and the fee is charged according to the requirements of Ch 11A and the Regulation. If a fee is charged in contravention of this provision, a complaint against the agent may be brought to the Industrial Magistrates Court. On a finding of guilty, the Magistrate may order repayment of the whole of the fee, if it has not been repaid. Additionally, on a finding of not guilty the Magistrate may order repayment of an amount which the Magistrate is satisfied, on the balance of probabilities, the defendant has received from the job seeker.

A job seeker wrongly charged a fee by an employment agent may otherwise apply to the Commission (if the fee is not greater than $20,000) or to the Industrial Magistrates Court, for an order that the fee be refunded. The time limit for such a claim has been set at 6 years from the date of payment, and the claim may also be made on the job seeker's behalf by an employee organisation, an inspector, or another person authorised by the job seeker. If the matter is brought to the Commission, the Commissioner Administrator may remit it to an Industrial Magistrate, in which case, the Magistrate's decision and order are taken to be a decision and order of the Commission.

Private Employment Agents Regulation 2002

The *Industrial Relations Regulation 2000* was amended by the *Private Employment Agents Regulation 2002*. This provides guidelines regarding fees that are payable to employment agents. The regulation commenced on 26 April 2002.

Industrial Relations Tribunals Amendment Rules

The *Industrial Relations (Tribunals) Rules 2000* were amended by the *Industrial Relations Tribunals Amendment Rule (No 2) 2001* and the *Industrial Relations (Tribunals) Amendment Rule (No 1) 2002*. Included in the former, was a new rule, r 131B, requiring applications to make or amend awards to be accompanied by an affidavit, setting out the facts to show that the award or amendment provides for equal remuneration for men and women employees for work of equal or comparable value. This is in line with Recommendations of the Pay Equity Inquiry

Trading (Allowable Hours) Amendment Act 2002

The Commission also hears matters under the *Trading (Allowable Hours) Act 1990*. That Act was amended by the *Trading (Allowable Hours) Amendment Act 2002*,

assented to on 11 March 2002. The amending Act introduced a uniform regime of Sunday and public holiday trading for non-exempt shops in the south-east Queensland zone covering the Sunshine Coast, the Brisbane statistical area, west to Amberley, and the Gold Coast. The Act specifies certain days on which shops are required to close. The commencement date for the new trading hours regime was set at 1 August 2002. A provision was included in the amending Act making it an offence to require current employees to work extended hours unless agreed to in writing. That section has not yet been proclaimed to commence.

Appeals to the Commission under *Training and Employment Act 2000*

Under the *Training and Employment Act 2000*, a person aggrieved by certain decisions of the Training Recognition Council relating to training contracts and apprenticeships, or to disciplinary measures, can appeal to the Commission. A further appeal from the Commission is available to the Court, on a matter of law only.

That part of the *Training and Employment Act* commenced operation on 28 September 2000. During its first nine months of operation in the 2000-2001 year, there were 10 apprenticeship and trainee appeal applications filed. During the 12 months of the 2001-2002 year, the number had increased markedly to 33. The new provisions have made such appeals to the Commission more accessible. Under the IR Act, the Commission also has the power to fix the rate at which an apprentice will be paid if he or she is not employed under an industrial instrument with a specified rate.

FEATURES OF THE YEAR UNDER REVIEW

Statement of Policy — Equal Remuneration Principle

Following on the recommendations of the Pay Equity Inquiry completed by Commissioner Fisher in September 2000, a Full Bench of the Commission delivered a Statement of Policy on 29 April 2002. The *Statement on the Equal Remuneration Principle* was declared to commence on 1 May 2002. The Principle applies when the Commission makes, amends or reviews awards, makes orders about equal remuneration for work of equal value under Ch 2 Part 5 of the Act, arbitrates industrial disputes about equal remuneration, or values or assess the work of employees in “female” occupations or industries.

The Principle makes clear that the assessment is to be transparent, objective, non-discriminatory and free of gender-based assumptions. It is not necessary to show gender discrimination in order to establish that work has previously been undervalued. It also makes clear that, in assessing the value of work, the Commission must have regard to the history of the award, including whether remuneration has been affected by the gender of the workers covered by the award. Matters which the Commission may consider in this process include:

- whether the work has been characterised as “female”;
- whether the skills of female employees have been undervalued;
- whether remuneration in an industry or occupation has been undervalued because of occupational segregation or segmentation;
- whether features such as the degree of occupational segregation, the disproportionate number of women in part-time or casual work, low rates of unionisation, limited union representation in workplaces covered by formal or informal work agreements, the incidence of consent awards or agreements, and other similar considerations may have influenced the value of the work; or
- Whether sufficient weight has been placed on the typical work performed and the skills and responsibilities exercised by women, as well as the conditions under which the work is performed and other relevant work features.

Where the principle has been satisfied, an assessment will be made as to how equal remuneration is to be achieved. For example, work may be reclassified; new career paths may be established; there may be changes to incremental scales, or wage increases; new allowances may be established; definitions and descriptions of work may be reassessed to reflect properly the value of the work.

Award Review

Section 130 of the Act requires the Commission to review awards every three years to ensure they are relevant and that their provisions are up to date, appropriate to current community standards of fairness to employees, and suited to efficient performance needs of particular enterprises. This is a major project, involving the review of over 300 awards. The Registry has been providing significant levels of assistance to the Commission in the Award Review Process.

A Tripartite Committee was set up by the Full Bench to oversee issues arising and provide a mechanism whereby relevant parties could participate in the Award Review process. All parties with an interest in an award were invited to participate in the Committee at the time of the State Wage Case in May 2000, and all parties who nominated were accepted as parties to the Committee. In addition, an advertisement was placed in the Courier Mail to ensure that all relevant parties could participate in this process.

The Tripartite Industrial Relations Taskforce recommended that all awards be reviewed on a range of grounds. A test case was heard by the Full Bench in September 2001, giving an opportunity to test certain newer provisions of the Act relating to Awards. An Awards Grants Program was established by the department to assist parties with funding towards completion of the process.

The Tripartite Committee developed a range of "Model Clauses" to streamline the process by ensuring a minimum standard of drafting, which meets the legislative requirements and uses plain English so that those essential clauses are easily understood by all parties. To improve access to the model clauses and information in the Process, the Research Manual, including model clauses, and the Review timetable are available on the QIRC website <www.qirc.qld.gov.au>. To date, there has been a high degree of collaboration among parties to the various awards throughout the Award Review process. This has resulted in modernisation of a large number of awards with a high level of cooperation between unions and employer organisations.

Privacy Plan

In March 2002, the Privacy Plan was produced for the Court, the Commission, and the Registry. This Plan was produced in accordance with the Queensland Government's Information Standard 42. That requires that all state public sector agencies have a plan which outlines the type of personal information held by the agency, its collection, storage, use and any disclosure to other parties.

The Standard applies to the administrative function of the Court, Commission and Registry only. The judicial and quasi-judicial work of the Tribunals – including the Registry when it is performing functions related to decision-making on matters – is exempt from the operation of the Information Standard.

A copy of the *Privacy Plan 2002* is available on the Commission's website at http://www.qirc.qld.gov.au/privacy/plan.doc Information Standard 42 is included as an Appendix.

INDUSTRIAL ORGANISATIONS

The provisions governing industrial organisations – that is, employer organisations and employee organisations – are found in Chapter 12 of the Act. This chapter includes provisions as to registration of industrial organisations, their financial accountability, provisions governing rules on membership, structure and control of organisations, and requirements about conduct of elections to office.

The Court decides questions or resolves disputes about membership of an organisation; it determines applications regarding the compliance of the organisation's rules with restrictions set out in the Act, and also may issue a direction that a person perform or observe the rules. Applications for registration of an industrial organisation may only be made to the Commission. An organisation may be deregistered on certain grounds by a Full Bench of the Commission, which must include the President. The Commission determines applications to amend the name of an organisation in any substantive way, as well as applications for amalgamation. On referral by the Industrial Registrar it may conduct an inquiry about any alleged irregularities in an election for office-bearers in any industrial organisation. It must also determine applications to amend the eligibility rules and the callings represented by an organisation.

All other applications to amend rules are determined by the Registrar. Under the Act, the Registrar must keep a register of organisations, including details of office bearers, along with copies of their rules. During 2001-2002, there were 21 applications in respect of industrial organisations' rules, registrations, exemptions (see below) and name changes lodged with the Registrar. Decisions under Chapter 12, by whichever of the industrial tribunals is empowered to determine the matter, must only be made after certain persons and organisations are given an opportunity to be heard in the matter.

Elections

The Act requires all industrial organisations to make rules governing elections to office. After 1 July 2001, any organisation which has not adopted election rules or whose election rules do not comply with the requirements of the Act, is taken to have adopted the 'model election rules'. These are set out in Schedule 3 of the *Industrial Relations Regulation 2000*. Under the Act, organisations may resolve to adopt these model rules, in whole or in part. The process of assessing the compliance status of all organisations' election rules is a lengthy one, requiring considerable staff time from Registry. Where the existing rules do not comply or where the model election rules have been adopted, the Registrar must then register the model rules as amendments to the organisations' rules.

To have an election of office bearers, an industrial organisation must file prescribed information in the Registry. If satisfied the organisation's rules require an election to be held, the Registrar must then arrange for the Queensland Electoral Commission to conduct the election according to the organisation's rules. The cost is borne by the State. An industrial organisation may apply to be exempted from this requirement that the Electoral Commission conduct an election on its behalf. Such applications must be approved by the Registrar.

During 2001-2002, 46 requests to conduct an election were lodged with the Registrar. (Table 5, above, lists industrial organisation matters filed in Registry.) Three requests were refused because the industrial organisations were incorporated under another Act or law. During the period, 1 application was filed by an industrial organisation seeking exemption from having elections, on the ground that the organisation had a counterpart federal organisation which conducted an election for office-bearers under the federal Act. Two applications were filed by organisations seeking exemption from having the Electoral Commission conduct their elections. In such applications, members of the organisations concerned

must be given an opportunity to object; the Registrar then conducts a hearing to determine whether the organisation's rules, the application, and planned election processes comply with statutory requirements. During the reporting period, 5 exemptions from election requirements were granted (this may include applications pending from the previous year). (Table 5.)

The Registrar is also responsible for monitoring the financial accountability of industrial organisations. Organisations must file copies of their audit reports and accounts in the Registry, and the Registrar must investigate any irregularity or accounting deficiency found by an organisation's auditor. Organisations must also file in the Registry a statement of any loans, grants or payments totalling more than $1000 to any one person during the financial year.

Any industrial organisation with a counterpart federal organisation may apply to the Registrar for exemption from the requirements to hold elections, to keep registers of officers or members, and from accounting and audit provisions. In the case of exemptions from accounting and audit provisions, the organisation must file with the Registrar a certified copy of the documents filed under the federal Act. Similar provisions apply where an employer organisation is a corporation subject to other statutory requirements to file accounts and audit reports. One application for exemption on the basis of compliance with the federal Act was carried over from the previous year, and approved during the 2001-2002 reporting period.

There were 45 industrial organisations of employees registered at 30 June 2002. Total membership figures for employee organisations are only available at 31 December 2001: at that date there were 372,660 members of employee organisations. This number is more than 5,000 fewer than the previous year. Table 6 ranks registered industrial organisations of employees according to their membership.

There were 37 industrial organisations of employers registered at 30 June 2002. Again total membership numbers are only available as at 31 December 2001: at that date there were 40,244 members of employer organisations. Table 7 lists registered industrial organisations of employers according to membership.

There were no new registration applications and no applications to approve amalgamations filed during the year under review. An application for a declaration of a community of interest between ALHMWU and QBWC was filed and granted during the period. There was one application to amend the name of an industrial organisation: Queensland Nursery Industrial Association Union of Employers changed its name to Nursery and Garden Industry Queensland Industrial Union of Employers.

Table 6 Industrial Organisations of Employees – Membership at 31 Dec 2001

Industrial Organisation	Membership
The Australian Workers' Union of Employees, Queensland	54,451
Queensland Teachers Union of Employees	37,964
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees ..	33,782
The Queensland Public Sector Union of Employees	27,057
Queensland Nurses' Union of Employees .	25,516
Australian Liquor, Hospitality and Miscellaneous Workers Union, Qld Branch, Union of Employees.	25,505
Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Qld	18,620
Transport Workers' Union of Australia, Union of Employees (Queensland Branch)	16,343
The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland	12,447
Queensland Services, Industrial Union of Employees	11,879
The Electrical Trades Union of Employees of Australia, Queensland Branch	11,869
Queensland Independent Education Union of Employees	10,557
Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees	9,017
Federated Ironworkers Association of Australia (Queensland Branch) Union of Employees	8,119
Queensland Police "Union of Employees"	7,821
Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch	7,373
Australasian Meat Industry Union of Employees (Queensland Branch)	7,000
Finance Sector Union of Australia, Queensland Branch, Industrial Union of Employees	6,334
Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees	6,158
The National Union of Workers Industrial Union of Employees Queensland	6,095
Federated Engine Drivers' and Firemen's' Association of Australasia Queensland Branch, Union of Employees	4,523
Queensland Colliery Employees Union of Employees	4,350
The Plumbers and Gasfitters Employees Union of Australia, Queensland Branch, Union of Employees .	2,997
The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees	2,693
United Firefighters' Union of Australia, Union of Employees, Queensland	2,030
Australian Federated Union of Locomotive Employees, Queensland Union of Employees	1,519
The Bacon Factories' Union of Employees, Queensland	1,267
Federated Clerks' Union of Australia, North Queensland Branch, Union of Employees	1,068
Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees	1,055
Australian Journalists' Association (Queensland District) "Union of Employees"	1,019
Australian Salaried Medical Officers Federation Industrial Organisation of Employees, Queensland	851
The University of Queensland Academic Staff Association (Union of Employees)	646
Queensland Association of Academic Staff in Colleges of Advanced Education (Union of Employees)	622
Property Sales Association of Queensland, Union of Employees	611
Australian Institute of Marine and Power Engineers' Union of Employees, Queensland District.	498
The Seamen's Union of Australasia, Queensland Branch, Union of Employees	487
Actors, Entertainers and Announcers Equity Association, Queensland, Union of Employees	460
James Cook University Staff Association (Union of Employees)	384
The Queensland Police Commissioned Officers Union of Employees	312
Musicians' Union of Australia (Brisbane Branch) Union of Employees	302
Queensland Fire Service Senior Officers' Association, Union of Employees	81
Queensland Blind Workers Union of Employees	18
Griffith University Faculty Staff Association (Union of Employees)	Figures not supplied
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 7. Industrial Organisations of Employers – Membership at 31 December 2001

Industrial Organisation	Members
Queensland Master Builders Association, Industrial Organisation of Employers	8,839
Agforce Queensland Industrial Union of Employers	7,548
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers	4,500
Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)	2,635
Motor Trades Association of Queensland Industrial Organisation of Employers	2,081
Australian Dental Association (Queensland Branch) Union of Employers	1,582
Retailers' Association of Queensland Limited, Union of Employers	1,466
Australian Industry Group, Industrial Organisation of Employers (Queensland)	1,409
National Electrical and Communications Association Queensland, Industrial Organisation of Employers	1,351
Children's Services Employers Association Queensland Union of Employers	934
Master Plumbers' Association of Queensland (Union of Employers)	792
The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers	686
Queensland Hotels Association, Union of Employers	675
The Baking Industry Association of Queensland – Union of Employers.	628
Queensland Motel Employers Association, Industrial Organisation of Employers	547
The Registered and Licensed Clubs Association of Queensland, Union of Employers	521
Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers	510
Nursery and Garden Industry Queensland Industrial Union of Employers	447
National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers	427
Hardware Association of Queensland, Union of Employers	380
The Queensland Road Transport Association Industrial Organisation of Employers	378
Queensland Real Estate Industrial Organisation of Employers	259
The Hairdressing Federation of Queensland – Union of Employers	247
Australian Building Services Association – Queensland Division, Industrial Organisation of Employers	220
Queensland Mechanical Cane Harvesters Association, Union of Employers	216
Furnishing Industry Association of Australia (Queensland) Limited Union of Employers	189
Queensland Private Childcare Centres Employers Organisation of Queensland Industrial Organisation of Employers	141
Consulting Surveyors Queensland Industrial Organisation of Employers	118
T.A.B. Agents' Association of Queensland Union of Employers	110
Association of Wall and Ceiling Industries Queensland – Union of Employers	95
Queensland Master Hairdressers' Industrial Union of Employers	80
The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited	50
Queensland Cane Growers' Association Union of Employers	26
Queensland Country Press Association – Union of Employers	25
Australian Federation of Civil Engineering Contractors, Queensland Branch, Industrial Union of Employers	21
Australian Sugar Milling Association, Queensland, Union of Employers	18
Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers	12

Level of Industrial Disputes

During the year the number of working days lost to industrial disputation in Queensland declined from the previous year: 44,600 days lost in the 12 months to June 2002 (or 31 days per thousand employees) compared to 60,000 days lost in the year to June 2001 (42 days per thousand employees) and 84,900 days lost in the previous year (61 per thousand employees). It is important to note that these figures for Queensland include disputes under the Federal as well as the State jurisdiction.

SELECTED INDUSTRIAL COURT CASES

Watpac Australia Pty Ltd AND Stewart Campbell Rosenlund (No C50 of 2001)

Industrial Court of Queensland, President Hall, 9 August 2001
Industrial Relations Act 1999 (Qld) s 341(2) — Appeal against decision of Industrial Magistrate

Costs — *Industrial Relations Act 1999* (Qld) s 335; *WorkCover Queensland v Markwell (No 2)* 166 QGIG 466 referred to
Workplace health and safety — System of work — *Workplace Health and Safety Act 1995* (Qld) s 28 — Instruction, training and supervision of employee

The appellant company was charged with an offence and convicted under the WH&S Act in that it failed to ensure the workplace health and safety of a person. There were circumstances of aggravation: an employee sustained bodily harm and a person suffered a fatal injury.
The appellant appealed on the ground that the Industrial Magistrate pre-judged the case. The question for the Court was what a reasonably minded lay observer might possibly infer from a sequence of remarks by the Industrial Magistrate. The Court considered there was a real possibility that a reasonable lay person would conclude from the remarks that the Industrial Magistrate was "informing the parties that he understood his own mind …" *Ebner v Official Trustee in Bankruptcy* 75 ALJR 277 considered

Appeal allowed; decision of Magistrate refusing to disqualify himself quashed. Matter remitted to Industrial Magistrates Court to be heard and determined according to law with an order that the same Industrial Magistrate be disqualified from further hearing the matter.
Application for costs rejected as being beyond power.

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Francis Henry Charles Frazer AND Ronald David Gardner (No C54 of 2001)

Industrial Court of Queensland, President Hall, 21 August 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — appeal against decision of Industrial Magistrate

Industrial Relations Act 1999 (Qld) ss 289; 292; 294; 320(1), (2)
Workplace Health and Safety Act 1995 s 164(1)
Words and Phrases "offence against this Act", "proceedings"
Prosecutions under *Workplace Health and Safety Act* — Industrial Magistrates Court — Jurisdiction

The Industrial Magistrates Court is a court of record under s 289 *Industrial Relations Act*. Under the *Workplace Health and Safety Act* prosecution for an offence is by way of summary proceedings before an Industrial Magistrate.

This was an appeal from prosecution by summary proceedings. The appellant argued that s 320 *Industrial Relations Act* could be used by the Industrial Magistrate to admit otherwise inadmissible evidence under the WH&S Act. The Court considered the significance of the exclusion from s 320(1)(b) *Industrial Relations Act* of "an offence against this Act". The question for the Court was whether prosecutions under the WH&S Act are excluded from the operation of s 320. The Court found that no such exclusion was needed because prosecutions under that Act were not otherwise within the section.
Held: Despite the reference in s 164(4) of the *Workplace Health and Safety Act* to the *Workplace Relations Act 1997* [read now *Industrial Relation Act 1999*] applying in proceedings before the Industrial Magistrate, it was not possible to apply a provision of the *Industrial Relations Act 1999*, which was not intended to apply, to a prosecution under s 164(4) of *Workplace Health and Safety Act 1995*.
Appeal dismissed

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Clive John Newman AND Foamaction Pty Ltd (No C37 of 2001)

Industrial Court of Queensland, President Hall, 7 September 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate

Workplace Health and Safety Act 1995 (Qld) s 24
Cooper v Hopgood and Ganim (1999) 2 QdR 113 referred to
Grovit v Doctor [1997] 1 WLR 640 cited
House v The King (1936) 55 CLR 499 referred to
James v Williams; ex parte James [1967] QdR 496 considered
Lawrence v Oil Drilling (1967) QWN 4 considered

McKeering v McIlroy; ex parte McIlroy (1915) StRQd 85 referred to
Wilson v Bynon [1984] 2 Qd R 83 considered

Workplace Health and Safety — failure to discharge a workplace health and safety obligation — Industrial Magistrate's discretion — *Justices Act 1886* (Qld) s 147

The respondent was charged following a complaint of failure to discharge a workplace health and safety obligation, with a circumstance of aggravation, leading to bodily harm. The matter was adjourned a number of times for the convenience of the respondent. The complainant/appellant failed to attend the mention, where the respondent requested, and the Industrial Magistrate granted dismissal of the complaint. The Court was required to consider the Industrial Magistrate's exercise of discretion under the *Justices Act*. The Court considered whether an appellate court "may infer a failure properly to exercise the discretion which the law reposes in the court of first instance": *Lawrence v Oil Drilling*.
The matter was a serious charge and there was a public interest in having the matter heard. Prior adjournments were for the convenience of the respondent and the appellant's absence could not support a finding that the absence was intentional. There was no challenge to the bona fides of the complainant/appellant.
Appeal allowed; order of Industrial Magistrate dismissing the complaint set aside.

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Sandra Lillian Venn-Brown AND Alexander Colquhuon & Son Pty Ltd (No C42 of 2001)

Industrial Court of Queensland, President Hall, 20 September 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate

Workplace Health and Safety Act 1995 (Qld) ss 24, 28(1)
House v The King (1936) 55 CLR 499 considered
Workplace Health and Safety — offence — breach of obligation under s 28(1) *Workplace Health and Safety Act* — guilty plea — penalty — Industrial Magistrate's discretion

This was an appeal against sentence. The respondent pleaded guilty to a charge of breaching its obligation under the *Workplace Health and Safety Act*. There was a circumstance of aggravation averred, in that a person suffered bodily harm. A penalty of $4500 was imposed with no conviction recorded.
The Industrial Magistrate identified mitigating factors. The Court had to consider whether the Industrial Magistrate failed to take into account aggravating matters included in the written statement of facts. The Court found there was insufficient detail submitted to the Industrial Magistrate to support statements of so-called aggravating matters. The Industrial Magistrate acted correctly in putting the matters aside.
Appeal dismissed.

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Bettina O'Connor AND Electroboard Administration Pty Ltd (No C60 of 2001)

Industrial Court of Queensland, President Hall, 20 September 2001
Case stated under *Industrial Relations Act 1999* (Qld) s 282

Industrial Relations Act 1999 (Qld) s 72(1)(e)
Words and Phrases — "wages"
Ardino v Count Financial Group Pty Ltd (1994) 57 IR 89 considered
Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435 considered
Reinhard Wolfer v Computer Associates Pty Ltd (Boon JR, Industrial Relations Court, 12 April 1995, WI 538/94) referred to
Nunn v Linde Materials Handling Pty Ltd (1999) QGIG 212 referred to
Vines v Djordjevitch (1955) 91 CLR 512 considered
Re: Australian Liquor Hospitality and Miscellaneous Workers' Union (AIRC Full Bench, 3 July 1998) Print Q1629 considered
Mitchell v Australasian Correctional Management Pty Ltd (1997) 157 QGIG 7; *May v Lillyvale Hotel Pty Ltd* (1995) 68 IR 112; *Rigby v Technisearch Limited* (1996) 67 IR 68 cited
Dismissal — Reinstatement under s 74 *Industrial Relations Act 1999* — Exclusions under s 72(1)(a) or (e) — calculation of wages
Words and phrases — "wages" — "remuneration"

This was an application for reinstatement under s 74 *Industrial Relations Act*. At first instance the question before the Commission was whether the applicant was excluded from applying by s 72(1)(a) and (e). The Commissioner determined the question under s 72(1)(a) adversely to the respondent but stated a case to the Court for determination of the question on s 72(1)(e).
The Court considered the terms "wages" and "remuneration", whether "wages" should be

read in its natural meaning or its Sched 5 meaning, the calculation of annual wages, and the history of s 72(1)(e). The Court examined relevant forms of payment to determine whether they were within the ordinary concept of wages and should be included in the calculation of annual wages. These were: money paid by results, such as a commission; car allowances "in the form of reimbursement of expenses incurred"; and superannuation payments for the benefit of an employee.
Held: "Wages" in s 72(1)(e) should be given its natural meaning. A commission paid pursuant to an employment agreement, for sales made, should not be included in calculation of annual wages for the purpose of s 72(1)(e)(iii). Superannuation payments pursuant to statutory obligation are "remuneration" for the purpose of calculating annual wages.
A car allowance reimbursing expenses outlaid is not within the ordinary concept of wages. Matter remitted to the Commission to be determined according to law.

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John Robert Grant AND WorkCover Queensland (No C51 of 2001)

Industrial Court of Queensland, President Hall, 8 October 2001
WorkCover Queensland Act 1996 (Qld) s 509 — appeal against decision of Industrial Magistrate

WorkCover Queensland Act 1996 (Qld) ss 494, 497, 498, 506
WorkCover benefits — statutory review under *WorkCover Queensland Act* — powers of Review Unit to refer questions to Medical Assessment Tribunal

The appellant's application for benefits under *WorkCover Queensland Act* was rejected. He applied for statutory review. The Review Unit set aside the decision-maker's decision and referred the question whether the applicant had suffered an "injury" to a Medical Assessment Tribunal. The appellant appealed to the Industrial Magistrates Court against the Review Unit's decision to refer the matter. The issue was whether the Review Unit was required to make its own decision on the question. The Industrial Magistrate dismissed the appeal.
The Court considered the nature of the power of the Review Unit under s 494(1)(c) to "substitute another decision". The Court determined the words to mean to "substitute another decision that the decision-maker might have made".
Held: By s 437, the decision-maker was able to refer the matter to a Medical Assessment Tribunal. There was nothing in the Act which required the Review Unit to resolve the question whether the appellant had suffered an "injury". While there was no appeal available to an Industrial Magistrate against a decision of the (actual) decision-maker to refer the matter to a Medical Assessment Tribunal, there was nothing odd in the fact that an appeal was available from such a decision of the Review Unit. By s 494(5) the Review Unit's decision is "the decision of the decision-maker" and by s 497 it is a "review decision". The original decision is not a "review decision" under s 497. The Review Unit may properly decide to refer a matter to a Medical Assessment Tribunal. That decision may be appealed to an Industrial Magistrate, who may set the decision aside and direct that the Review Unit determine the question itself. The appellant had not persuaded the Industrial Magistrate that the decision to refer should be set aside.
Appeal dismissed.

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James Paul Neilands AND Darryl O'Neil (No C52 of 2001)

Industrial Court of Queensland, President Hall, 8 October 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate

Workplace Health and Safety Act 1995 (Qld) ss 24, 28(1)
Penalties and Sentences Act 1992 (Qld) ss 9(2), 11, 13
House v The King (1936) 55 CLR 499 referred to
R v Valentini (1980) 48 FLR 416 considered
Re Jorgensen and The Commonwealth (1990) 23 ALD 321 considered
Workplace Health and Safety — breach of obligation under *Workplace Health and Safety Act 1995* — plea of guilty — penalty — Industrial Magistrate's discretion.

The respondent was charged with breaching an obligation under the *Workplace Health and Safety Act 1995*. There was a circumstance of aggravation in that a worker suffered grievous bodily harm. The defendant pleaded guilty and a fine of $3000 was imposed. The inspector viewed the penalty as inadequate and appealed.
The Court considered the Industrial Magistrate's exercise of discretion regarding sentence. The Acting Industrial Magistrate had

taken into account certain mitigating circumstances.
Held: The sentence was not so manifestly inadequate or contrary to the interests of justice as to conclude that the Acting Industrial Magistrate proceeded on the basis of an unidentifiable error of principle.
Appeal dismissed

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Kevin Huey AND Immaculate Roofing Pty Ltd (C45 of 2001); Kevin Huey AND Classic Roofing Pty Ltd (C46 of 2001)

Industrial Court of Queensland, President Hall, 8 October 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate

Workplace Health and Safety Act 1995 (Qld) ss 23, 24, 26(3), 27, 28(1)
Code of Practice: Plant
Industrial Relations Act 1999 s 348
Workplace Health and Safety — failure to discharge workplace health and safety obligation — managing exposure to risk — industry code of practice — conduct of appeal

Complaints in identical terms were filed against each company, that each failed to discharge a workplace health and safety obligation, as a consequence of which a worker suffered grievous bodily harm while using a tool. The companies operated in partnership; the worker was an employee of each company. The Code of Practice Plant covered the industry and stated a way of managing exposure to risk. The Code's definition of "plant" included tools. The Industrial Magistrate found, wrongly, that no code of practice applied to the type of work being carried out by worker. On that basis, the Industrial Magistrate found that the defendants had taken reasonable precautions and exercised proper diligence to fulfil their obligations under the *Workplace Health and Safety Act*, by choosing to employ qualified tradesmen, relying on their experience to ensure the work was done safely.
The appellant argued that the matter should be re-heard on the record as allowed for under *Industrial Relations Act* s 348. The Court considered whether trial by transcript was an appropriate way to deal with the appeal — these were serious criminal matters with circumstances of aggravation; and there had been a conflict of expert evidence. Further, the Industrial Magistrate had ruled, incorrectly, that the appellant might not lead evidence or cross-examine on the question whether the defendants had failed to carry out a risk assessment
Held: To re-hear the matter on transcript would do a gross injustice to the respondents/defendants.
Decision of the Industrial Magistrate, that the defendants were not guilty, set aside. Matter remitted to Industrial Magistrates Court to be heard and determined according to law.

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James Paul Neilands AND CMC Cairns Pty Ltd (C49 of 2001)

Industrial Court of Queensland, President Hall, 8 October 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate

Workplace Health and Safety Act 1995 (Qld) ss 24, 30(1)(a)
Penalties and Sentences Act 1992 (Qld) s 9(2)
House v The King (1936) 55 CLR 499 referred to
Re Mika Engineering Pty Ltd (Industrial Magistrates Court, Gladstone, 27 June 2001) considered
Master Ryane (Qld) Pty Ltd v Thouard (2000) 165 QGIG 44 cited
Workplace Health and Safety — failure to discharge obligation as person in charge of workplace — plea of guilty — sentencing principles

The respondent pleaded guilty to a complaint that it failed to discharge its obligation as the person in charge of a workplace, imposed by s 30(1)(a) of the *Workplace Health and Safety Act*. There was a circumstance of aggravation in that a worker on site suffered grievous bodily harm. The worker was employed by a subcontractor plasterer. The subcontractor was responsible for scaffolding and workplace health and safety of employees using scaffolding
The Acting Industrial Magistrate took account of mitigating factors, including the guilty plea, that it was a first offence, and actions of the injured worker. The penalty was set at $7500.
The Court considered whether the Acting Industrial Magistrate acted on wrong principle. In a similar case with a guilty plea, 5% of the maximum penalty was imposed. The question arose whether justice between defendants required that a similar approach be adopted in 'similar' cases. The Acting Industrial Magistrate used the earlier benchmark (5% of maximum) as a basis for sentencing in this case, with discount for mitigating factors.

Held: The Acting Industrial Magistrate's sentence should be reviewed
The approach to sentencing was not a legitimate one. "The starting point should be the nature and quality of the defendant's (mis)conduct and the objective gravity of the offence." Any mitigating factors should then be taken into account. It was inappropriate for a sentencing Magistrate to restrict himself to the same approach he had used on another guilty plea.
The Acting Industrial Magistrate's method of evaluating the blameworthiness of the defendant's acts and omissions was flawed. It was inappropriate to treat the actions of workers or other persons in a similar way to contributory negligence or contributions between joint tortfeasors.
The Court addressed the issue of fixing an appropriate sentence. The respondent had relied on the subcontractor plasterer to have an adequate safety plan. The plasterer's safety plan was inadequate. The respondent should have audited observance of the plan. Under the Act, those in control of a workplace are required to exercise supervision over employers and their employees at the workplace.
Scaffolding was erected to a height above 4 met; at that height, certified scaffolders should have been used. The site foreman omitted to supervise or audit employees' erection and use of scaffolding. The employee fell while plastering from inadequate scaffolding erected beyond 4 met, suffering grave, life-threatening and lasting injuries.
Held: The $7500 fine (2.5% of maximum penalty) was inadequate in the circumstances, despite significant mitigating factors. The fine must be sufficient to deter offenders, denounce the conduct, and punish offenders to an extent which is just.
Sentence imposed by Acting Industrial Magistrate set aside; fine of $22,500 substituted.

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Mewborough Pty Ltd AND Walter Dare (C47 of 2001)

Industrial Court of Queensland, President Hall, 9 October 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate.

Workplace Health and Safety (Falls from Heights) Advisory Standard 1996 para 4.3
Penalties and Sentences Act 1992 (Qld) s 9
James Paul Neilands AND CMC Cairns Pty Ltd (C49 of 2001) referred to
Re Mika Engineering Pty Ltd (Industrial Magistrates Court, Gladstone, 27 June 2001) referred to
Workplace health and safety — failure to discharge obligation under the Act — risk control measures — Falls from Heights Advisory Standard — sentencing

The appellant pleaded guilty to a charge that it failed to discharge its obligation to ensure the workplace health and safety of workers, by failing to provide a system of working at heights that was safe and without risk to safety. A worker was injured in a fall from a leading edge. It was the appellant's first offence. A fine of $9375 was imposed. The appellant appealed against the sentence.
The appellant submitted on appeal that it is impracticable to guard against the risk of falls from leading edges. The Court found that submission to overstate the problem. This was evidenced by the fact that the appellant had, since the accident, instituted guard rails and bridging platforms to overcome risks. Additionally, *Falls from Heights Advisory Standard* addresses the problem of risk control in such situations.
Held: The appellant had failed to conform to control measures outlined in the Advisory Standard. The fine imposed was not manifestly excessive in the circumstances.
Appeal dismissed.

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Smashcare Pty Ltd AND Clive James Newman (C27 of 2001)

Industrial Court of Queensland, President Hall, 30 October 2001
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate.

Workplace Health and Safety Act 1995 (Qld) ss 26(3), 37(1)(b)
Code of Practice: Plant
Workplace health and safety — obligation to provide safe system of work — obligation to prevent risk of injury — evidence — miscarriage of justice — expert evidence

The appellant was found to have breached its obligation to provide a system of work that was safe and without risk. A worker suffered grievous bodily harm. The appellant was fined $17,000. This was an appeal against the guilty finding and the fine.
The *Code of Practice: Plant* outlines risk control measures. The appellant was found to have failed to prevent risk of injury, in that it failed to

properly inspect, maintain and replace worn or damaged parts. A certain witness was not called at first instance, nor was his evidence disclosed to the defence. The question arose whether that witness's evidence was significant enough that, if disclosed, it would have affected the credibility of a Crown witness. The Court considered, in the circumstances, such non-disclosure of material known to the Crown resulted in a miscarriage of justice.
The Court allowed the Appeal.

The Court considered whether the matter should be remitted to the Industrial Magistrate to be determined according to law. The appellant contended the decision was flawed on other grounds; it should be quashed and the matter dismissed.
At trial, there was conflict between expert opinions. The Industrial Magistrate preferred to accept evidence of the complainant's expert over that of the defendant/appellant. The appellants argue the Industrial Magistrate erred; he should have proceeded on the basis that the conflict could not be resolved. The Court was of the opinion that the Industrial Magistrate was in a better position to evaluate the evidence given by the experts and there was no reason to dispute his preference.
The appellant contested the Industrial Magistrate's finding that its way of managing exposure to risk, in terms of inspection, maintenance and replacement of plant, and in terms of training, did not reach a level of protection equivalent to methods in the *Code of Practice Plant*, as was required under the Act. The Court examined the Industrial Magistrate's reasons. There was no proper record kept of tools (plant) and maintenance; the so-called 'quality manual' and 'problem note books' were too vague and underused to qualify as a system of protection; the system of training was inadequate. The appellant failed to persuade the Court that the matter should be dismissed.
Appeal allowed. Decision of Industrial Magistrate set aside. Matter remitted to Industrial Magistrates Court to be heard and determined according to law.

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Neville Palk, Dept of Industrial Relations AND Carey and Sons Pty Ltd (C67 of 2001)

Industrial Court of Queensland, President Hall, 31 October 2001
Industrial Relations Act 1999 (Qld) s 282 — case stated to Court.

Industrial Relations Act 1999 (Qld) ss 278, 319. Industrial Relations Commission — conduct of proceedings — representation of parties — legal representation

The issue for the Court's determination was whether s 319 *Industrial Relations Act* denies the right to legal representation, to parties in proceedings before the Commission under s 278 (recovery of unpaid wages and superannuation contributions); and if prohibited, whether the prohibition is absolute or on what terms.
Section 319(1) creates a right to representation and s 319(2) limits the circumstances under which representation may be by a lawyer. Paragraph 319(2)(b) specifically excludes s 278 from matters for which legal representation may be allowed. The Court considered the apparent ambiguity as to whether s 278 proceedings are outside the limited circumstances allowing legal representation.
Held: There is no circumstance in which a person or a party may be represented by a lawyer, in proceedings under s 278.

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Colin Earner AND Queensland Investment Corporation and QIC Properties Pty Ltd (C43 of 2001)

Industrial Court of Queensland, President Hall, 8 November 2001
Industrial Relations Act 1999 (Qld) s 341(2) — Appeal against decision of Industrial Commission.

Industrial Relations Act 1999 (Qld) s 276.
Public Service Act 1996
Re Dingjan; ex parte Wagner (1994) 183 CLR 323 considered
Power to amend or void contract

This was an appeal against a decision of the Industrial Relations Commission striking out an application for relief under s 276. The appellant was denied access to relief by s 276(6) by reason that he was not a public service officer employed on tenure under the *Public Service Act* and had earned more than $71,200 pa. At the time of the application the appellant was unemployed and had no income.
The Court had to consider whether s 276(6) should be read so as to restrict the range of employees denied access to relief under s 276. The appellant submitted that s 276 is remedial legislation and should be beneficially construed, and that any employee should be allowed the option of terminating a contract and thereafter attacking it under s 276 since he or she would no longer be excluded by s 276(6). The Court

was of the opinion that such an interpretation is a proposal for legislative change outside the scope of legislative interpretation. There is nothing remedial about s 276(6)(b)(ii). It denies relief to a small group of employees, while contractors similarly remunerated retain the right to relief under s 276.
The appellant also relied on the history of the provision to support a finding that he was not excluded by s 276(6) but the Court rejected the argument
The appellant further contended that he was not denied relief because he was not a tenured public service officer under the *Public Service Act*. In support of the contention, the appellant argued that the double negative in s 276(6)(b) should be construed as mistaken and should be read as a single negative. The Commission had rejected that construction on the ground that it was not at liberty to consider any word as superfluous or insignificant. The Court considered the Commission's reasoning persuasive.
Held: The Commission's construction of s 276(6) was appropriate. Appeal dismissed.

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Clive Peter Williams t/as Queensland Institute of Property Studies AND State of Queensland (C61 of 2001)

Industrial Court of Queensland, President Hall, 14 November 2001
Industrial Relations Act 1999 (Qld) s 341(2) — Appeal against decision of Industrial Magistrate.

Vocational Education Training and Employment Act 1991 (Qld) ss 9, 67, 124
VETE Amendment Regulation (No 1) 1999 (Qld) s 45
Training and Employment Act 2000 (Qld) s 298, s 229
Australian National Training Authority Act 1992 (Cth)
Judiciary Act 1903 (Cth) s 78B
Warren v Coombes (1978-1979) 142 CLR 531 considered
Calvin v Carr & Ors (1979) 22 ALR 417 cited
House v The King *(1936) 55 CLR 499 referred to*
National Principles for registration of training organisations: Australian Recognition Framework (ARF)
Vocational education and training — national standards — training organisations — accreditation — availability of appeal to Industrial Court

Training organisations were accredited to offer vocational education and training awards (VET awards) pursuant to s 67 *Vocational Education Training and Employment Act 1991* (VETE Act). New national standards were introduced and required to be met in order that VET awards would be granted national recognition. Training organisations with existing accreditation were considered to be 'registered training organisations' under the new scheme and were required to undergo compliance audits under *VETE Amendment Regulation (No 1) 1999*.
The appellant was issued with a 'show cause' notice by the Registration Management Committee (RMC) following audit of his organisation. Following appearance before the RMC, he was informed of cancellation of his Institute's status as a 'registered training organisation'. Appeals to the VETE Commission and the Industrial Magistrates Court were unsuccessful.
The Court considered the availability of appeal from an Industrial Magistrate to the Industrial Court under the VETE Act or subsequent *Training and Employment Act 2000*: whether appeal was allowed on a point of law only, under s 124(11) VETE Act; whether, in the circumstances, the general power of the Court to entertain appeals under s 341(2) IR Act is available. The rule in *Warren v Coombes* on the proper inference to be drawn on facts by appellate court was discussed.
The Court found the Industrial Magistrate was right to conduct the appeal by way of hearing de novo.
The Court considered whether the Industrial Magistrate erred in declining to admit evidence as to conflict of interest among those involved in decision-making. The Court found that any conflict of interest was cured by conducting the hearing de novo. As regards the Industrial Magistrate's finding of substantial non-compliance with the recognition framework, the Court highlighted that the appellant carried the burden of onus of proof
The appellant contended s 45 VETE Amendment Regulation (No 1) was invalid as outside the objects of the VETE Act.
Held: s 45 forms part of a legislative framework to give effect to the objects of the Act and is within the substantive provisions of the Act.
The appellant contended s 45 VETE Amendment Regulation (No 1) was inconsistent with *Australian National Training Authority Act 1992* (Cth) (ANTA Act) — The Court had to consider whether the cause "involves" a matter arising under the Constitution.
Held: The Regulation does not trespass on the field covered by the ANTA Act. The appellant's submission was unarguable and based on a false reading of the ANTA Act. No question

involving the Constitution or its interpretation arose.
The appellant further submitted that the Industrial Magistrate erred in law by insisting on strict adherence to the rules of evidence.
Held: this is not a case for examining the limits of discretion and there was no error by the Acting Industrial Magistrate in exercising his discretion.
Appeal dismissed

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David Francis Cox AND Lesleigh Maree Daley (C53 of 2001)

Industrial Court of Queensland, President Hall, 20 November 2001
Industrial Relations Act 1999 (Qld) s 341(2) — Appeal against decision of Industrial Magistrate.

Industrial Relations Act 1999 (Qld) ss 123(1)(b), 135, 399, 666, 667(1)
Retail Industry Interim Award — State
Igaki Australia Pty Ltd v Coastmine Pty Ltd (unreported, Drummond J, Federal Court, Queensland District, 2 November 1994) referred to
Nelson v Nelson (1995) 184 CLR 538 cited
Yangao Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 considered
Under-Award wages — casual employee — cash payment — illegality

This matter arose out of a failure to pay wages at the rate prescribed by award. An application to the Industrial Magistrates Court to enforce the respondent/employer's statutory obligation, under s 123(1)(b) *Industrial Relations Act*, to give effect to provisions of the Award, failed.
The applicant/Inspector appealed.
The employer paid a casual employee lower than the award rate. Payments were by cash with no deductions for taxation. The Industrial Magistrate dismissed the case on the ground of illegality in not deducting tax.
The Court found the Inspector was not attempting to enforce an illegal transaction, but to enforce the respondent's obligation to give effect to the Award as required by the IR Act. The cash in hand arrangement was not part of the Inspector's case. Therefore it was not appropriate for the Industrial Magistrate in such a case to allow the respondent's plea of illegality, and thereby to give full force to the illegal arrangement.
The Industrial Magistrate incorrectly used the decision of *Igaki v Coastmine* to find the contract void. The Court acknowledged that illegality may render a contract void or unenforceable, but added that whether a contract prohibited by statute is void is a matter of statutory construction.
Held: Nothing in the IR Act renders a contract to pay less than the award rate void. However, the Award will override such a contract and be enforceable: see ss 135 and 399(5)(b).
Decision of Industrial Magistrate set aside.
Matter remitted to Industrial Magistrates Court to be heard and determined according to law.

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King Pie (Brisbane Central) Pty Ltd AND Dru Elliot Powell (C75 of 2001)

Industrial Court of Queensland, President Hall, 23 November 2001
Industrial Relations Act 1999 (Qld) s 342(1) — Appeal against decision of Industrial Commission.

Industrial Relations Act 1999 (Qld) s 335
Retail Take-Away Food Award – South Eastern Division
Training Wage Award – State
Recovery of unpaid wages — whether a "trainee"

This case arose following a successful application by an Inspector, to the Industrial Relations Commission, to recover wages due but unpaid to an employee of the appellant.
The Appellant argued the employee was covered by the *Training Wage Award – State*. The Commission found that award did not apply as no traineeship agreement existed as required under that award. The employee was covered by the *Retail Take-Away Food Award – South Eastern Division*. Under the provisions of that award, the employee was underpaid.
The Court was not persuaded by the appellant's submission. Appeal dismissed.
The question arose whether costs should be awarded against the appellant. The appellant chose to litigate his case in Court knowing the Commission had already held his case without substance
Held: The discretion to order costs should be exercised. Order the appellant to pay the respondent's costs of and incidental to this appeal, assessed according to the Supreme Court scale.

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Hartnell Pty Ltd AND Dru Elliot Powell (C74 of 2001)

Industrial Court of Queensland, President Hall, 23 November 2001
Industrial Relations Act 1999 (Qld) s 341(2) — Appeal against decision of Industrial Magistrate.

Industrial Relations Act 1999 (Qld) ss 278, 292
House v The King (1936) 55 CLR 499 referred to
Industrial Magistrates Court — Practice and procedure — joinder

There was an application by an Inspector to recover unpaid wages. The matter was remitted by the Industrial Relations Commission to the Industrial Magistrates Court. The employer applied either to join a civil matter then before the Magistrates Court, or to adjourn the matter until the civil proceeding was heard and determined. The Industrial Magistrate refused. The employer appeals against the refusal.
Held: There can be no joinder of proceedings when proceedings are before different courts. There was nothing in the Act to vest jurisdiction, over matters raised in the civil proceeding, in the Industrial Magistrates Court.
The appeal against refusal by the Industrial Magistrate to grant an adjournment related to exercise of discretion by a tribunal of first instance. The discretion related to a matter of practice and procedure raised in an interlocutory application. There was no basis for interference in this case. The matters could not be joined. To adjourn in order to wait for civil proceedings to be heard and determined would cause further and unnecessary delay. In the circumstances the Industrial Magistrate was right to refuse an adjournment.
Appeal dismissed.

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WorkCover Queensland AND Farrant James Howgego (C62 of 2001)

Industrial Court of Queensland, President Hall, 21 November 2001
WorkCover Queensland Act 1996 (Qld) s 509 — Appeal against decision of Industrial Magistrate.

WorkCover Queensland Act 1996 (Qld) s 34, 34(4)(d)
Preddle v WorkCover Queensland (1999) 162 QGIG 170
Queensland v Murphy (1990) 95 ALR 493 cited
Workers' compensation — payments ceased — definition of "injury" — psychological disorder

WorkCover Queensland ceased payment of compensation to the respondent. The respondent appealed WorkCover's decision to the Industrial Magistrates Court. The Industrial Magistrate found in favour of respondent.
WorkCover appeals
WorkCover claims that the respondent is predisposed to development of a psychological disorder. The Court considered the definition of "injury" and interpretation of s 34(4)(d) *WorkCover Queensland Act*.
Held: The Industrial Magistrate erred in finding that the legislature in s 34(4)(d) chose not to exclude workers' individual susceptibilities for psychiatric and psychological illness except in so-called stress cases. The paragraph should be read to exclude workers from protection by the scheme "in all cases where, for whatever reason, a reasonable person would not in fact have been expected to sustain injury".
Appeal allowed. Matter remitted to Industrial Magistrates Court to be heard and determined according to law.

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WorkCover Queensland AND Patricia Mary Downey (C70 of 2001)

Industrial Court of Queensland, President Hall, 4 December 2001
WorkCover Queensland Act 1996 (Qld)— Appeal against decision of Industrial Magistrate.

WorkCover Queensland Act 1996 (Qld) ss 158, 168, 510A
Workers' compensation — statutory time limitations — when entitlement to compensation arises

A worker suffered carpal tunnel syndrome to both wrists, with symptoms arising over a period from May 1997. An application for workers' compensation was made in November 2000. The application was supported by a medical certificate issued in November 2000. That application was rejected as statute barred. The applicant appealed successfully to the Industrial Magistrates Court. WorkCover appeals against the decision of the Industrial Magistrate.
The Court considered the meaning of the limitation period expressed in s 158(1) as 6 months "after the entitlement to compensation arises", and the use of s 168 *WorkCover Queensland Act* in interpreting s 158. Section 168(1) states: "The entitlement to compensation for an injury arises on the day the worker is assessed by— (a) a doctor; or (b) … a dentist". The Court took this to mean the injury

"assessed by a doctor as resulting in total or partial incapacity for work".
The Court discussed the remedial nature of the statute and expressed sympathy with the Industrial Magistrate's unwillingness "to depart from the literal meaning to develop a legislative scheme which is properly the province of the legislature".
Held: The claim was not statute barred.
Appeal dismissed. Application for costs rejected as not available under the Act.

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Clive James Newman AND Aldo's Fine Foods Pty Ltd (C90 of 2001)

Industrial Court of Queensland, President Hall, 8 February 2002
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate.

Workplace Health and Safety Act 1995 (Qld) s 28(1)
Penalties and Sentences Act 1992 (Qld) s 9
House v The King (1936) 55 CLR 499 referred to
R v Valentini (1980) 48 FLR 16 cited
Workplace Health and Safety — safe system of work

Appeal by Inspector as to quantum of fine.
The respondent employer was charged with breach of an obligation under s 28(1) *Workplace Health and Safety Act 1995*. There was a circumstance of aggravation in that a worker suffered grievous bodily harm. The respondent/defendant pleaded guilty and a fine of $10,000 was imposed. This was at the lower end of the scale of penalties.
There was no safe system of work instituted for the particular action causing injury: the respondent had relied on verbal warnings to workers of possible danger in operating machine. Subsequently, the respondent installed a safety switch and warning signs.
The Court considered the discretion of the Industrial Magistrate in setting a fine. The Industrial Magistrate had evidence as to the blameworthiness of the respondent, and of mitigating factors. The straitened circumstances of the respondent were also a factor and the Court referred to the need to guard against imposing a sentence that in the circumstances was oppressive.
Held: No legitimate basis for treating quantum of fine as manifestly inadequate.
Appeal dismissed.

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Australasian Meat Industry Union of Employees (Queensland Branch) AND Inghams Enterprises Pty Ltd (C84 of 2001)

Industrial Court of Queensland, President Hall, 14 February 2002
Industrial Relations Act 1999 (Qld) s 341(1) — Appeal against decision of Industrial Commission.

Industrial Relations Act 1999 (Qld) s 87
Industrial Relations (Tribunal) Rules 2000 (Qld) r 125(2)
Inghams Enterprises (Park Ridge Processing) – Certified Agreement 2000
VA Mitchell v The Totalisator Administration Board of Queensland (1979) 100 QGIG 926; *EC Ewald v Gabinka Pty Ltd* (1982) 109 QGIG 39 cited
Julia Ross Personnel v Wain (2001) 166 QGIG 350 referred to
Refusal by respondent to pay severance payments to a group of employees made unemployed by closure of plant. Commission notified of dispute — Conciliation unsuccessful. Issues on arbitration by the Commission — 1. Whether former employees entitled to severance payments under Certified Agreement. — 2. Whether group of employees remaining unpaid were entitled to relief under s 87 of the Act. — Appellant/applicant failed on both issues. — Appeal on second issue only.

The question for the Court's determination was whether the employees the subject of this dispute fell into the category of employees excluded from the operation of Chapter 3 Part 4. It was accepted that the group of employees who remained unpaid were not entitled to a remedy under s 87 if they were casual employees.
The Court considered the meaning of 'casual employment': "the law now recognises that there exist (at least) two classes of employee colloquially described as 'casual'", that is, irregular, informal and uncertain vs a regular pattern of hours within an ongoing employment relationship and benefits similar to employees on indefinite hiring. The difficulties arise when casual employees are given benefits and conditions indistinguishable from those engaged on an indefinite hiring.
The respondent recruited new employees on a casual basis over a 4 year period, prior to closing the Park Ridge Plant. Such employees were paid in accordance with the Award and Certified Agreement covering the Plant and their conditions included requirements to present for work every day; to work according to published rosters; to work at least 38 hours

per week; being subject to the employer's disciplinary procedures if absent without reason; and a requirement to gain approval before taking unpaid leave. Length of service for the subject employees ranged from 1 to 4 years.
On the issue whether s 87 relates to applications by single employees only, the Court held: in the case of a statute which, inter alia, is directed at the resolution of group conflict there is no apparent reason for denying that s 87 vests power to deal with a group of employees; r 125(2) of the Tribunals Rules assumes that proceedings under s 87 may relate to a number of employees.
Held: Once it is conceded that upon all the facts there is a debatable question whether the work is casual work, it is in truth conceded also that there is no error of law on which to base an appeal.
Appeal dismissed

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Allied Express Transport Pty Ltd AND Bruce Humphrey (C4 of 2002)

Industrial Court of Queensland, President Hall, 8 April 2002
Industrial Relations Act 1999 (Qld) s 341(1) — Appeal against decision of Industrial Commission.

Industrial Relations Act 1999 (Qld) ss 101, 104(1), 105(1), 105(2)(b)
Pearce v WD Peacock and Co Ltd (1917) 23 CLR 199 considered
R v Commonwealth Conciliation and Arbitration Commission; ex parte William Holyman and Sons Limited (1914) 18 CLR 273 referred to
Burnie Port Authority Pty Ltd v Maritime Union of Australia (2000) 103 IR 153 considered
Re Dingjan ex parte Wagner (1995) 183 CLR 323 referred to
Briginshaw v Briginshaw (1939) 60 CLR 336 referred to
Appeal from a finding of the Commission that the appellant engaged in prohibited conduct contrary to s 105(2)(b) *Industrial Relations Act* in that it dismissed the respondent because of his dissatisfaction with industrial conditions.
Whether s 105(2)(b) prohibits dismissal of employee because employee dissatisfied with industrial conditions — If s 105(2)(b) prohibits such dismissal, whether dismissal and dissatisfaction must be contemporaneous.

In a case for dismissal on prohibited grounds, it is for the applicant to establish that he was dissatisfied and that that circumstance was substantial and an operative factor in the employer's decision to dismiss. The Court had to consider whether there must be a temporal nexus between the dissatisfaction and the dismissal. The applicant/respondent argued successfully before the Commission that it was sufficient to establish an earlier dissatisfaction with conditions causally linked to the decision to dismiss. The appellant contended the dismissal must be at the time of the dissatisfaction. The Court examined the meaning of "dissatisfied" and reviewed various authorities
Held: The appellant's contention is correct. Under s 105(2)(b), the dismissal must be shown to be "because" the employee is dissatisfied with his industrial conditions; the link between s 105(2)(b) and 104(1)(k) is to be temporal as well as causative; other paragraphs of s 104(1) distinguish between past, present and future, eg s 104(1)(a). There was no evidence to support a finding of the requisite connection.
Appeal allowed. Respondent's application for relief under Chapter 4 *Industrial Relations Act 1999* dismissed.

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Gary Eric Newman AND David Knox Holdings Pty Ltd (C31 of 2002)

Industrial Court of Queensland, President Hall, 31 May 2002
Workplace Health and Safety Act 1995 (Qld) s 164(3) — Appeal against decision of Industrial Magistrate.

Workplace Health and Safety Act 1995 (Qld) ss 24(1), 28(1)
House v The King (1936) 55 CLR 499 referred to
Appeal by WHS Inspector against sentence.

The respondent pleaded guilty to a charge of breaching its obligation under *Workplace Health and Safety Act 1995*. There was a circumstance of aggravation: the breach resulted in the death of a worker. A fine of $15,000 was imposed (maximum available against a corporation $300,000). No conviction was recorded.
The respondent's employees were working on a site operated by its customer, a glass manufacturer (ACI). The respondent failed to ensure its employees complied with a requirement to wear fitted seatbelts when operating a forklift. The particular worker was trained in forklift operation and knew of the danger of not wearing a seatbelt. The respondent relied on ACI's workplace health and safety operation; it had no active and continuing involvement in workplace health and safety matters on the site and was unaware of

the culture at the workplace not to wear seatbelts.
The Court examined the Industrial Magistrate's exercise of discretion as to sentencing. The evidence included the serious circumstance of aggravation and the gravity of breach, as well as the mitigating factors.
Held: The case was one where the Industrial Magistrate's decision as to sentencing should be reviewed. "It was neither understandable nor acceptable for the respondent to vacate any responsibility for the safety of its employees because of (misplaced) confidence in ACI."
Appeal allowed. Orders of Industrial Magistrate set aside. Fine of $25,000 imposed.

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Muhammad Alamzeb AND Education Queensland (No 2) (C55 of 2001) Education Queensland AND Muhammad Alamzeb (C56 of 2001)

Industrial Court of Queensland, President Hall, 4 June 2002
Industrial Relations Act 1999 (Qld) s 341(1) — Appeal against decision of Industrial Commission.

Public Service Act 1996 (Qld) s 73
Public Service Regulation 1997 (Qld) ss 6, 7
Acts Interpretation Act 1954 (Qld) s 39
Industrial Relations Act 1999 (Qld) s 335
Vidler v Education Queensland (2000) 165 QGIG 47 considered
McPhee v Bennett Ltd (1935) 52 WN(NSW) 8 considered
Unfair dismissal — probation — whether probationary employee at termination

MA was dismissed by EQ in June 2000, and applied to the Commission for reinstatement. That application was partially successful: reinstatement was deemed impracticable; EQ was ordered to pay 4 months salary. Both parties appealed.
MA was employed initially by EQ in May 1999, as a relieving teacher, subject to a minimum probationary period of 8 months. Subsequently he was offered a full-time teaching position to commence in 1st semester 2000. Following considerable dissatisfaction with his performance, which EQ apparently tried to help him rectify, he was dismissed in June 2000.

Appeal by MA (C55 of 2001): The Court had to consider whether MA was a probationary employee at the time of termination. The appellant contended that by ss 6 and 7 *Public Service Regulation 1997*, he acquired tenure when, at the end of 8 months he was neither told he was terminated nor told his probationary period was extended.
Held: The Court rejected this contention: the *Public Service Regulation* had no relevance; appointment from 1st semester 2000 was subject to a 6 month period of probation under s 73 *Public Service Act 1996*.
The appellant MA contended further, that he was not given notice of termination until after expiry of the 13 months referred to in s 73.
Held: Delivery of the letter of termination to his letter-box was sufficient to amount to notice for the purposes of the Act.
The Court had to consider whether the appellant MA can challenge a finding of fact. Appeal to the Court from the Commission is on a question of law, or an excess or want of jurisdiction only. The Court examined the bases on which errors of fact can amount to an error of law.
Held: There was no basis on which to challenge the Commission's findings of fact.
Held: The Commission's conclusion that reinstatement or re-employment was impracticable was inevitable.
Appeal of MA (C55 of 2001) dismissed

Appeal by EQ (C56 of 2001): The Court had to consider whether the appellant EQ must identify a particular error of law to mount an appeal. The Court determined that it was possible to conclude that there must have been an error of law, though the precise nature of the error is not discernible.
The Court considered whether the appellant EQ acted unfairly in terminating the probationary employment of a teacher who, the Commission found, was unable to develop his skills and of whom there was no prospect that time and instruction would lead to any improvement. The Commission found reinstatement and re-employment to be impracticable on the basis of the same facts and opinion that EQ used to decide to terminate the respondent MA's employment. However, the Commission ruled that decision to be unfair, finding that, as a probationary employee, MA had been treated unfairly.
The Court considered whether the Commission had asked the wrong question, that is, whether the question before the Commission was: did EQ, as the Commission found, treat MA unfairly as a probationary employee:
The Court found that the proper question for the Commission to have asked was whether the respondent MA was unfairly dismissed. Although the period of evaluation and assistance given to MA was compressed, evidence of recalcitrance and ineffectiveness

showed that the appellant EQ could confidently terminate MA's employment when it did.
The Commission awarded compensation to MA on the basis that his probationary employment was terminated after a 4 month period of evaluation and testing, instead of 8 months. That is, effectively, compensation was given for the 'unfairness' of his probationary employment.
The Court found that it was not within the jurisdiction of the Commission to do so.
Appeal of EQ (No C56 of 2001) allowed. Order of Commission set aside. In lieu thereof, order that MA's application for reinstatement be dismissed.
Application by EQ for costs — s 335 *Industrial Relations Act*.
Under the circumstances, although the appeal by MA had no objective prospects of success, the Court rejected the Appellant EQ's application for costs.

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Carpentaria Gold Pty Ltd AND WorkCover Queensland (C16 of 2002; C16 of 2002)
Copper Refineries Pty Ltd AND WorkCover Queensland (C18 of 2002; C19 of 2002)
Oaky Creek Coal Pty Ltd AND WorkCover Queensland (C20 of 2002; C21 of 2002)
Newlands Coal Pty Ltd AND WorkCover Queensland (C22 of 2002; C23 of 2002)
Industrial Court of Queensland, President Hall, 13 June 2002
WorkCover Queensland Act 1996 (Qld) s 509 — Appeal against decision of Industrial Magistrate.

WorkCover Queensland Act 1996 (Qld) ss 5, 34, 50(1), 58, 152, Ch 3 Part 9, ss 229, 498, *WorkCover Queensland Notice* No 1 of 1998 Sched 6 s 3A
Workers' compensation scheme — accident insurance premium assessments

The appellants appealed to the Industrial Magistrates Court against decisions of the WorkCover Queensland Review Unit regarding correctness of accident insurance premium assessments for each of the appellants for 1998/99 and subsequent years. Identical issues were raised in each matter, that is, the inclusion of amounts relating to employees' industrial deafness claims in the calculations.
The Industrial Magistrate dismissed the appeals.
Entitlement to workers' compensation, of workers who suffer industrial deafness, is limited to Ch 3 Part 9 and s 229(1)(a) of the *WorkCover Queensland Act*. The appellants were covered by WorkCover policies
The formula for calculating a WorkCover premium relies on the Experience Factor of the employer, the employer's statutory claims history and common law claims history, and the "costs" … incurred by WorkCover [for] "injuries" … "incurred on a date in the preceding period of insurance".
The appellants contend that "incurred on a date …" refers to "injury". They argue that, since industrial deafness as an "injury" occurs over a period of time (rather than "on a date") with the last employer bearing liability, moneys paid as a result of successful claims relating to industrial deafness should be removed from the premium calculation.
The respondents contend that "incurred on a date …" refers to "costs"
Held: When s 3A of Sched 6 of the *WorkCover Queensland Notice* is read in conjunction with the formula for calculating a premium, it appears that "incurred on a date …" refers to "injury". The date at which injury becomes a "compensable injury" is the date on which an injury is incurred; s 3A deems the injury to be incurred on the date at which a worker is assessed as having the injury.
The appellants further contend that, in calculating the premium, reference should only be made to costs of injuries arising out of, or in the course of employment with that employer whose premium is being assessed. They point to the purpose of referring to the previous claims history as rewarding employers with good histories and penalising employers with poor histories. Also, the Act's objects in s 5(6) include the need to set premiums at a rate that is not burdensome to industry in order to maintain competitiveness
Held: The need to avoid burdensome premium rates must be set against the need also set out in the Objects of the Act, to ensure WorkCover is able to meet its liabilities for compensation and damages and maintains solvency as required under the *Insurance Act 1973* (Cth) and regulations. The Legislature and WorkCover, as the body charged with formulating the method and rate, have made a policy decision which must be respected.
Appeal dismissed

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Lutheran Church of Australia – Qld District AND Clive John Newman (C27 of 2002)

Industrial Court of Queensland, President Hall, 18 June 2002

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

Workplace Health and Safety Act 1995 (Qld) ss 22(2), 24(1), 26, 27, 28(2), 30
Workplace Health and Safety Risk Management Advisory Standard 2000
House v The King (1936) 55 CLR 499 referred to
R v Brown; ex parte Attorney- General [1994] 2 QdR 182
Workplace health and safety — obligation to ensure safety of persons at workplace — death — Appeal against recording of conviction and quantum of penalty.

The appellant is a "person in control of the workplace", an educational facility, subject to the *Workplace Health and Safety Act*. The appellant was charged with breaching its obligation to ensure the safety of persons at workplace. There was a circumstance of aggravation: a fall from the roof of the school chapel resulting in death of a pupil. The appellant had failed to restrict access of persons to the roof of the chapel.
The Industrial Magistrate found that the appellant failed to identify the obvious hazard created by a ladder giving access to the chapel roof. The Industrial Magistrate recorded a conviction and imposed a penalty of $60,000. Mitigating factors were taken into account.
Held: This is not a case in which the penalty imposed is clearly unreasonable; there was no ground on which to interfere with the sentence. The appellant was unable to identify incorrect principle, irrelevant consideration or failure to recognise a relevant consideration in the Industrial Magistrate's decision to record a conviction. It is not proper for the Court to interfere with the Industrial Magistrate's exercise of discretion.
Appeal dismissed.

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Department of Justice and Attorney-General AND David Carey (C42 of 2002)

Industrial Court of Queensland, President Hall, 25 June 2002

Industrial Relations Act 1999 (Qld) s 341(1) — Appeal against decision of Industrial Commission.

Public Service Act 1996 (Qld) s 69, 113
Siagian v Sanel Pty Ltd (1994) 54 IR 185 considered
Construction, Forestry, Mining & Energy, Industrial Union v Newcastle Wallsend Coal Company Ltd (1998) 88 IR 202 considered
Hale v South Australia Department of Primary Industry (1988) 78 ALR 494 referred to
Andersen v Umbakumba Community Council (1994) 56 IR 102 considered
Appeal from a decision of the Commission on a preliminary point as to jurisdiction. Appeal on the basis that the Commission lacked jurisdiction. — Whether respondent employed for fixed period — Whether employment terminated through effluxion of time, not dismissal

The respondent was employed by the appellant on temporary engagements over a period of 8 years. Appointments were made by repeated letters of engagement, each time stating the period of engagement. The final termination was by verbal and written notice 1 week before the expiry date of the period of engagement. The question arose, whether termination was at the initiative of the appellant employer or by effluxion of time.
The Commission found the respondent's employment was terminated either at the date 1 week prior to the expiry of his term of engagement, or on the expiry date of the term of engagement, but in either case, it was effected at the initiative of the appellant/employer. The Court found the Commission's decision, on the basis of termination 1 week prior to the expiry date, unassailable. The employment was clearly terminated before the stated date in the fixed period of engagement. The appellant was limited to attacking the decision on the basis of an error of law or excess or want of jurisdiction. The Court considered whether the Commission erred in finding that it had jurisdiction if the employment was terminated at the initiative of the employer before expiry of the period of engagement. The Court found the challenge to the Commission's acceptance of jurisdiction must fail: "The finding that the manner of the communication prevailed over or gave a different meaning to the words used was an

inference for which there was some basis. It cannot be said to be an error of law."
Appeal on that basis dismissed.
Although that was sufficient to dispose of the appeal, the parties pressed for a decision on the Commission's second basis for accepting jurisdiction. The Court examined the respondent's employment history with the appellant. There was no suggestion that he was employed as a public service officer under the *Public Service Act 1996*. Under s 113(1) of the Act the chief executive may employ persons as temporary employees or casual employees to perform work ordinarily performed by an officer. The respondent was not appointed as a casual employee therefore, it must be determined whether he was validly appointed, as required by the Act, as a temporary employee. The Court considered the meaning of "temporary".
The appellant contended on this issue that the Commission acted on irrelevant matters, relied on inappropriate authorities, and applied incorrect principles, and that it erred in relying on the reasonable expectations of the respondent (the parties were agreed that there was no question of estoppel). The Court considered whether the employment was on contract for a specified period entailing mutuality of obligation; whether the Commission paid regard to authorities which were inappropriate to employment governed by the *Public Service Act 1996*, where "temporary circumstances" created a need as ascertained by the chief executive (in particular *Fisher v Edith Cowan University*); and whether it erred in relying on the reasonable expectations of the respondent.
Held: The submission as to reliance on inappropriate authorities in this case, where the chief executive nominates a limited period of time is correct. By doing that which he or she is required to do in regard to temporary employment under s 113 *Public Service Act*, the chief executive cannot be said to trigger the jurisdiction of the Commission under the *Industrial Relations Act*. Additionally, because of the particular circumstances, the Commission is not able to grant any relief.
In considering the issue of reasonable expectation, whatever scope there may be for notions of conscionability in construction and enforcement of employment contracts, requirements of good conscience cannot confer on an employee and impose upon the Crown, an engagement not allowed under the *Public Service Act*.
Matter remitted to the Commission to be heard and determined according to law.

SELECTED CASES OF INDUSTRIAL COMMISSION

Mercy Aged Care Services and Ors AND Queensland Nurses' Union of Employees and Ors (No B994 of 1999)

Queensland Industrial Relations Commission, Full Bench, 7 June 2002
Industrial Relations Act 1999 (Qld) s 125 — Making, amending and repealing awards

Industrial Relations Act 1999 (Qld) ss 125, 126, 132, 320, 322(2)
Queensland Independent Education Union of Employees v Study Group Australia t/as Lorraine Martin College (1999) 161 QGIG 270 considered

Application for new award for 13 operators of aged care facilities — Commission's discretion in making awards — public interest — whether proposed award regulates industrial interests of parties appropriately in accordance with the Act

The applicants claim the existing regime of multiple industrial instruments covering aged accommodation and care facilities is inefficient and outdated and does not satisfy their needs. The applicants seek replacement of the existing awards and agreements insofar as they apply to facilities operated by them. The applicants have not sought exemption from the existing range of instruments. The Commission must determine whether the proposed award achieves appropriate regulation of the industrial interests of the applicants and their employees, according to the requirements of the Act.
The applicants argue that recent changes in the way aged care is provided require changes to the industrial conditions. For example, where there had been separation between hostel and nursing home facilities, these were now frequently in the same residential facility and the categories had become less clearly marked. The raft of industrial instruments governing their operations caused uncertainty about their application, particularly when different types of facility are housed on one site and staff may move between them. For example assistant nurses and personal care attendants were governed by different awards depending on the level of care facility in which they are employed. "In effect it is claimed, the existence of two awards covering non-nursing employees has led to a demarcation of duties performed which is unable to withstand reasonable contemporary industrial relations scrutiny" (at [24]). There is also considerable difference in the application of penalty rates, salary classifications and

competency standards between the different awards and agreements. The applicants contend that certified agreements introduced by groups such as TriCare depart significantly from the existing awards and the proposed award would give terms and conditions similar to those in TriCare's facilities.

The ALHMWU, AWU, QNU and QCU opposed the application. (The QCU was given leave to intervene because it has affiliates with sufficient interest in the proceedings.) The unions contend that the applicants made up only 10% of the aged care industry; they had identified no special circumstances requiring a separate award to be created, and had not demonstrated the threshold requirements for making a new award for their operations. The flexibility sought by the applicants could be gained by single- or multi-employer certified agreements.

The ALHMWU and AWU pointed to their ongoing negotiations with QCCI to rationalise 4 of the awards subject of this application. That matter, also currently before the bench, is intended to achieve a single modern common rule award for the aged care industry. Further, the unions contested the assertion that the current award regime is a source of widespread confusion about coverage within the industry. High-care and low-care facilities have been co-located for many years. Any confusion that may have existed has not been to the extent that demarcation disputes could have arisen.

The respondents point to certified agreements covering two of the applicants, TriCare and Mercy Aged Care. The TriCare CA is an extensive agreement and already applies to 45-47% of the employees to be covered by the proposed award – illustrating that the outcomes sought by the application were available through the process of enterprise bargaining.

The AWU claimed the history of enterprise bargaining in the industry has been good. The AWU and ALHMWU claim to have achieved clear understanding on the coverage of various awards in the industry and joint enterprise bargaining has rationalised multiple award classifications into CAs with a single structure.

The respondents contend that granting the application would fragment the industry, by setting up the proposed award covering a small group of participants, in parallel with the common rule award. The common rule awards are a benchmark for enterprise bargaining in the industry.

The QNU submitted that the proposed award does not meet the requirements set out in s 126 of the Act. In particular, the nationally accredited competencies for registered nurses would be replaced by competencies established by the employers. Such employer-set competencies could not be relied on by the community as the nationally accredited competencies are. The classification structure based on nationally accredited competencies gives to registered and enrolled nurses a level of professional recognition and rates of pay which may be lost if individual employers are allowed to set the competencies.

The applicants assert that the proposed award delivers better training opportunities, but the ALHMWU contend that the current award regime does not in any way inhibit training opportunities for all staff – a claim that, it says, was acceded to by the applicants' own witnesses.

Other objections by the respondents included that the application did not accord with the Objects of the Act in s 3. For example, the proposed award makes no provision for the employees' role in approving the award. With the current industrial instruments, industrial organisations of employees have a representative role as parties to various instruments, consistent with s 3(h) and (i); this is not available under the proposed award. Paid maternity leave is also not provided – this is inconsistent with objects in s 3(c) and (e).

The opponents also claim the application does not conform to Wage Fixing Principle 11(3), in that it seeks to circumvent enterprise bargaining requirements for certified agreements.

In considering the application and submissions from all parties, the bench acknowledged the significant changes in the residential aged care industry in recent years, particularly with the *Aged Care Act 1997* (Cth) and the principle of "aging in place", the increased co-location of high-care and low-care facilities, and the greater number of high-care residents being cared for in hostel accommodation. In addition, the number of industrial instruments applying to the industry was acknowledged, and the different conditions of employment covering different classifications of employees.

However, the proposed award seeks only to rationalise the conditions of unregulated employees: registered and enrolled nurses would still have entitlements to conditions such as annual leave and weekend penalties different from those of assistant nurses.

In the applicants' submissions and evidence of their witnesses, the bench could not find evidence of widespread uncertainty in the industry about applying the awards. Since the applicants cover only 10% of the industry, it appeared the other 90% was relatively happy with the regime of industrial awards and agreements. The applicants claim that one of the benefits of the proposed award is a move to a competency-based progression structure,

similar to that in the TriCare agreement. However the bench found the arguments on this issue were not well supported by witnesses' statements, and were outweighed by the unions' arguments.

Overall, the bench considered that making a new award to cover 10% of the industry was not warranted, particularly when at least 50% of the employees to be affected were already covered by certified agreements. The outcomes sought by the applicants could generally be achieved by enterprise bargaining, as attested to by TriCare's success in negotiating an extensive certified agreement. Most of the applicants had not explored this avenue sufficiently, and had not sought help to do so under s 148 of the Act.

Turning to the interests of employees to be covered by the proposed award, the bench expressed concern about the apparent lack of consultation with those employees or the unions in its formulation. The bench referred to the importance of unions as employee representatives, in this State's industrial regulation. It also pointed to the ongoing negotiations between relevant unions and the QCCI to rationalise 4 awards governing this industry and create a single common rule award (B669/2000). In that application, the unions have shown their preparedness to address the need to rationalise awards where it can be substantiated.

As the QNU pointed out, with regard to registered and enrolled nurses the proposed award would remove their professional classification structures; it would also replace their nationally accredited competencies with a scale of competencies set by the employers. This has implications for public confidence in the nursing staff in those facilities. It would also remove the paid maternity leave available to nurses covered by one of the awards.

The public interest must also be considered under s 320(5). The bench turned to the objects of the Act in s 3. Applicants and respondents both submitted competing arguments based on different elements of s 3. All parties accepted that the Act places no greater importance on either awards or certified agreements as instruments for regulating employment conditions. The bench did not consider that the industrial instruments which the applicants seek to have superseded by the proposed award are mere safety net awards. While the applicants wish to gain more efficient operations in their 10% of the industry, the other 90% appear to find the current awards and agreements generally promote effective and efficient operations. The current regime of instruments already provides for vocational training and skills acquisition as well as jobs growth, along with employment conditions and wages that are of a fair standard in relation to the wider community. The current range of awards also provides for enterprise bargaining and for industrial dispute settlement. The bench considered the current range of industrial instruments was in no way contrary to s 3.

Considering all of the submissions and evidence, the bench did not consider the applicants had demonstrated a need to create a different regime of industrial regulation for their segment of the industry. The problems and confusion which they claim hinder their operations do not appear to exist to such a degree as to warrant replacing the current award structure in respect of their facilities, when approximately 50% of their employees already operate under certified agreements negotiated under the current industrial regime.

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Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND Queensland Nurses' Union of Employees and Ors (No B669 of 2000)

Queensland Industrial Relations Commission, Full Bench, 6 June 2002
Industrial Relations Act 1999 (Qld) s 125 — Making, amending and repealing awards

Application for new award to replace 4 existing industrial instruments — *Aged and Community Care Workers' Award–State* — application and operation of proposed award.
Industrial Relations Act 1999 (Qld) ss 125, 329

This was an interim matter in an application by QCCI for a new award, the proposed *Aged and Community Care Workers' Award – State*, and repeal of all or parts of 4 other industrial instruments (2 awards: 1 covered by ALHMWU, 1 by AWU; Part C of Private Hospitals and Nursing Homes Industry (Interim) Award–State; and Diversional Therapy–AWU–Industrial Agreement). AWU and ALHMWU, the industrial organisations of employees recognised in the proposed award, consent to making of the proposed award. QNU was granted a right to be heard on the extent its applicability.

In this decision, the bench concerned itself with Part 1 of the proposed award: its application and operation. The bench considered clauses 1.2 Scope; 1.3 Exemption from Scope; and 1.4 Relationship with other Industrial Instruments, along with equivalent clauses in the instruments to be repealed and replaced.

The QNU contended that the proposed award extends the work performed under existing ALHMWU and AWU awards to nursing homes, whereas those awards did not currently extend to nursing homes. In addition, while the relevant Private Hospitals award referred to nursing homes, it did not provide classifications for personal care workers, personal attendants or personal carers. QNU argued the scope of the proposed award went beyond that of the existing ALHMWU and AWU awards. The bench also noted QNU's concerns regarding the indicative tasks and skills of various levels of "Aged and community care worker" in the proposed award: the work described in these classifications was not covered by the ALHMWU and AWU awards. The QNU also argued that the descriptions of "personal carer" ('who is not qualified …') and "personal care worker" ('who is not a nurse …') in the proposed award, along with its failure to define "nurse" and "nursing duties", had the potential to affect adversely the interpretation and application of the assistant nurse classification in the relevant QNU award (the *Nurses' Aged Care Interim Award – State*).
In response to QNU's submissions, the QCCI amended cll 1.2 and 1.4, and indicated that the proposed award did not seek to cover employees providing personal care in nursing homes, or to alter the role of assistant nurses in nursing homes or hostels. The ALHMWU proposed an amendment to satisfy QNU's concerns regarding employees performing personal care work in nursing homes. With its amendment the ALHMWU contended the proposed award would not extend the scope of the industrial instruments it was to replace. However, the bench pointed out that, under the existing ALHMWU and AWU awards, "personal care attendants" were employed only in "provision of accommodation"; the addition of the words "aged and/or community care and" before the word "accommodation" expanded the application beyond that of the existing awards. The bench made clear that it was not prepared to expand the definition in this way. It suggested the parties may wish to consider further the insertion of an appropriate definition of "personal care attendant". The bench would deal with that and other matters of content when the full content of the proposed award came before it.

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Michael John D'Arcy AND Amalgamated Television Services Pty Ltd (No B11 of 2002)

Queensland Industrial Relations Commission, 14 February 2002
Industrial Relations Act 1999 (Qld) s 74 — Application for reinstatement

Industrial Relations Act 1999 (Qld) s 72(1)(e)
Seven Network (Operations) Limited – Enterprise Agreement 2000
Re Wakim; ex parte McNally (1999) 198 CLR 511 referred to
"Industrial instrument" — federal award — availability of relief under Queensland Act.

The applicant was employed by a constitutional corporation, under a federal industrial instrument. The issue before the Commission was whether the applicant was employed under an "industrial instrument" as defined in *Industrial Relations Act 1999* (Qld) and whether he was excluded from relief under the Act.
The Commission considered whether the definition, in Sched 5 of the Act, of "award" "generally" includes a federal award, and the meaning of "generally" in para (a) of the definition. The history of the legislation, and the significance of para (b) in the definition were discussed. The Commission considered the effect of the High Court decision in *Re Wakim* and the effect of amendments resulting from the *Training and Employment Act 2000*.
Held: Including para (b) in the definition of "award" indicates that employees subject to awards under the Commonwealth Act are excluded from application of the Act except in terms of the provisions indicated in that paragraph, ie Ch 6 Part 1 Div 3 and Part 2 Div 6. Any reading of the definition which included federal awards under the word "generally" in para (a), would make para (b) redundant. Federal award employees may be entitled to file applications in the State jurisdiction, unless excluded by the operation of s 72(1)(e). However, in the present case, the applicant was employed by a constitutional corporation, the applicant's wages exceeded the prescribed limit and he was not employed under an industrial instrument as defined in the Act. He was therefore excluded from s 73(1).
Application dismissed.

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Australian Liquor, Hospitality and Miscellaneous Workers' Union AND Chubb Protective Services (No B1861 of 2001)

Queensland Industrial Relations Commission, 8 January 2002
Industrial Relations Act 1999 (Qld) s 276 — Application to amend or void contract

Parker v Tranfield (2001) WASC 233 considered
Bell & Anor v Macquarie Bank Limited & Anor (No 4) (1999) 93 IR 191 considered
Ex parte Richardson; Re Hildred (1972) 2 NSWLR 423 considered

Jurisdiction of the Commission to entertain an application relating to certain employees of the respondent, who performed work in Nauru on temporary deployment (5 days). The contracts between the respondent (an Australian Company) and the employees, were made in Queensland and related specifically to the employment in Nauru. Payment was made in Brisbane and deductions for taxation payable to Australian Taxation Office were made. The question at issue was whether there was sufficient connection with the State of Queensland to allow the Commission to assume jurisdiction.
The *Australia Act 1986* (Cth) empowers each State's Parliament to make laws for the peace, order and good government of that State; laws which have extra-territorial operation. In cases relating to contracts of employment, the contract itself determines the finding of jurisdiction, not the place where the work was to be performed. In this case there was a real and significant connection with the State of Queensland, therefore the Commission has jurisdiction. Even if there were a case for forum non conveniens, the respondent had shown nothing to indicate that the proceedings brought in Queensland rather than Nauru would be oppressive or vexatious.
Application to dismiss on jurisdictional grounds dismissed.

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Australian Liquor, Hospitality and Miscellaneous Workers' Union AND Chubb Protective Services (No 2) (No B1861 of 2001)

Queensland Industrial Relations Commission, 20 March 2002
Industrial Relations Act 1999 (Qld) s 276 — Application to amend or void contract

Reich v Client Server Professionals of Australia Pty Ltd (2000) 49 NSWLR 551
ALHMWU v Chubb (2002) 169 QGIG 103

The application in this case alleges that contracts for temporary employment of 2 Queensland-based workers on Nauru provided for wages and conditions below those contained in the Certified Agreement relating to the employer's operation in Australia; were harsh unconscionable or unfair; were against the public interest; and were designed to avoid the provisions of the Certified Agreement. The applicant seeks an order that work done on Nauru be treated as though subject to the Certified Agreement.
Two security workers were among those who accepted temporary postings in Nauru to set up a security operation. There was disagreement regarding the information given to the workers as to the nature of contract: whether work was to be in periods of 28 days straight, on 12 hour shifts; or 4 days on, 4 days off. In addition, the accommodation was overcrowded and not as promised; departure tax was not paid as promised. The Commission had also to determine whether the employees had terminated their contracts and returned to Australia voluntarily, or whether the employer terminated the contracts
Held: On analysis of the facts, the Commission found, although there was some confusion as to exact wages and conditions, the workers knew of and freely accepted the oral offer of employment on the basis of 12 hour shifts for 28 days straight, at a wage that was lower than that under the Certified Agreement or the Award covering their employment in Australia. One worker (H) terminated her contract voluntarily; the other worker (S) was terminated by direction of the employer.
On consideration of the issue whether the contracts were unfair, the Commission discussed whether terms and wages should reflect those included in the Certified Agreement covering the workplace in Queensland.
Held: The Award or Certified Agreement had no application in Nauru. There was no evidence to support a claim that wages and allowances were unreasonably low for employment on Nauru. Provided the employees were not exploited it is not valid to compare the contracts in question to the Certified Agreement. However, no provision was found in the contracts for a reasonable period of notice of termination. In that respect, the contracts were found to be unfair.
There was nothing unfair in the contract's provision for payment of all travel expenses,

however, the conduct of one of the parties to a contract may be found to render it unfair in its operation and amenable to relief: *Reich v Client Server Professionals of Australia Pty Ltd* referred to. Chubb was found to be unfair in that, by requiring that H and S pay their own departure tax, its conduct breached the condition that all travel expenses would be paid. This conduct and the manner in which the contracts operated made the contracts unfair.
The Commission had also to consider whether the contracts were against the public interest. The meaning of "public interest" was examined.
Held: To the extent that the contracts were found to be unfair, they could be said to be against the public interest. However there was no evidence Chubb sought to exploit the workers. While the contract itself may be subject to the extra-territorial application of the *Industrial Relations Act* (see *ALHMWU v Chubb*), the Act (like the Certified Agreement and the Award) has no extra-territorial application in terms of the services rendered on Nauru.
The Commission considered whether the contracts were designed to avoid the provisions of the relevant industrial instrument.
Held: While the contracts provided for remuneration less than that paid to workers performing work in Australia, this work was being performed in a foreign country where accommodation and food expenses were met by the employer. Comparisons in these circumstances were inappropriate.
Finally, the Commission turned to consider whether the contracts should be amended, under the judicial discretion to amend or avoid.
Held: Both contracts should be amended to provide recompense for overcrowded accommodation and appropriate provision for payment (of departure tax) in the event of a breach. S's contract should be amended to provide for one week's payment in lieu of notice. Orders made for payment of monies.

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Wendy May Hutter AND Gold Coast Arts Centre Pty Ltd (No 2) (No B927 of 2000) Susan Fern Ireland AND Gold Coast Arts Centre Pty Ltd (No 2) (No B929 of 2000)

Queensland Industrial Relations Commission, 28 March 2002
Industrial Relations Act 1999 (Qld) s 74 — Application for reinstatement;
Industrial Relations Act 1999 (Qld) s 280 — Application for orders allowing applicants to take further action
Industrial Relations (Tribunals) Rules 2000 (Qld) r 201
Minon v Australia Meat Holdings Pty Limited (1998) 159 QGIG 6; *Muscat v Queensland Fasteners* (1999) 160 QGIG 181 referred to
Roma Town Council v Latemore (2001) 167 QGIG 176 cited

The applicants sought orders allowing them to take further action, following substantial delay in prosecution of applications for reinstatement. The legislative scheme requires applications to be filed within 21 days of a cause of action and progressed within 6 months. As the primary remedy in such applications is reinstatement, it is important that the matter be prosecuted diligently: *Minon v Australia Meat Holdings Pty Limited*.
The facts show the applications for reinstatement were lodged a few days out of time; the applicants were warned at conference that the applications should be progressed within 6 months. Another delay greater than 12 months occurred between callover and an application to re-open. No application was lodged for an order allowing further action, as required. There ensued further delay in applying for the order. Over 21 months elapsed from the dismissals to lodging this application, with no adequate explanation for the delay.
The Commission outlined relevant considerations when determining such applications: length of and reason for the delay; prejudice to the applicant if the order is refused; prejudice to the respondent if the application is allowed to proceed; and any relevant conduct of the respondent: *Muscat v Queensland Fasteners*.
The applicants were not seeking reinstatement, having obtained alternative employment. They were seeking to "clear their names" of allegations of theft. (No charges of theft were laid.) The question arose, whether the unfair dismissal provisions of the Act are available for that purpose. At issue in an action for unfair dismissal is whether the employer had a bona fide and reasonable belief, after proper investigation, that the employee had engaged in misconduct, not whether an offence has been committed: *Roma Town Council v Latemore*. A finding of actual theft or misconduct is not necessary for determination of such an application.
Held: The length of the delay is determinative of the matter. Given the history, and in light of earlier warnings, there is no guarantee that further delay will not occur. No sufficient reason has been shown for an order allowing the application to proceed.
Application dismissed.

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Mark Jarzabek AND Nifsan Pty Ltd (No B2256 of 2002)

Queensland Industrial Relations Commission, 20 May 2002
Industrial Relations Act 1999 (Qld) s 74 — Application for reinstatement

The applicant's job included the role of Workplace Health and Safety Officer. He was dismissed for alleged gross negligence in: failing to instruct an untrained, unlicensed employee in correct use of a hazardous agricultural chemical when directing him to perform a task; failure to supply the relevant Material Safety Data Sheet (MSDS) to the employee before the task was undertaken; incorrectly advising on the appropriate respirator to be used.
There was conflicting evidence presented by each side. The question arose whether the respondent should have called certain other witnesses; and whether any inferences may be drawn from the neglect to call those witnesses. On balance, the Commission accepted the applicant's version of events as being honest and reliable.
The Commission found that the chemical being used, while hazardous, did not require a licence to spray; the employee, while not licensed, had limited training in the correct safety procedures, including the reference to the appropriate MSDS. The employer had no written policy by which only licensed sprayers were allowed to spray.
The employer's investigation into the incident and the complaint leading to summary dismissal was found to be seriously flawed. The complaints (1 verbal, 1 written) had been accepted at face value and the applicant's account of events was dismissed without proper investigation, resulting in grossly unfair treatment of the applicant.
The Commission found that, although a heavier duty might bind a workplace health and safety officer to abide by the rules, and proven breaches might attract greater consequences to such an employee, in this case no breach has been proved and no adequate investigation carried out which might lead the employer to hold an honest and reasonable belief that such a breach had occurred
Held: Sufficient grounds for dismissal were not made out. The dismissal was unfair in that it was harsh, unjust and unreasonable.
Order that the respondent reinstate the applicant to his former position on conditions as favourable as those prior to dismissal; that continuity of service be maintained without loss and the employer pay the remuneration lost after taking into account wages received by the applicant from other sources since the dismissal.

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Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Union of Employees AND Bayton Property Services Pty Ltd (No W14 of 2002)

Queensland Industrial Relations Commission, 28 March 2002
Industrial Relations Act 1999 (Qld) s 278 — Application for recovery of unpaid wages

Australian Building Services Association – Queensland Division – Certified Agreement 1999
Declaration of Policy on Conditions of Employment relating to Termination, Change and Redundancy (1987) 30 QGIG 1119
Harrison v Electcom Limited (2000) 163 QGIG 347 referred to
Crosilla v Challenge Property Services (1982) 2 IR 448 considered
North Western Health Care Network v Health Services Union of Australia (1999) 92 FCR 477 considered
PP Consultants Pty Ltd v Finance Sector Union (2000) 75 ALJR 191 considered
Stellar Call Centres Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (2001) 103 IR 220 considered

Application for recovery of unpaid severance pay on behalf of employee.
The employer, Bayton, changed, with the knowledge and implied consent of the employee J, from 4 April 2001 (as evidenced from payslips received by J). Pursuant to a franchise agreement, the new employer, Cheetham assumed duties at the shopping centre and accepted responsibility for employment of staff. The Union submits that Bayton remains responsible for severance pay because of the terms of the Certified Agreement: cl 2.2. Because the Union was not notified within 14 days of the change of contract, the Termination Change and Redundancy (TCR) provisions apply.
Bayton submits that there was a transfer of business under s 69 of the Act, making Cheetham liable for payment.
The Commission stated that Bayton's submission mistakes the effect of s 69: *Harrison v Electcom Limited*. Under s 69, employment is treated as continuous only for the purpose of

calculating length of service. The remedy for unlawful dismissal is to be sought from the former employer.
In the course of transfer of J's employment he was dismissed and re-employed
The Commission considered whether there had been a "transmission" of business. Under the TCR Policy, severance payments are not required to be paid in cases of succession, assignment or transmission of business. The Commission examined authorities on the question of "transmission of business": what must be shown is the transmission of the transmitter's business or a core part of it, to the transmittee.
C acquired the franchise to operate a "commercial janitorial cleaning service business" from B. B's business was much wider than provision of janitorial cleaning services. The business conducted by B was not substantially the same as the business transmitted to C. The contract to provide cleaning services remained with B, who licensed C to fulfil its obligations under the contract. It was irrelevant that J continued to perform the same tasks.
Held: There was no transmission of business in accordance with the provisions in the TCR Policy. The dismissal of J by B constituted a redundancy because B no longer required J's job to be done by anyone. Since acceptable alternative employment for J had not been arranged by B (TCR Policy cl C para 9), B remains liable for severance payment to J.

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Gary Owen Chalker AND Brisbane City Council (No B1834 of 2001)

Queensland Industrial Relations Commission, 24 June 2002
Industrial Relations Act 1999 (Qld) s 74 — Application for reinstatement

Constructive dismissal — redundancy payment — Federal award employee — Commission jurisdiction — false or misleading information in employment application — failure to disclose criminal convictions — recommendation of dismissal — resigns before dismissal — recruitment and dismissal procedures.
D'Arcy v Amalgamated Television Services Pty Ltd (2002) 169 QGIG 185 referred to
Berends v Gillilodge Pty Ltd t/a Campmart (2001) 167 QGIG 402 considered
FEDFA v Shell (1989) AILR 430 referred to

The applicant, C, claimed to have been constructively dismissed from employment as an Accounts Receivable officer at Brisbane Water (BW), a department of Brisbane City Council. He had been employed there approx 14 months, under terms of the Brisbane City Council Salaried Staff Award. While this is a federal award, the Commission has jurisdiction to hear the reinstatement application: *D'Arcy v Amalgamated Television Services Pty Ltd*.
During C's employment, BW received information that C had been imprisoned for 2 years on conviction for fraud and embezzlement against a former employer. C had not been asked about, and had failed to disclose any previous criminal history in his application for employment. BW investigated the allegations, and found that one referee, H, who had supported C's application for employment was not a company director, as C had held him out to be (H had never been a company director in Australia and could not be traced). At the time of the selection process, H could only be contacted by mobile phone. Investigations also revealed that the company which C claimed to have worked for in 1997, and of which H was said to be a director, had not existed since 1985. It was also discovered that C had been in prison at a time he claimed to have worked for the company.
After full investigation, including police checks carried out with C's permission, a report was produced recommending dismissal. Confronted with the facts, C chose to resign. C claims he resigned under duress and had previously been in line for a redundancy payout.
Prima facie, it seemed that C was pressured to resign. The approach to determining whether there has been constructive dismissal was examined. The Commission looked at the whole circumstances of the matter. C's inquiries about redundancy payout were made 2 days before the first interview regarding his alleged criminal history and false referee, when he would have been aware that investigations were on foot. C denied his criminal convictions at that interview, and claimed not to remember the address of the company he said had employed him for 14 years. C was not obliged to disclose his criminal history during the job application and selection process, unless questioned about it. However, if BW's selection panel had conducted proper inquiries (particularly in view of the fact that the job required handling public money), the history of money offences would have been discovered and C would never have been employed.
The Commission found C lacked credibility. It found that, when C was confronted with the facts and told he should consider his options, he chose to resign. He subsequently pursued this claim for constructive dismissal either because he had proceedings on foot for a

redundancy payment, or so that he could receive compensation under the reinstatement provisions of the Act.
The Commission found that C had misled BW, and once the truth was known, BW had sufficient and reasonable grounds to dismiss him. There was no constructive dismissal. However the Commission was also critical of BW's approach to the matter. While allowing an employee to resign may avoid embarrassment to the employee, BW had exposed itself to a charge of constructive dismissal, and itself had evaded the onerous responsibility of dismissing the employee, and avoided due process. The Commission commented: "It is not a practice that has much to recommend it." The Commission also expressed criticism of the selection panel and process: the panel's report form required it to indicate additional checks that were carried out, including criminal history checks. That part of the form was not addressed, nor was the Council's policy of checking for civil and criminal convictions adhered to. While this policy was discretionary, the selection panel's failure to investigate was a matter for concern, particularly in the public sector and in view of the position being applied for (Accounts Officer). That conduct had contributed significantly to the outcome. The Commission expressed a view that such checking should be mandatory, particularly where employees are public officers handling public funds. In addition, carrying out reference checks by mobile phone meant false references could be concealed very easily. (The Commission noted that the Council had introduced a policy requiring reference checks by telephone to be conducted by land line only.)
Application dismissed.