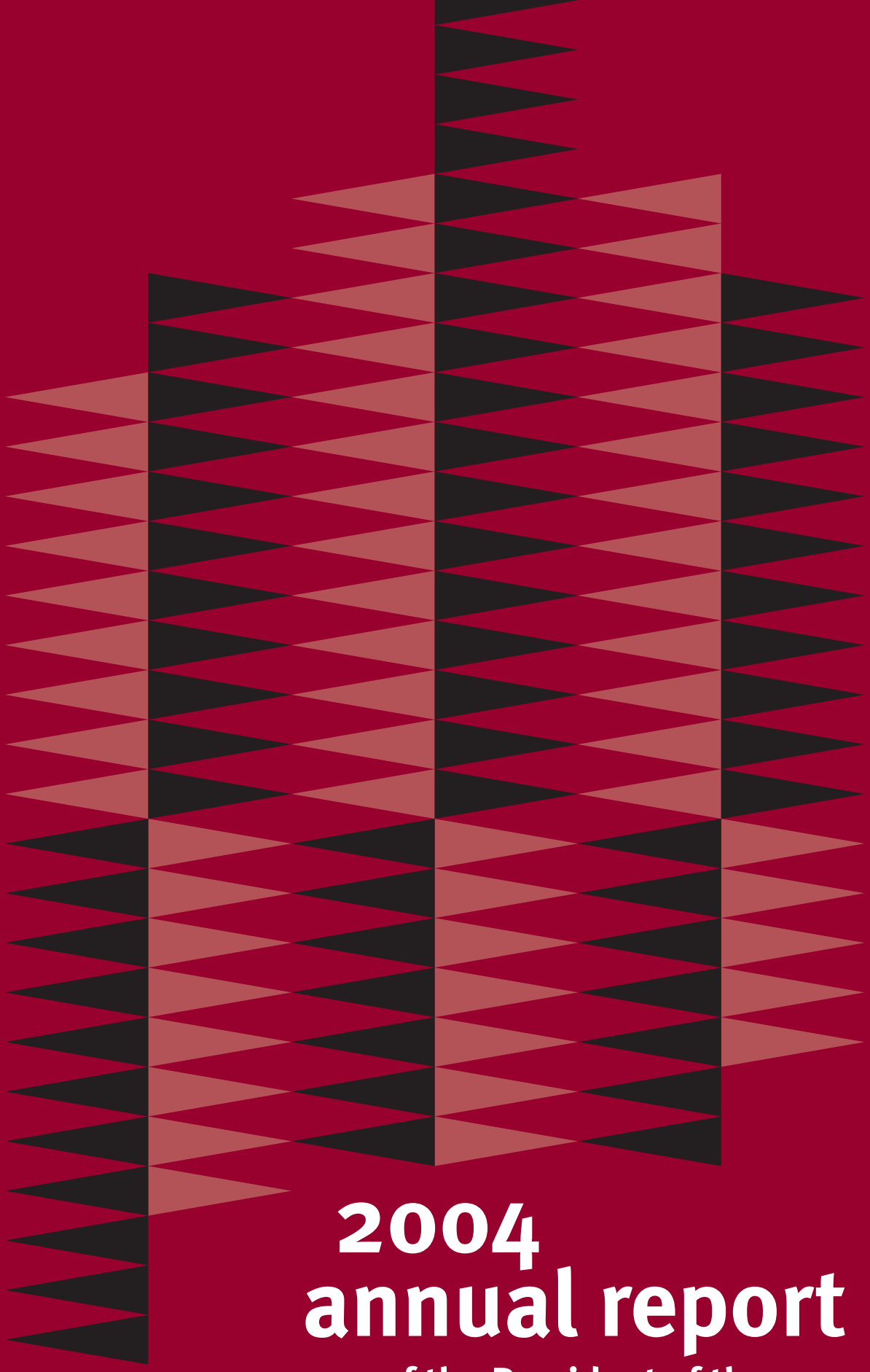

2004 annual report

of the President of the Industrial Court of Queensland

in respect of the

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

Annual Report of the President of the Industrial Court of Queensland 2003–2004
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Industrial Court of Queensland

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December 2004

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

Dear Minister

I have the honour to furnish to you for presentation to Parliament, as required by section 252 of the *Industrial Relations Act 1999*, the Annual Report on the work of the Industrial Court of Queensland, the Queensland Industrial Relations Commission, the Industrial Registry and generally on the operation of the *Industrial Relations Act 1999* for the financial year ended 30 June 2004. The report relating to the Industrial Registry has been prepared by the Industrial Registrar whose assistance is acknowledged.

D. R. Hall.

D.R. Hall
President
Industrial Court of Queensland

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The Industrial Court of Queensland

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

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

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

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

Jurisdiction of the Court

Section 248 of the Act outlines the Court's jurisdiction generally and states that it may exercise all powers prescribed under the *Industrial Relations Act 1999* or another Act. (The Court's jurisdiction under other Acts is largely appellate jurisdiction and will be outlined briefly below.) The jurisdiction includes hearing and deciding:

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

The section also allows the Court to issue prerogative orders, or other process, to ensure that the Commission and Magistrates exercise their jurisdictions according to law and do not exceed their jurisdiction. There have been no such applications this year.

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

Cases stated

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

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

Offences under *Industrial Relations Act 1999*

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

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

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

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

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

Industrial organisations

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

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

Workplace Health and Safety undertakings

Recent amendments to the *Workplace Health and Safety Act 1995*, introduced enforceable 'workplace health and safety undertakings'. Breach of an undertaking may result in an application to the Court, by the chief executive Workplace Health and Safety Division, to enforce compliance. Similar provisions now exist in the *Electrical Safety Act 2002* also.

Appellate Jurisdiction of the Court

Matters filed in the Court are predominantly appeals (see Table 1). Appeals to the Court under the *Industrial Relations Act 1999* are available only on the grounds of error of law, or of excess, or want, of jurisdiction: s. 341. Appeals are by way of re-hearing on the record although fresh evidence may be adduced if the Court considers it appropriate: s. 348.

Appeal decisions are final and conclusive, under s. 349. (Judicial review has been found by the Supreme Court, to be available, but only for decisions that involve jurisdictional error: see *Carey v President of the Industrial Court of Queensland* [2004] 2 Qd.R. 359 at [366] citing *Squires v President of Industrial Court Queensland* [2002] QSC 272.).

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

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

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

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

- offences and wage claims under the *Industrial Relations Act 1999* (see s. 341(2));
- prosecutions under the *Workplace Health and Safety Act 1995* (see s. 164(3) WH & S Act); and
- appeals from review decisions, and non-reviewable decisions, on claims for compensation under the *Workers' Compensation and Rehabilitation Act 2003*: see ss. 561 and 562.

The Court is the final appeal court for prosecutions under the *Workplace Health and Safety Act* and the *Industrial Relations Act*, and for compensation claims under the *Workers' Compensation and Rehabilitation Act*.

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

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

Costs Jurisdiction

The Court may order costs against a party to an application. Under s. 335 of the *Industrial Relations Act 1999* costs may only be ordered against a party if the Court is satisfied that:

- the party's application was vexatious or without grounds; or,
- in a reinstatement application, if the party caused another party to incur additional costs, by doing some unreasonable act or making an unreasonable omission during the course of the matter.

There is a power to award costs of an appeal against a party under s. 563 of the *Workers' Compensation and Rehabilitation Act*., if the Court is satisfied that the party made the application vexatiously or without reasonable cause. However, because of the wording of s. 563, this power has been found not to allow

an award of costs to a successful appellant. It will only permit costs to be awarded to a respondent, to an appeal that has failed, in circumstances where the appeal application is found to have been made vexatiously or frivolously.

The question of costs is invariably decided on submissions after a decision is delivered in a matter, rather than on a separate application. During the year, the Court has given decisions in 15 applications for costs (see Table 1), either as a second decision based on written submissions after the appeal has been determined, or at the end of the substantive decision, based on argument during the appeal hearing.

Table 1: Matters filed in the Court 2002–03 and 2003–04

Type of Matter	2002–03	2003–04
Appeals to the Court	87	84
■ Magistrate's decision	40	43
■ Commission's decision	47	39
■ Registrar's decision	0	0
■ Director, WH&S decisions	0	2
Stay order	10	10
Direction to observe/ perform Industrial Org rules	0	0
Case stated by Commission	1	4
Prerogative order	1	0
Application for orders – other	1	6
TOTAL	**100**	**104**
Number of Court Decisions Released	**53**	**75**
■ includes decisions on Costs (separately or with substantive decision)	11	15

Table 2: Number of matters filed in the Court 1994–95 – 2003–04

1994–95	60
1995–96	89
1996–97	81
1997–98	90
1998–99	95
1999–00	61
2000–01	74
2001–02	102
2002–03	100
2003–04	104

Table 3: Appeals filed in the Court 2002–03 and 2003–04

Appeals from decisions of Industrial Commission	2002–03	2003–04
IRA s 341(1)	27	39
■ Disputes	1	0
■ CAs	2	1
■ Wages	2	7
■ Reinstmt/contr	22	20
■ Organisations	0	0
■ Awards	0	3
■ Trading Hours	0	1
■ Whistleblowers	0	1
■ Other	0	6
V ET & E Act s 244	20	0
SUBTOTAL	**47**	**39**
Appeals from decisions of Industrial Magistrate	**2002–03**	**2003–04**
IRA s341(2)	6	14
WorkCover Act s509	20	14
Workers' Comp 1990 s105	0	0
WH & S Act s164(3)	14	15
SUBTOTAL	**40**	**43**
Appeal from review decisions by Director WH & S	**0**	**0**
TOTAL	**87**	**82**

Tribunal Rules

Under s. 338 of the Act, Rules about proceedings in the Tribunals may only be made with the consent of the President. The *Industrial Relations (Tribunals) Rules 2000* commenced on 1 January 2001.

Since that time amendments to the *Industrial Relations Act 1999*, *Workplace Health and Safety Act 1995* and *Electricity Safety Act 2002* as well as the introduction of the *Workers' Compensation and Rehabilitation Act 2003* have introduced legislative changes which impact on the processes and procedures of industrial tribunals.

Further since the commencement of the Rules in 2001, time and practice had shown the need to further refine the rules to effectively and efficiently dispose of the business of the industrial tribunals.

The Rules were amended during the year, effective from 8 December 2003, to accommodate these legislative changes and to ensure that the business of the industrial tribunals is conducted in a just and expeditious manner and at a minimum expense.

Professional Contribution

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

- 2003 3rd Annual HR Masterclass Conference – paper presented "A Cautionary Note".
- 2003 Industrial Relations Society Conference – paper presented "The McCawley Story".
- 2004 Employment / IR Law Masterclass Conference – paper presented on the Industrial Court of Queensland.

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

President's Advisory Committee

The President's Advisory Committee is constituted under s. 253 of the Act. Members of the Committee include the President, the Vice President, the chief executive of the Department of Industrial Relations, a representative of the Queensland Anti-Discrimination Commission, two representatives each of employee and employer organisations and two persons with knowledge and experience in the area of industrial relations. The Committee meets every three months to discuss issues affecting the work, accessibility, and operational effectiveness of the Court and Commission.

Current members of the Committee are listed below:

Ex officio appointments

Mr DM Hall, President of the Industrial Court and Industrial Relations Commission

Ms D Linnane, Vice President of the Industrial Relations Commission

Mr P Henneken, Director-General, Department of Industrial Relations

Ms S Booth, Anti-Discrimination Commissioner

Industrial Organisation Representatives

Mr M Belfield, Australian Industry Group

Ms G Grace, Queensland Council of Unions

Mr W Ludwig, Australian Workers' Union

Mr S Nance, Queensland Chamber of Commerce and Industry

Other appointments

Professor M Gardner, Pro-Vice Chancellor (Academic) University of Queensland

Ms K Prior, Industrial Relations Consultant

The Queensland Industrial Relations Commission

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

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

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

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

Current members of the Commission are listed in Table 4.

Table 4: Current members of the Commission

Member	Role and date sworn in
Mr DR Hall	President 2.8.1999 Chief Industrial Commissioner 1.3.1993
Ms DM Linnane	Vice-President 2.8.1999
Ms DA Swan	Deputy President 3.2.2003 Commissioner 10.9.1990
Mr AL Bloomfield	Deputy President 3.2.2003 Commission 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
Mr BJ Blades	Commissioner 1.3.1998
Mr DK Brown	Commissioner 2.8.1999
Ms IC Asbury	Commissioner 28.9.2000
Mr JM Thompson	Commissioner 28.9.2000

Jurisdiction, Powers and Functions of the Commission

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

The jurisdiction under the Act includes regulation of callings, dealing with industrial disputes and resolving questions and issues relating to industrial matters. "Industrial matter" is defined broadly in s 7, and includes matters affecting or relating to work to be done; privileges, rights or functions of

employees and employers; matters which, in the opinion of the Commission, contribute to an industrial dispute or industrial action. Schedule 1 of the Act lists 27 matters which are considered to be industrial matters, for example: wages or remuneration; hours of work; pay equity; occupational superannuation; termination of employment; demarcation disputes; interpretation and enforcement of industrial instruments; what is fair and just in matters concerning relations between employers and employees.

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

Industry Panel System

Under s. 264(6) of the Act, the Vice President must establish panels, for allocating matters involving particular industries to particular Commissioners. This ensures that, where possible, members with experience and expertise in the relevant industries are assigned to deal with disputes. The Commission is thereby able to deal with disputes more quickly and effectively. The current arrangement is a two-panel system, with industries divided between the panels. Each panel is headed by a Deputy President, who is responsible for allocating disputes for conciliation, and hearings for certified agreements, within the panel. Table 5 sets out the panels in operation since 1 March 2004.

Commission's Powers

As indicated already, the Commission's functions are outlined in Part 2 of Chapter 8 in the *Industrial Relations Act 1999*. In Div. 4 of that Part, s.274 gives the Commission general powers to do "all things necessary or convenient" in order to carry out its functions. Other sections in that Division give more specific powers, which are listed below. Specific powers are also distributed throughout the Act. For example various provisions in Chapters 5 and 6 empower the Commission to do what is necessary to make, approve, interpret and enforce industrial instruments (Awards and Agreements). Provisions in Chapter 3 enable it to order reinstatement or award compensation to workers who have been unfairly dismissed. The Commission's exercise of its powers, and the powers necessary for conducting proceedings and exercising its jurisdiction are governed by Chapter 8, Part 6, Div 4.

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

The powers given by the Act include the power to:

- hear and determine applications for reinstatement following termination of employment, including awarding compensation if reinstatement is impracticable, and imposing a penalty on the employer if the dismissal was for an invalid reason: ss. 76 and 78–81;
- make orders for payment of severance allowance or separation benefits, and order penalties against employers who contravene such orders: s. 87;
- make, amend or repeal Awards, on its own initiative or on application: s. 125. The Commission may also review Awards under s. 130. (The first program of Award review was commenced by the Commission on its own initiative in 1999);
- make orders fixing minimum wages and conditions, and tool allowance for apprentices and trainees: ss. 137 and 138; and orders fixing wages and conditions for employees on labour market programs, and for students in vocational placement schemes: ss. 140 and 140A;
- resolve industrial disputes (s. 230), or assist parties to negotiate certified agreements (ss, 148 and 149), by conciliation and, if necessary, by arbitration. The Commission's powers in such disputes includes the power to make

Table 5: Industry panels 2004

Deputy President Swan
Commissioner Bechly
Commissioner Blades
Commissioner Thompson

- Agriculture
- Agriculture Associated Bulk Handling
- Banking and Insurance
- Catering (excl. Construction Catering)
- Cemeteries and Funerals
- Childcare
- Clerical
- Disability Services
- Dry Cleaning & Laundry
- Education
- Fast Food
- Fire Services
- Food Manufacturing
- General Manufacturing
- General Transport (excl. Sugar)
- Hotels and Motels
- Hospitality
- Local Authorities (excl. Brisbane City Council)
- Maritime Transport
- Meat and Poultry
- Miscellaneous
- Pharmaceuticals
- Port Authorities
- Prisons
- Professional Services
- Rail
- Retail
- Sales and Wholesale Warehouses (incl. Stores & Distribution Stores)
- Security
- Shearing
- Statutory Authorities (not otherwise allocated)

Deputy President Bloomfield
Commissioner Edwards
Commissioner Brown
Commissioner Asbury

- Aged Care
- Ambulance
- Arts and Entertainment
- Beauty and Hairdressing
- Building and Constructing
- Cement
- Chemicals
- Concrete
- Construction Catering
- Electrical Contractors
- Electricity
- Forestry Products (incl. Timber, Sawmilling)
- Gas and Oil
- Health
- Hospitals
- Metal Industry
- Mining (incl. Associated Bulk Handling)
- Nursing
- Police
- Printing and Publishing
- Professional Engineering & Technical Drafting
- Public Sector (not otherwise allocated)
- Quarries
- Racing
- Residential Accommodation
- Sports
- Sugar (including Bulk Sugar, Sugar Transport)
- Tree Lopping
- Aged & Infirm Permits

orders necessary to ensure negotiations proceed effectively and are conducted in good faith, and the power to enforce its orders;

- certify or refuse certification of agreements, and amend or terminate certified agreements, according to the requirements of the Act: ss. 156, 157, 169–173;
- declare a class of persons to be employees rather than independent contractors, and declare a person to be their employer: s. 275;
- amend or declare void a contract for services, or a contract of service not covered by an industrial instrument, where the contract is found to be unfair: s. 276;
- grant an injunction to compel compliance with an industrial instrument or permit, or with the Act, or to prevent contraventions of an industrial instrument, permit or the Act: s. 277;
- determine claims for, and order payment of unpaid wages, superannuation contributions, apprentices' tool allowances, and certain other remuneration, where the claim is less than $20,000 (claims above that sum must be heard before an Industrial Magistrate): s. 278;
- make orders to resolve demarcation disputes (that is, disputes about what employee organisation has the right to represent particular employees): s. 279. In addition, if an organisation breaches an undertaking it has made about a demarcation dispute, the Commission has the power to amend its eligibility rules to remove any overlap with another organisation's eligibility rules: s. 466;
- interpret an industrial instrument: s. 284;
- order a secret ballot about industrial action, and direct how the secret ballot is to be conducted: ss. 176 and 285;
- make general rulings about industrial matters, employment conditions, and a Queensland minimum wage: s. 287; and statements of policy about industrial matters: s. 288;
- order repayment of fees, charged in contravention of the Act by a private employment agent, where the total fee paid was not more than $20,000: s. 408F (claims above that sum must be decided by an Industrial Magistrate);
- issue permits to 'aged or infirm persons' allowing them to work for less than the minimum wage under the applicable industrial instrument: s. 696;
- grant an injunction under the *Whistleblowers Protection Act 1994*, to prevent reprisal action against an employee whistleblower where the reprisals involve a breach of an industrial instrument.
- hear and determine applications for changes in trading hours for non-exempt shops under the *Trading (Allowable Hours) Act 1990*;
- hear and determine applications to reinstate training contracts and appeals from decisions of the Training Recognition Council under the *Vocational Educational, Training and Employment Act 2000*.

Industrial Organisations

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

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

In addition, a Full Bench of the Commission may order the de-registration of an industrial organisation under Chapter 12 Part 16. For this purpose, the Bench must include the President: s 256(2). In certain circumstances, the Commission may review an organisation to determine whether it should be de-registered (see ss. 645 and 646).

There was one application for de-registration during 2003–04. On application by the Registrar, The Australian Stevedoring Supervisors Association (Queensland) Union of Employees was deregistered on the grounds that it was defunct

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

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

Industrial Instruments

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

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

Awards

Section 265(2) gives the Commission jurisdiction to regulate a calling by an Award. Awards are regulated by Chapter 5 of the Act. The Commission's powers with regard to Awards are set out in Part 2 of Chapter 5. Awards can be limited to a geographic region or a particular employer. But they may cover all employers who are engaged in a particular calling, along with their employees and any industrial organisations (that is, employer or employee organisations) that are concerned with that calling. Table 8 shows that there are 304 Awards currently in force in Queensland. Table 6 shows that during the year there were ten Awards made, including four new Awards.

Award Review

Section 130 of the Act requires the Commission to review each Award within three years of when it was made or when it was last reviewed.

During 2004, the first round of the Award Review process was finalised. A second review of all awards has now commenced to ensure provisions remain relevant and current, awards that were not reviewed in round one, due to previously being outside the three year time limit.

Certified Agreements

Certified Agreements are regulated by Chapter 6 Part 1 of the Act. A CA will usually cover one employer and, either all of its employees, or a particular category of its employees. It can be negotiated between an employer and a group of employees or between an employer and one or more employee organisations (unions) representing the employees. Such agreements can also be made to cover 'multi-employers', for example associated companies or companies engaged in a joint venture. A CA may stand alone, replacing a relevant Award, or it may operate in conjunction with an Award. The affected employees must have access to the agreement before they approve

Table 6: Applications filed and matters heard 2002–03 and 2003–04

Section	Type of Application/Matter	2002–03	2003–04
s 53	Long Service Leave – payment in lieu of	137	123
s 74	Application for Reinstatement (Unfair dismissal)	1671	1575
s 74(2)(b)	Application to extend time for filing	2	1
s 87	Application for severance allowance	11	5
	Exemption from requirement to pay severance or redundancy entitlements	13	6
s 90	Order re redundancy – over 15 employees	0	0
s 120	Prohibited conduct – breach	7	17
s 125	Awards:		
	■ New award	4	6
	■ Repeal and replace award	3	4
	■ Rescind award	0	2
	■ Amend award	52	134
s 130	Review of Award	91	15
s 132	Exemption from Award	0	0
s 137	Order – wages & conditions (trainees)	14	7
s 138	Order – tools (trainees)	3	0
s 140	Order – trainees' conditions order	1	0
s 148	Assistance to negotiate a CA	33	37
s 156	Application to approve a new CA	189	361
s 156	Agreement replacing existing CA	328	635
s 163	Designated Award	2	9
s 169	Amending a CA	0	10
s 172–173	Terminate a CA	0	4
s 176	Secret ballot re industrial action	0	0
s 177	Authorisation to take industrial action	339	246
s 184	Ballot on CA	0	0
	Dispute – re: ballot for CA	2	0
s 203	Application to approve a QWA	88	87
s 229	Notification of dispute	525	486
s 230	Request for orders to settle/arbitrate dispute	13	9
	■ Arbitration	8	7
	■ Mediation	0	0
	■ Other orders	5	1
s 231	Application for mediation	1	0

Table 6 *continued*

s 265(3)	Inquiry about an industrial matter	0	0
s 274	Application for directions/orders	0	1
s 275	Declare class of persons to be employees	1	0
s 276	Application to amend/void a contract	31	29
s 277	Application for injunction	9	8
s 278	Claim for unpaid wages/superannuation	166	152
s 279	Representation order (demarcation dispute)	0	0
s 280	Application to re-open a proceeding	6	10
s 281	Reference to a Full Bench	2 (1 refused)	0
s 284	Interpretation of industrial instrument	4	3
s 287	Application for general ruling	2	2
s 287(5)	Exemption from general ruling	2	0
s 288	Application for statement of policy	0	0
s 288	Statement of policy and general ruling	2	2
s 319	Representation of party/Legal representation	1	0
s 326	Interlocutory orders	1	0
s 329(h)	Application for adjournment	1	0
s 331	Application to dismiss/refrain from hearing	22	16
s 335	Costs	12	2
s 342	Appeal to Full Bench	4	3
s 342	Leave to appeal to Full Bench	3	4
s 408F	Repayment of private employment agent's fee	1	3
s 409–657	Industrial Organisation matters [Table 11]	70	65
s 695	Student work permit	12	6
s 696	Aged and/or infirm permit	75	49
T(AH) Act	Trading hours order	2	9
T&E Act s62	Reinstatement of training contract	1	2
T&E Act s230	Apprentice/trainee appeals	2	8
	■ extension of time to appeal	1	
Whistleblower's s47	Application for injunction	1	0
TOTAL APPLICATIONS/MATTERS		**3959**	**4099**
No. of Decisions released (excl. New Awards; Award amendments)		234	277
	■ Incl. Reinstatement Decisions released	78	75

it, and they must have its terms and its effect on their work and conditions explained to them. A majority of workers must approve it and the Commission must also be satisfied that it passes the "no-disadvantage test". That is, it must not place the affected employees under terms and conditions of employment that are less beneficial, on balance, than terms and conditions in an Award that is relevant to the calling (a "designated Award"). During the year there have been nine applications to the Commission to determine a designated Award.

If the parties have difficulty in negotiating the terms and conditions of the agreement, they may apply to the Commission for assistance with conciliation (s. 148). As Table 6 shows, there has been a slight increase in such applications for assistance during the year. If conciliation cannot resolve the impasse, the Commission has the power to arbitrate, as it would do for an industrial dispute.

During the year there were 996 applications to approve a Certified Agreement. Of these, 361 were new Agreements. The number of CAs currently in force is indicated in Table 8.

Queensland Workplace Agreements

QWAs are governed by Chapter 6 Part 2. They can be negotiated collectively by one employer with a group of employees, but they are individual agreements. That is, ultimately each QWA governs the relationship between an employer and an individual employee. Referring to Table 7, the number of QWAs approved indicates the number of individual employees who agreed to QWAs with their employers during the year. To have effect, a QWA must be filed. It must then be approved by the Commission. Unless there is a public interest reason for not approving it, or it does not pass the 'no disadvantage' test as outlined in s. 209 (determined by comparing it with a designated Award), the QWA will usually be approved. A copy of the approved agreement must be given by the employer to the employee.

Table 7: Agreements filed 2002–03 and 2003–04

Agreements & notifications filed	2002–03	2003–04
Certified agreements	518	996
Notice: initiation of bargaining period: s143(2)	2	1
Notice: authorisation to engage in industrial action: s177	339	246
Queensland Workplace Agreements	88	73

Table 8: Industrial instruments in force 30 June 2004

Type of Instrument	Number
Awards	304
Industrial agreements	380
Certified agreements	3913
Traineeship agreements	1
Superannuation industrial agreements	136
TOTAL	**4734**

Industrial Agreements

Industrial Agreements (IAs) were made under the *Industrial Relations Act 1990*. A large number of these remain in force by virtue of the transitional provisions of the current Act (s. 713). Many of these are effectively redundant, or contain terms that are obsolete, or have not been able to be amended since 1997, in particular to reflect State Wage Case decisions.

On 12 September 2003 the Industrial Registrar notified industrial organisations that the Queensland Industrial Relations Commission under s. 317(2) of the Act of its own initiative had decided to embark on a review of Industrial Agreements. On 30 June 2004 the

Full Bench handed down its decision. (For further details see Full Bench decisions at page 47.)

Obtaining copies of Instruments

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

Unfair Dismissals

Table 6 shows that over 38% of matters filed in the Registry during the year were applications for reinstatement or "unfair dismissals". Applications for reinstatement are allocated to Commission Members by the Vice President. (Each Member sets aside certain weeks of the year, during which that Member is available for reinstatement matters).

While there is a common belief that people come to the Commission seeking compensation for what they see as unfair dismissal or dismissal for an invalid reason, in fact, the primary remedy which the Commission can award under the Act is reinstatement to an applicant's former job, or alternatively re-employment in another job with the same employer. This is indicated in s. 78 of the Act. It is only if the Commission determines, because of the circumstances, that reinstatement or re-employment is impracticable, that compensation may be awarded instead. The Commission will decide the amount of any compensation based on the applicant's wages before dismissal, the circumstances surrounding the dismissal, and any amount that has already been paid to the applicant by the former employer. The powers of the Commission in this regard are outlined in s. 79 of the Act.

The path to a remedy for dismissed employees begins by filing an *Application for Reinstatement*. All such applications are dealt with first by conciliation conferences. These are proceedings where a member of the Commission assists the parties – that is, the former employee and employer – to negotiate an agreement.

This allows each party to tell her or his side of the story. And at the same time, the member can inform the parties of their rights and obligations under the legislation and under any award or agreement that applies to their employment relationship. No record is kept of these conferences, except for the outcome.

In many cases, an agreement can be reached, disputed claims are resolved, or the matter is not pursued further. This is reflected in the figures in Table 9. Of the many applications filed, a limited number of those proceed to formal hearings. Decisions on reinstatement applications made up 27% of the 277 decisions released during the year.

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

The applicant must then decide whether to pursue the matter to a hearing. This is a more formal procedure where the Commission is constituted as a court, presided over by a different member of the Commission.

Parties may be represented by advocates (employees who are union members and employers who are members of employer organisations will usually be represented by the union/organisation), or in some circumstances by lawyers.

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

Table 9: Reinstatement applications 2003–04 – breakdown of outcomes

Total no. of applications	**1575**
Rejected by Registrar	25
No jurisdiction found by Commission	1
Application refused following hearing	6
Application dismissed following hearing	23
Application struck out at hearing	1
Application Granted following hearing	18
Application withdrawn	811
Lapsed	405
Inactive	174
Completed	3
Still in progress	99
Adjourned to Registry	9

Contracts

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

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

Table 6 shows that there has been a slight decrease in the number of applications to amend or void a contract during the year. As with the applications for reinstatement, there is a level of remuneration at which the provision ceases to be available. That is, a person cannot file an application under s. 276 if he or she earned above the prescribed amount (set out in s 4 of the *Industrial Relations Regulation 2000*). During the year, the stipulated cut-off was $85,400.

Disputes and the Conferencing Role

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

notifications filed, as indicated in Table 6. The figures show that there has been a slight decrease in the number of dispute notifications filed. These made up approximately 12% of matters filed during the year.

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

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

Parties who request assistance to negotiate a certified agreement, under s. 148, may require several conferences to work through their differences satisfactorily. There was a slight increase in the number of these requests during the year.

Industrial Action

Industrial action is protected if engaged in according to the terms of s. 174 of the Act. Under s. 176, industrial action can only be taken if it is authorised by the industrial organisation's management committee, is permitted under the organisation's rules, and if the Registrar is notified of the authorisation. During the year a significantly lower number of authorisations to take industrial action were notified to the Registrar, than in the previous year.

If it appears to the Commission that industrial action may be avoided, or a dispute settled by ascertaining the relevant employees' attitudes to the issues, the Commission may order that a secret ballot be conducted of the employees. In that event, the action is not protected industrial action unless and until the ballot is conducted and a majority vote in favour of it. During the year there have been no instances where the Commission has ordered a secret ballot for this purpose.

Cases Stated or Referred

Under s. 282 of the Act, the Commission may state a written case to the Court for an opinion or for determination of a legal question arising in a matter before it. During the year there were 4 cases stated to the Court by the Commission.

Where a matter before the Commission is of substantial industrial importance, s. 281 allows the Member hearing the matter to refer it to a Full Bench, with approval of the Vice President or the President. In certain circumstances, a party to a case may apply to have the matter referred.

Jurisdiction under Vocational Education, Training and Employment Act

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

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

During the year, there have been eight apprentice/trainee appeals.

The Full Bench of the Commission

Under s. 256(2) of the Act, the Full Bench is composed of three Members and must always include a presidential member.

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

- hearings on a "show cause" notice issued by the Registrar in regard to an industrial dispute: this may occur when an organisation has failed to comply with an order of the Commission under s. 233;
- applications to de-register industrial organisations under Chapter 12 Part 16.

Appeals to the Full Bench

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

Industrial organisations

The Full Bench hears and determines applications for de-registration of an industrial organisation. It can also make representation orders to settle demarcation disputes. If an organisation involved in an industrial dispute does not comply with orders of the Commission, a Full Bench may make further orders against the organisation, including penalties (up to 1000 penalty units) against the organisation. Refer to Table 11 for the number of industrial organisation matters dealt with during the year.

Declaring persons to be employees

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

Trading hours jurisdiction

The Full Bench determines applications by non-exempt shops to vary trading hours under Part 5 of the *Trading (Allowable Hours) Act 1990* (see s. 21). By s. 23 of that Act, the Commission may do so on its own initiative or on application by an organisation. During the year there were 9 applications relating to trading hours, including a decision to approve a period of continuous trading 23 to 24 December 2003. (See Full Bench decisions at page 42 for more detail)

General Rulings and Statements of Policy

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

In making any such determination s273(2) of the Act requires that the Full Bench perform its functions in a way that furthers the objects of the Act, and s.320 of the Act requires the Full Bench to consider the public interest. In so doing the Full Bench must consider the objects of the Act and the likely effects of any decision on the "community, local community, economy, industry generally and the particular industry concerned."

Under s 287, the Full Bench may make General Rulings about industrial matters for employees bound by industrial instruments, and about general employment conditions. The **State Wage Case**, for employees covered by industrial instruments, has been commenced by an application for a general ruling in recent years. Section 287 also requires that a general ruling be made each year about a **Queensland Minimum Wage** for *all* employees. (For summaries of the 2003 State Wage Case and Queensland Minimum Wage decisions, see page 43.)

Another application (filed in May 2003) for a general ruling relating to entitlements of employees who are required to participate in **jury service** was still before the commission at the end of the year .

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

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

During the year, the Commission finalised the hearing of two applications, filed by the QCU and the AWU, for a **Statement of Policy on termination, change and redundancy (TCR) entitlements**. (See summary of decision at page 45.)

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

Costs

The Commission has a discretion to order costs against a party to an application. However the discretion may only be exercised if the Commission is satisfied the 'offending' party's application was vexatious or without reasonable cause, or if a party to a reinstatement application, by some unreasonable act or omission during the course of the matter, caused another party to incur additional costs. Table 6 indicates how many of these costs matters were dealt with.

Professional Activities

During the year, the Commissioners attended the following conferences and meetings:

- Commissioner Fisher participated in the McCullough Robertson Conference in July 2003.
- Deputy President Swan attended the Australian Legal Conference in August 2003.
- Vice-President Linnane and Commissioner Blades attended the Australian Institute of Judicial Administration Conference in September 2003.
- Deputy President Bloomfield and Commissioners Blades, Asbury and Thompson attended the Industrial Relations Society of Queensland Conference in September 2003
- Commissioner Asbury participated in the Trillium Group Mediation Skills Enhancement Workshop in October 2003.

In addition, President Hall hosted a function for the Henan Provincial Trade Union Delegation from China in February 2004. The trade union officials, sponsored by the Australian Workers' Union Queensland Branch, met with members of the Commission and observed a hearing before the Commission.

In March 2004, Vice-President Linnane, Commissioner Fisher and the Industrial Registrar participated in Workplace Health and Safety seminars on Workplace Harassment issues. In particular officers from various Government agencies, who have direct client contact with the Queensland public, were addressed on Commission and Registry requirements in regard to lodging applications for reinstatement and the notification of industrial disputes, and practices and procedures in relation to conferences and hearings.

Commission and Registry Business Plan

The Commission recognises the importance of its role in the provision of a fair system of industrial relations that supports economic prosperity and social justice.

Together, the Commission and Registry are committed to a process of continual review and improvement of their practices, procedures and service delivery.

To this end, in July 2003 the Commission and Registry developed a Business plan to underpin the longer-term management of the Commission/Registry. The Business Plan includes how to best access the benefits of information technology that meets the needs of the Commission, Registry and the Queensland public.

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

The key priorities of the Business plan are listed below:

Priority One:

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

Objective:

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

Priority Two:

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

Objective:

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

Priority Three:

Best practice service delivery for users.

Objective:

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

Priority Four:

A highly skilled, motivated and adaptable workforce.

Objective:

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

Queensland Industrial Registry

The Queensland Industrial Registry

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

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

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

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

Staff of the Registry also provide support to Members [and Associates] through:

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

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

Up to 30 September 2003 the Registry also served as Registry for the Australian Industrial Relations Commission in Queensland, under a fee for service arrangement. As of 1 October 2003, the Australian Industrial Registry (AIR) appointed a Deputy Registrar and recommenced direct service delivery in Queensland.

The Registry continued to work cooperatively with the AIR. The Registry and the AIR are currently co-located and share a joint front counter and library services. Additionally, the AIR has agreed for the Registry to have access to the AIR's Case Management System (CMS) software to adapt for the Registry's business requirements. At the same time, the Registry has agreed to provide to the AIR any CMS software enhancements developed by the Registry, including new web technology.

Organisational Capability of the Registry

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

An Information Systems plan was developed, to identify information and communication technology strategies that support the key priority areas of the Business plan, including accessing "e-court" information systems.

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

Importantly, the DIR ICT Resources Strategic Plan recognises the independence of the Commission and Registry.

Table 10: Registry performance indicators 2002–03 and 2003–04

Criterion	Target	2002–03	2003–04
Notify parties to dispute conferences within 5 working hrs	99%	98%	99%
Process applications within 8 working hrs	95%	98%	98%
Initial processing of agreements within 3 working days	90%	99%	100%

In 2003–04 the Department of Industrial Relations supported the Commission and Registry with effective ICT resources and services.

In particular DIR is currently funding a program to modernise the information and business systems which support the Commission and Registry.

This includes a capital investment in laptop computers and multifunctional office equipment [printers, photocopiers, faxes and scanners] and the design, development and installation of a new case management system which will be the foundation for future e-service delivery initiatives.

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

Industrial Registrar's Powers

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

Applicants excluded are those found to be:

- short-term casual employees as defined in s. 72(8) (unless the reason is one of discrimination, pregnancy, parental leave, or adoption of a child: ss. 73(2)(i), (j), (k), or (m));
- employees still within the probationary period (unless the dismissal is claimed to be for an invalid reason, as stated in s. 73(2));
- apprentices or trainees;
- employees engaged for a specific period or task or on a labour market program, unless the period, task or program has not yet ended; or
- employees, not covered by industrial instruments or tenured under the *Public Service Act*, who were earning more than the prescribed limit (set down by s. 4 of the *Regulations*). The prescribed limit during the year was $85,400.

During the year, the Registrar has rejected 25 applications for reinstatement on these bases (see Table 9).

The Registrar's powers under the Act also include the power to decide applications for student work permits under s. 695. These permits allow students undertaking tertiary studies to work in a particular calling for a set period, when their studies require it.

Applications Filed and Processed by Registry

During 2003–04, the number of applications and notifications filed increased in comparison to the number filed in the previous year (see Table 6). There were less dispute notifications lodged in this year than in the previous year, less applications for payment of long service leave.

There was a decrease in applications to dismiss a matter and the number of applications for reinstatement fell once again. There were decreases in applications for recovery of wages and severance pay.

There was an increase in appeals on apprenticeship and traineeship decisions.

The Registry has set itself benchmarks for timeliness in initial processing of applications and notifications. The table below indicates how successful it has been in meeting those targets during the year to 30 June 2004.

Taking into account the business improvement initiatives being undertaken by staff in addition to carrying out their day to day requirements for client service delivery, the Registry has performed very well during the year.

Registrar's Role Regarding Industrial Organisations

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

Register and rules

Under s 426 of the Act, the Registrar is responsible for maintaining the register of industrial organisations, along with copies of each organisation's rules. These are available for inspection on payment of the fee indicated in the *Industrial Relations (Tribunals) Rules*. Industrial organisations' rules must include rules about the election of office-bearers. The *Industrial Relations Regulations* provide 'Model Election Rules'. If an organisation has not adopted the model rules, and its own election rules do not comply with the requirements of the Act, s 467 allows the Registrar to amend the organisation's rules in line with the model election rules.

The Industrial Registrar may approve applications to amend an industrial organisation's rules under s 467, other than by amending its name or its eligibility rules (which must be approved by the Commission). If the Registrar considers an organisation's rules do not provide all the requirements under s 435, the Registrar may act on his or her own initiative to amend the rules to include the requirement. If the Industrial Court finds the rules do not comply with s. 435, s. 467 allows the Registrar to amend the rules to remove the offending provisions. Table 11 shows that the number of Registrar-approved amendments in this year is less than the number in the previous year. All amendments during the year have been on application by the organisations.

Industrial organisations must also file in the Registry each year, copies of their registers of officers (s 547). The Registrar may direct an organisation to give its register of members or officers to the Registry or to correct its register of members or officers (s 550). Failure to comply with the Registrar's direction can incur a penalty up to 40 penalty units. The Registrar has issued no directions under s 550 during the year.

Elections

Under s 482, the Registrar must arrange for the Electoral Commission to conduct an election of officers for an industrial organisation, when its rules require one, and the organisation has filed the prescribed information in the Registry. Table 11 shows that the number of elections arranged during the year is approximately 16% more than the previous year.

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

The Registrar may also refer an application for an election inquiry to the Commission. Under s 500 a member of an industrial organisation who believes there has been some irregularity in its election of officers, can lodge an application for an inquiry to be conducted. The Registrar can refer these applications to the Commission under s 499. The Commission may then authorise the Registrar to carry out certain inspections and investigations for such an inquiry. There has been no election inquiries held during the year.

Financial accountability

Organisations must also file copies of their audit reports and financial accounts, along with records of certain loans, grants or donations (s 570, 578). The Registrar may direct an officer of an organisation to keep the accounts in a certain way, to make entries of a stated type in the accounts, or to disclose to the Registrar certain information about the

organisation's funds and accounts. An organisation that does not file any of these reports or records can be penalised up to 40 penalty units.

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

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

Exemptions

Industrial organisations may apply to the Registrar for exemptions from holding elections, or from the requirement to file audit reports and financial accounts, or from certain other obligations under Chapter 12. Such exemptions may be granted, when appropriate, to organisations with counterpart federal bodies, and for organisations which are corporations.

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

Industrial Organisations

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

Membership of Industrial Organisations

Eligibility for and admission to membership of industrial organisations are governed by Part 10 of Chapter 12. At 30 June 2004, there were 43 employee organisations registered in Queensland; and at 31 December 2003 total membership was 373,756 (compared to 378,161 members at December 2002). The organisations are listed according to membership numbers in Table 12. Equivalent figures for employer organisations are: 37 organisations registered at 30 June 2004, with a total membership of 40,963 at 31 December 2003 (compared to 43,344 members in December 2002). Table 13 lists the organisations according to membership.

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

Applications for registration of an organisation, or amalgamation of two or more organisations, may only be made to the Commission. There were no new registration applications filed during 2003–04. Amalgamations (and withdrawals from amalgamations) are approved under Chapter 12 Part 15. Under s 618, the Commission may approve an amalgamation only if the process has complied with the *Industrial Relations Regulations*, and the rules of the amalgamated organisation will comply with the Act's requirements about rules (which are in Parts 3 and 4 of the Chapter).

Part 16 of the Chapter provides for an organisation to be de-registered, on certain grounds, by a Full Bench of the Commission. For this purpose, the Bench must include the President (see s 256(2)). The grounds for de-registration are set out in s 638; and s 639 states who may apply. In certain circumstances, the Full Bench can act of its own initiative to bring proceedings to de-register an organisation. The Registrar can also apply to have an organisation de-registered on one of the grounds in s 638, or on the ground that the organisation is defunct. On application by the Registrar, The Australian Stevedoring Supervisors Association (Queensland) Union of Employees was deregistered on the grounds that it was defunct.

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

During 2003–04, there were 33 applications in respect of industrial organisations' rules, registrations, name changes, and exemptions from requirements of the Act lodged with the Registrar. Twenty-one of these were applications for rule changes.

Rules

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

Under Part 5 of Chapter 12, a person who is a member of an organisation can make an application to the Industrial Court, if he or she believes the organisation's rules do not comply with restrictions set down in s 435. A member can also apply to the Court for a direction that an office-bearer, or some person who is obliged to do certain things under the organisation's rules, perform those things, or observe the organisation's rules. If a person does not comply with the Court's direction to perform or observe the rules, he or she can be penalised up to 40 penalty units. If necessary, financial assistance can be made available for applications under Part 5. This is an important avenue for members to ensure that their organisations are accountable.

The rules of an organisation can be amended, on approval by the Commission or the Registrar. If the Court has declared, following an application under s 459, that a rule does not comply with s 435, the organisation must amend it within 3 months – if this is not done, the Commission or the Registrar may amend the rule to enforce compliance (s 468). The Commission must determine an application to amend the eligibility rules (s 474) and the list of callings represented by an organisation (s 427). All other applications to amend rules are determined by the Registrar under s 467. Amendments to rules may only be approved if they are proposed in accordance with the organisation's rules and will not contravene the restrictions set down in s 435 (see ss 474, 478). There have been 21 applications filed during the year for amendments to rules; two of those were for changes to eligibility rules. This is a slight decrease on the previous year (see Table 11).

If an organisation wishes to change its name, this may be done only if the amendment is proposed according to the organisation's rules and approved under the Act. Section 472 enables the Registrar to approve a simple change of the word "union" to the word "organisation". However more substantial name changes must be approved by the Commission (s 473). There was one name change for an employee organisation and three name changes to employer organisations during the reporting period. The Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees changed its name to the Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees. The Retailers Association of Queensland Limited, Union of Employers changed is name to the National Retail Association Limited, Union of Employers. The National Electrical and Communications Association Queensland, Industrial Organisation of Employers changed its name to the Electrical and Communications Association, Queensland Industrial Organisation of Employers. The T.A.B. Agents Association of Queensland Union of Employers changed its name to the UNiTAB Agents Association, Union of Employers Queensland.

Table 11 shows the number of applications to amend organisations' names and rules.

Elections

The Act requires all industrial organisations to make rules governing elections to office (see Chapter 12 Part 4). Section 440 also states a general requirement of transparency: that is, rules should ensure that election processes are transparent and irregularities are avoided. If a member of an organisation believes there has been irregularity in the conduct of its election, the member can apply to the Industrial Registrar under Chapter 12 Part 8 to

conduct an election inquiry. If the Registrar is satisfied there are reasonable grounds and the circumstances justify an inquiry, the application may be referred to the Commission. There have been no election inquiry matters referred by the Registrar during the year.

The rules must provide for elections to be either by a direct voting system (Div 3 of Part 4) or by a collegiate electoral system (Div 4 of Part 4). A direct vote must be conducted by a secret postal ballot, or by some alternative form of secret ballot approved by the Registrar. Schedule 3 of the *Industrial Relations Regulation 2000* sets out 'Model Election Rules' which must be taken to be an organisation's election rules if their election rules do not comply with the Act.

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

Table 11 lists industrial organisation matters filed in Registry. During the year, 36 requests to conduct elections for office-bearers were filed and dealt with by the Registrar, compared to 31 in 2002–03. Any industrial organisation with a counterpart federal organisation may apply to the Registrar for exemption from certain of the Act's requirements, including the stipulations about holding elections. Three organisations sought 'election exemptions' during the year, on the ground that their federal counterparts held elections under the federal *Workplace Relations Act*.

Financial Accountability

The Industrial Registrar is responsible for monitoring the financial accountability of industrial organisations. Chapter 12 Part 12 of the Act sets out accounting and audit obligations of organisations. Copies of audit reports and accounts must be filed in the Registry in accordance with s 570. Under Division 5 of Part 12, the Registrar must investigate any irregularity or accounting deficiency found by an organisation's auditor, and may engage another auditor to examine an organisation's accounting records. Other records to be filed include statements of any loans, grants or payments totalling more than $1000 to any one person during the financial year. These must be available for inspection to members of the organisation (ss 578 and 579). The Registrar has not had to investigate any accounting irregularities during 2003–04.

Any industrial organisation with a counterpart federal organisation may apply to the Registrar for exemption from accounting and audit provisions, under s 586. If the application is approved, the organisation must file with the Registrar a certified copy of the documents filed under the federal *Workplace Relations Act*. (Similar provisions apply where an employer organisation is a corporation subject to other statutory requirements to file accounts and audit reports: see s 590). One exemption from the accounting and auditing requirements was granted on the basis of compliance with the federal *Workplace Relations Act* during 2003–04.

Table 11: Industrial organisation matters filed 2002–03 and 2003–04

Industrial organisation matters		2002–03	2003–04
s 422(3)	New rules [Registry approval]	3	0
s 427	Amendment – list of callings	0	0
s 473	Amendment – Change of name	1	4
s 474	Part amendment – eligibility rules	3	2
s 329(j)	Extension of time to object – eligibility rules amendments	1	0
s 478	Part amendment to rules	23	19
s 482	Request for conduct of election	31	36
s 594	Exemption from conduct of election	4	3
s 582	Exemption – members' register	1	0
s 447	Exemption – postal ballot	0	0
s 586	Exemption – branch financial return	3	0
s 618	Amalgamation	0	0
s 638	Review union registration – application for de-registration	0	1
TOTAL		**70**	**65**

Table 12: Industrial organisations of employees – membership at 31 Dec 2003

Industrial organisation	Members
The Australian Workers' Union of Employees, Queensland	50,225
Queensland Teachers Union of Employees	39,206
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.	36,248
The Queensland Public Sector Union of Employees	33,680
Queensland Nurses' Union of Employees.	30,059
Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees.	24,920
Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland	17,995
Queensland Services, Industrial Union of Employees	12,303
The Electrical Trades Union of Employees of Australia, Queensland Branch	12,073
Queensland Independent Education Union of Employees	11,789
Transport Workers' Union of Australia, Union of Employees (Queensland Branch)	10,822
Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees	9,500
The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland	8,866
Queensland Police "Union of Employees"	8,495

Table 12 *continued*

Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch	7,377
Federated Ironworkers Association of Australia (Queensland Branch) Union of Employees	6,710
Queensland Colliery Employees Union of Employees	6,611
Australasian Meat Industry Union of Employees (Queensland Branch)	6,465
The National Union of Workers Industrial Union of Employees Queensland	6,333
Finance Sector Union of Australia, Queensland Branch, Industrial Union of Employees	6,025
Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees	5,469
Federated Engine Drivers' and Firemen's Association of Australasia Queensland Branch, Union of Employees	3,360
The Plumbers and Gasfitters Employees Union of Australia, Qld Branch, Union of Employees	3,203
The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees	2,416
United Firefighters' Union of Australia, Union of Employees, Queensland	2,075
Australian Federated Union of Locomotive Employees, Queensland Union of Employees	1,502
The Bacon Factories' Union of Employees, Queensland	1,318
Australian Journalists' Association (Queensland District) "Union of Employees"	1,101
Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees	1,080
Australian Salaried Medical Officers Federation Industrial Organisation of Employees, Queensland	1,048
Federated Clerks' Union of Australia, North Queensland Branch, Union of Employees	936
Property Sales Association of Queensland, Union of Employees	846
The University of Queensland Academic Staff Association (Union of Employees)	656
Queensland Association of Academic Staff in Colleges of Advanced Education (Union of Employees)	598
Actors, Entertainers and Announcers Equity Association, Queensland, Union of Employees	527
Australian Institute of Marine and Power Engineers' Union of Employees, Queensland District.	461
James Cook University Staff Association (Union of Employees)	388
The Queensland Police Commissioned Officers Union of Employees	312
Musicians' Union of Australia (Brisbane Branch) Union of Employees	216
Queensland Fire Service Senior Officers' Association, Union of Employees	80
Griffith University Faculty Staff Association (Union of Employees)	Figures not supplied
Merchant Service Guild of Australia, Queensland Branch, Union of Employees	Figures not supplied
Number Employee Organisations	**43**
Total Membership	**373,756**

Table 13. Industrial organisations of employers – membership at 31 December 2003

Industrial organisation	Members
Queensland Master Builders Association, Industrial Organisation of Employers	9,409
Agforce Queensland Industrial Union of Employers	7,661
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers	3,640
Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)	2,827
Motor Trades Association of Queensland Industrial Organisation of Employers	2,107
Australian Dental Association (Queensland Branch) Union of Employers	1,814
National Retail Association Limited, Union of Employers	1,563
Australian Industry Group, Industrial Organisation of Employers (Queensland)	1,368
Electrical and Communications Association Queensland, Industrial Organisation of Employers	1,340
The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers	1,097
Children's Services Employers Association Queensland Union of Employers	1,006
Master Plumbers' Association of Queensland (Union of Employers)	767
Queensland Hotels Association, Union of Employers	766
Queensland Motel Employers Association, Industrial Organisation of Employers	605
The Baking Industry Association of Queensland – Union of Employers.	504
The Registered and Licensed Clubs Association of Queensland, Union of Employers	513
Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers	455
Nursery and Garden Industry Queensland Industrial Union of Employers	433
Hardware Association of Queensland, Union of Employers	411
National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers	402
The Queensland Road Transport Association Industrial Organisation of Employers	349
Queensland Real Estate Industrial Organisation of Employers	340
The Hairdressing Federation of Queensland – Union of Employers	192
Building Service Contractors' Association of Australia – Queensland Division, Industrial Organisation of Employers	235
Queensland Private Childcare Centres Employers Organisation of Queensland Industrial Organisation of Employers	250
Queensland Mechanical Cane Harvesters Association, Union of Employers	185
Furnishing Industry Association of Australia (Queensland) Limited Union of Employers	170
UNiTAB Agents' Association Union of Employers Queensland	140
Consulting Surveyors Queensland Industrial Organisation of Employers	102

Table 13 *continued*

Association of Wall and Ceiling Industries Queensland – Union of Employers	101
Queensland Master Hairdressers' Industrial Union of Employers	69
The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited	51
Queensland Country Press Association – Union of Employers	27
Queensland Cane Growers' Association Union of Employers	26
Queensland Major Contractors Association, Industrial Organisation of Employers	16
Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers	12
Australian Sugar Milling Association, Queensland, Union of Employers	10
Number of Employer Organisations	**37**
Total Membership	**40,963**

Amendments to Legislation

The legislation that principally relates to the work of the Court, the Commission and Registrar is the *Industrial Relations Act 1999*. Associated with the Act are the *Industrial Relations Regulation 2001* and *Industrial Relations (Tribunals) Rules 2000*. As indicated elsewhere in this report, the Commission's jurisdiction extends to certain matters under the *Vocational Education, Training and Employment Act 2000* and the *Trading (Allowable Hours) Act 1990*. In addition, the Court has appellate jurisdiction under the *Workers' Compensation and Rehabilitation Act 2003* and the *Workplace Health and Safety Act 1995*. The following outlines important legislative amendments made during the year which affect the work of the Tribunals.

Industrial Relations Act 1999 (Qld)

The *Training Reform Act 2003*, assented on the 13 October 2003, provided for specific amendment of the *Industrial Relations Act 1999* by the insertion of a new section 139A. This section commenced on the 1 January 2004 and provided for the maintenance or preservation of entitlements of existing workers who undertake an apprenticeship or traineeship. The provision also assures continuity of employment on completion or cancellation of the workers' training contract, regardless of the circumstances.

Existing workers are deemed to be reinstated in their previous positions, whether that position is available or not, on at least the same pay and conditions as applied to the previous position immediately before the apprenticeship or traineeship if any of the following events happen: (a) the Training Recognition Council refuses to register the person's training contract; (b) the training contract is cancelled; (c) the apprenticeship or traineeship ends before the probationary period; and (d) the person completes the apprenticeship or traineeship.

Chapter 3 (Dismissals) *Industrial Relations Act 1999* applies if the person is subsequently dismissed. The person retains all rights and entitlements accrued in the previous position under the Act or an industrial instrument, and is not specifically excluded from Chapter 3 by virtue of having undertaken the apprenticeship or traineeship.

The *Disaster Management Act 2003*, assented on the 18 November 2003, also provided for amendment of the *Industrial Relations Act 1999*. Section 173 of the aforementioned Act inserted a provision for an additional ground for a claim for unfair dismissal in s.73 (2) of the *Industrial Relations Act 1999*.

This provision is on the basis of temporary absence from work if the absence is: (a) by an SES member or an ES Unit under the *Disaster Management Act 2003* for the purpose of performing an SES function or an ESU function under that Act in an emergency situation; or (b) by a member of the rural fire brigade under the *Fire and Rescue Service Act 1990* ibid; or (c) by an honorary ambulance officer under the *Ambulance Services act 1991* ibid; or (d) by a hazmat advisor under the *Dangerous Goods Safety Management Act 2001* ibid.

The reference to an emergency situation in the *Industrial Relations Act 1999* includes disasters. It was also noted that having regard to all circumstances the period of absence must be reasonable. This provision commenced on the 31 March 2004.

Amendments to Regulations and Tribunal Rules

Industrial Relations Amendment Regulation (No.2) 2003

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

was raised by this Amendment Regulation from $81,500 to $85,400 per annum. The amendment took effect from 22 August 2003.

Industrial Relations (Tribunals) Amendment Rule (No.1) 2003

This Amendment Rule effected an increase to the fees charged by the Registry for filing, searching and photocopying documents. The fees are set out in Schedule 1 of the Rules. The *Financial Management Practice Manual* provides for annual increases in regulatory fees, in line with rises in the Consumer Price Index assessed on the basis of the Brisbane (All Groups) CPI movement for the March quarter. The increase took effect from 1 July 2003. A similar increase for 2004–05 was gazetted on 25 June 2004 to take effect for the year commencing 1 July 2004.

Other Consequential Amendments

The *Workers' Compensation and Rehabilitation Act 2003* was amended by the *Local Government and Other Legislation Amendment Act 2003* and the *Disaster Management Act 2003*.

Commencing on the 6 November 2003, the *Local Government and other Legislation Amendment Act 2003* clause 24 allowed for a local government self-insurer to choose to cover local government councillors under its licence. These councillors were then entitled to compensation in the event of an injury. The clause provided that councillors were entitled to weekly payments and all other compensation entitlements the same as workers under the *Workers' Compensation and Rehabilitation Act 2003*. This clause further provided that councillors were excluded from claiming common law damages under the self-insurer's licence.

The *Workers' Compensation and Rehabilitation Act 2003* was also amended by the *Disaster Management Act 2003* to enable the provision of insurance cover for members of the SES or an ES unit and for a person required to give reasonable help in the exercise of certain powers or another person performing a function or exercising a power under that Act. This amendment commenced on the 31 March 2004.

For all administrative matters during the reporting period, reference can be made to the *Workers' Compensation and Rehabilitation Regulation 2003*.

Lastly, on 1 January 2004, the *Training and Employment Act 2000* title was amended to the *Vocational Education Training and Employment Act 2000*. The name change was to reflect the significance of vocational education in the training system.

Summaries of Decisions

Decisions of the Industrial Court of Queensland

- **Coco's Trading Pty Ltd AND Barbara Gay O'Reilly**
  (C48 of 2003); Hall P; 3 September 2003; (2003) 174 QGIG 102

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

Issues: Unfair dismissal; Unreasonable act connected with the conduct of the application;

Application for costs under s.335 (1) (b).

Background: On 16 April 2003, an award of compensation was made in favour of Ms O'Reilly against her former employer Coco's Trading Pty Ltd after it was found she was constructively dismissed in circumstances which were harsh, unjust or unreasonable. The Commission did not reserve the matter of costs. On the 12 June 2003, application for costs was made by Ms O'Reilly under the provisions of the *Industrial Relations Act 1999* s.335. The Commission found that there had been no attempt by the employer to enter into honest negotiations to settle the matter and a clear inference that they were determined to force the employee to litigation. The Commission was satisfied that the employer had caused costs to be incurred by an unreasonable act or omission connected with the conduct of the application, as developed in *Barsha v Motor Finance Wizard (Sales) Pty Ltd* (2002) 171 QGIG 139 and ordered the employer to pay costs of $5197.00. The figure was based on the Magistrates Court Scale.

The appellant appealed against the Commission's decision awarding costs to Ms O'Reilly claiming that the power to award costs under s.335 (1) (b) was erroneously exercised.

Held: The Court held that the Commission was correct in its interpretation of the evidence. Its primary purpose s.335 was to protect the right of a party to litigate free of fear of an adverse costs order. The President stated "The quantification of costs is a quintessential exercise of discretion" (at 103) and there was no error in application of the principle. The award of costs based on the scale appropriate to an award of $7,000 in proceedings in a Magistrate's Court was accurate. However, the President rejected quantum of costs for instructions to sue and settling and filing the application. The Court was unable to accept that an unreasonable act or omission connected with the conduct of application may properly be said to be a cause of costs already incurred in initiating application. The appeal was allowed to that extent and decision of the Commission set aside. The appellant was ordered to pay respondent the sum of $4634.00 by way of costs. Costs application in respect to appeal was rejected.

- **Orchid Avenue Realty Pty Ltd t/as Ray White Surfers Paradise AND Julianne Lois Percival**
  (C63 of 2003); Hall P; 14 October 2003; (2003) 174 QGIG 643

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

Issues: Application for Commission to dismiss or refrain from hearing unfair dismissal; Argument that employment contract was illegal on the basis of statutory prohibition.

Background: Ms Percival was employed by Orchid Avenue Realty Pty Ltd as a real estate salesperson who under s.164 of the *Property Agents and Motor Dealers Act 2000* was required to obtain a professional certificate of registration. Ms Percival mistakenly believed that she was required only to complete an REIQ course and did not hold a registration certificate on 15 April 2002, the date her employment effectively commenced. Ms Percival was terminated from her employment on the 4 December 2002. She sought reinstatement under Pt 2 of Ch 5 of the *Industrial Relations Act 1999*. The employer's contention was that the contract of employment was prohibited by statute, and accordingly void for illegality at the point it was entered into under ss.160 and 161 of the Act. There was no employment and no dismissal. Further, where an employer has no

choice but to dismiss an employee in order to comply with a statutory direction, then the dismissal cannot, as a matter of law, be held to be unfair. The employer's application to the Commission under s. 331(b) of the *Industrial Relations Act 1999* to have her reinstatement dismissed was denied.

Held: The Court held that the Commission had not erred in law or exceeded jurisdiction in failing to find that s.164 or the combined effects of ss.164, 160 and 161 of the *Property Agents and Motor Dealers Act 2000* required it to dismiss the application for reinstatement. Firstly, the inclusive definition of "employ" adopted by the Act includes "engage on a contract for services or commission and use the services of, whether or not for reward." The evidence did not support the contention that the contract between the parties required or authorised Ms Percival to perform any of the activities of a real estate agent nor that the employer had actual knowledge on the 15 April 2002, that Ms Percival did not hold the relevant registration certificate. The Court stated that a distinction has always been made between the case in which the contract is unlawfully performed and the case in which the formation of the contract is prohibited. There was no justification for denying enforceability of the contract between a real estate licensed agent and unregistered salesperson in order to provide an additional sanction to the very substantial penalties imposed by s.160 and 161. Thirdly, the Court dismissed the appeal centred on the proposition that the dismissal could not be unfair, within the meaning of s.73 of the *Industrial Relations Act 1999*. The President noted that there was nothing in s.164 of the Act to prohibit employment of a real estate agent who did not hold a registration certificate so long as that person was neither required nor authorised to perform the work of a real estate salesperson. Further, to transfer the unregistered salesperson to other duties or (by consent), grant leave of absence so that certification may be obtained would be a fair course of action.

- **The Queensland Public Sector Union of Employees AND Department of Corrective Services**
  (C81 of 2003); Hall P; 31 October 2003; (2003) 174 QGIG 904

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

Issues: Certified Agreements. Industrial action. Interlocutory orders pursuant to s.149, s.230. Obligation to offer a right to be heard.

Background: The Queensland Public Sector Union and the Department of Corrective Services had been negotiating for some period of time about a replacement certified agreement. On 29 August 2003 an application lodged by the Department, pursuant to s.49 of the *Industrial Relations Act 1999*, for arbitration on grounds that further conciliation would not resolve the issue in a reasonable time was accepted by the Commission. The application also sought interlocutory orders to insulate the arbitral process from industrial action, in essence, 'associated with the current QPSU enterprise bargaining campaign'. On 19 September 2003, industrial action at a correctional centre triggered an application to the Commission to further press the orders sought by the employer's application of 29 August 2003. The Commission dealing with the arbitration of 19 September 2004, however, imposed a blanket ban on all industrial action, within the definition of "strike' at Schedule 5 of the Act, whether or not it was associated with the "current enterprise bargaining campaign." The QPSU appealed to the Court that it was entitled to notice that it was at risk of wider orders and to the right to heard on the issue.

Held: The President viewed the absence of notice that wider orders were in prospect and an opportunity for the QPSU to be heard on that matter as fatal to the validity of the Orders. However, the critical issue was whether the order made finally disposed of the rights of the parties – final rather than interlocutory. The point of issue centred on the general principle that an interlocutory order should be aimed at industrial action which is happening or threatened. The

President accepted unreservedly that the industrial action on the 19 September 2003 was about matters wholly unrelated to the matters in progress being arbitrated pursuant s.149. Although in these cases, s.230 arms the Commission with power to arbitrate and to issue interlocutory orders including injunctive orders, any arbitration pursuant to s.230 (3) (b) may not be intermingled with the arbitration pursuant to s. 149(1). By s.149 (4) – "In exercising the arbitration powers the Commission must limit its consideration to the matters at issue during negotiations for the proposed agreement". The appeal was allowed and the Orders made by the Commission on the 19 September 2003 set aside.

- **NQEA Australia Pty Ltd AND Walter Frederick Dare (No. 2)**
- **NQEA Australia Pty Ltd AND Walter Frederick Dare (No.3)**
  (C101 of 2003); (C102 of 2003); Hall P; 10 December 2003; (2004) 175 QGIG 17

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

Issues: Interlocutory decision of an Industrial Magistrate. Distinguishing between a final decision, albeit of an interlocutory nature, and a mere ruling in the course of a hearing.

Background: NQEA Australia Pty Ltd lodged an appeal against an interlocutory decision of an Industrial Magistrate allowing the admissibility of evidence and recalling of witnesses. The company submitted the Industrial Magistrate's decision was incompetent in allowing evidence incompatible with the case conducted by the complainant to be admitted. It argued that the need for the evidence should have been reasonably foreseen. Additionally, the evidence was to be tendered after the foreshadowed close of the complainant's case. An appeal was lodged under s.164(3) of the *Workplace Health and Safety Act 1995* whereby an appellant dissatisfied with the decision of an industrial magistrate in proceedings under subsection 1 ("A prosecution for an offence against this Act is by way of summary proceedings before an industrial magistrate"), may appeal to the Industrial Court. The critical issue was whether "decision" at s.164 (3) had the broad meaning which it bears in s.341 (2) of the *Industrial Relations Act 1999*.

Held: The Court held there was not sufficient justification for treating s.164 (3) of the *Workplace Health and Safety Act 1995* and the definition of "decision" in the *Industrial Relations Act 1999* as bringing "into existence an entirely unrestrained system of appeals against rulings and adjudications in the course of summary proceedings..... Expedition, it must be borne in mind, is critical to the effective operation of a Court dealing with summary proceedings, compare *Hayes v. Wilson* [1984] 2 Qd.R. 114 at 139 per Macrossan J". The appeal was dismissed.

- **Queensland Police "Union of Employees" AND Queensland Police Service**
  (C74 of 2003); Hall P; 19 December 2003; (2004) 175 QGIG 110

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

Issues: Application for interpretation of award. Whether voluntary agreement to perform special duty could be treated as being recalled to duty.

Background: A serving police officer was on a programmed day off on the 20 September 2002 and on rostered rest days from 21 to 24 September inclusive. He was telephoned on 20 September and asked to perform a special service for one hour on 21 September. He voluntarily agreed. Although he claimed a minimum payment of three hours overtime, the QPS paid him for one hour overtime for the actual time worked. The union applied to the Commission under s.284 of the *Industrial Relations Act 1999* for an interpretation of clause 4.9 "Recall to Duty" as referred to in clause 6.4 " Special Services" of the *Police Service Award – State*. As the two clauses in

the Award provided different formulae for remunerating police officers for the performance of special duties, the question posed was which clause determined the remuneration of a police officer who voluntarily agreed to perform a special duty after being contacted while on a programmed day off.

The Commission held that the meaning of "recalled" and "recall" in the context of clause 4.9 indicated an element of compulsion as distinct from the situation of voluntarism envisaged under clause 6.4. Consequently, as the police officer had not been recalled or summoned to work, he should be remunerated under the terms of clause 6.4(4) of the award and was entitled to be paid for one hour worked. An officer who was directed to return to work did not do so voluntarily and was protected by the exemption in clause 6.4 and entitled to a minimum of three hours overtime. The Union appealed the decision to the Court. It's principal submission was that s.6.4 of the Award abrogates the power otherwise vested in the Commissioner by s.4.9 of the *Police Service Administration Act 1990* to direct a person who has been appointed to the Queensland Police service to return to duty.

Held: The President put aside any question that the Award purports to abrogate power as made clear by reference to the primacy of s.4.1(5) and (6) of the *Police Services Administration Act 1990*.

However, the President held that the decision of the Commission had not explored the full meaning of the word "recall". The Court relied upon the decision of Richards J in *In Re General Construction and et cetera (State) Award* [1969] AR (NSW) 149 which indicated that the policy reason for allowing employees recalled to work a guaranteed minimum period of employment is as compensation for inconvenience, whether or not the return to work is voluntary or compulsory. Furthermore, the President added that the general objective of promoting voluntary performance of prescribed police duties is furthered by a construction of the Award which secures adequate compensation for inconvenience for those who volunteer. The appeal was allowed and the police officer's claim for special duty to be paid at a minimum of three hours overtime as provided in clause 4.9 "Recall to Duty" as referred to in clause 6.4 "Special Services" of the *Police Service Award – State*.

- **Robert William Watson AND A.J.C Electrical Service Pty Ltd**
- **Robert William Watson AND Gregory Michael Caulfield**
- **Robert William Watson AND John Anthony Caulfield**
  (C88 of 2003); (C89 of 2003); (C90 of 2003); Hall P; 2 February 2004; (2004) 175 QGIG 574

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

Issues: Workplace health and safety obligations. Electrical workers. Consideration of the exclusive nature of a statute within its own field.

Background: The events relating to this appeal took place on the 7 November 2001 and, as such, the legislation and delegated legislation considered was that in force on that date. In summary, the case dismissed by the Industrial Magistrate saw A.J.C. Electrical Service Pty Ltd and each executive officer charged with a breach of s.28(1) and s.167 respectively of the *Workplace Health and Safety Act 1995* for failing to ensure the workplace safety of two specified workers. The parties agreed on a statement of factual events surrounding the charges being preferred, that the work being conducted constituted electrical workers performing electrical work as identified in the *Electrical Act and Regulation 1994* and that during the course of carrying out work the boom of an elevated work platform came within two metres of the distribution power lines. The Industrial Magistrate held that by way of regulation, ministerial notice, advisory standard or industry code of practice the *Workplace Health and Safety Act 1995* intrudes into areas of safety, the subject of elaborate regulation under the *Electricity Act and*

Regulation 1994. There was an express exclusion under s.149 of *Workplace Health and Safety Regulation 1997* that electrical workers doing electrical work may come within two metres of an overhead electrical line at the employer's or self-employed person's workplace. Mr Watson appealed to the Court that the offence was made out under Advisory Standard Plant 2000 – Australian Standard 2550 Cranes – Safe Use which provides obligations under the *Workplace Health and Safety Act 1995* that a load and crane shall not approach distribution lines on poles any closer than two metres.

Held: The President held that s.149 of the Regulation was significant not because it aids construction of the *Workplace Health and Safety Act 1995* but because the Act and the regulations, ministerial notices, advisory standards and industry codes of practice are intended to constitute and operate as a "scheme" Standard 2550 cannot be construed as a stand alone document. The "scheme" exists in parallel with the system of safety established under the *Electricity Act and Regulations 1994*. Furthermore, because it has been accepted by the Court of Appeal that since the *Workplace Health and Safety Act 1995* is a penal statute – " if there are two reasonable constructions open, the more lenient one should be preferred", *Schiliro v Peppercorn Childcare Centres Pty Ltd (No.2)* (2001 1 QdR 518 at 539 – then advisory standards should be similarly construed. The appeal was dismissed.

- **Manchester Holdings Pty Ltd AND Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees** (C86 of 2003); Hall P; 6 February 2004; (2004) 175 QGIG 667

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

Issues: Principles of award interpretation and authorities considered. Definition of "alter" considered. Fundamental change of spread of ordinary hours.

Background: Manchester Holdings Pty Ltd employed certain telemarketers whose employment was subject to the *Clerical Employees Award – State 2002* (the Award). The employer submitted facilitative provisions in clause 6.1.2(a) of the Award enabled spread of ordinary daily working hours to be altered to permit ordinary daily working hours to be worked any time outside the defined spread of hours (6.30am to 6.30pm Monday to Friday) provided agreement between employer and individual employee(s) has been reached. The union argued the provision only contemplates changes of a minor nature and not changes that are repugnant to that spread of hours. The union submitted the employer had introduced a night shift and avoided obligations under clause 6.8 of the award. The Commission considered that the employer's position seriously overstated the level of flexibility provided by the facilitative clause, and that the award does not permit such fundamental alterations to hours as proposed, and agreed with the union's interpretation.

Held: On appeal, the Court held that nothing in the history or extrinsic materials relating to the award indicated that fundamental change was a reason for including the flexibility provision. "In those circumstances the Commission was correct to hold that changes to the spread of hours under s. 6.1.2 might not amount to fundamental change." (at 668) The spread of hours nominated by the employer were so far outside the Award spread as to represent "fundamental" change and the appeal was rejected.

- **Ross Eric Smith and Q-Comp**
  (C92 of 2003); Hall P; 17 February 2004; (2004) 175 QGIG 783

Workers Compensation and Rehabilitation Act 2003 – s.561 – appeal against decision of Industrial Magistrate

Issues: Interpretation of "injury" as defined by the *WorkCover Queensland Act 1996* and an "event" as that term is used in the Act.

Background: The Industrial Magistrate's decision of 10 September 2003 arose out of an appeal by Mr Smith in relation to a refusal of a Q-Comp application for benefits in respect to the death of his wife. On medical evidence, Mrs Smith died of a cerebrovascular incident causing her to lose control of the vehicle she was travelling in between her home and place of employment. The issue before the Industrial Magistrate, who ruled in favour of Q-Comp, was whether Mrs Smith suffered an injury according to s.34 of the *WorkCover Queensland Act 1996*.

Held: The Court confirmed that the difficulty arose out of the meaning of the noun "event", defined at s.33(1) and a critical part of the inclusive provision at s.37(1). Relying on the decisions of the High Court in *Zickar v. MGH Plastic Industries Pty Ltd* (1995–1996) 187 CLR 310 and *Kennedy Cleaning Services Pty Ltd v. Petkoska* (2000) 200 CLR 286, the President stated "In the absence of additional words or special context an injury with an internal cause is just as much an injury as an injury with an external cause" (at 783). The Court found Mrs Smith suffered an "injury" as defined by the *WorkCover Queensland Act 1996* during her journey home from her place of employment and that the injury occurred as a result of an "event" as that term is used in the Act. The Industrial Magistrate's decision and the decision to reject the appellant's application for compensation were overturned.

- **John Gersten AND Cape York Land Council Aboriginal Corporation**
  (C4 of 2004); Hall P; 12 March 2004; (2004) 175 QGIG 1085

Industrial Relations Act 1999 – s.34 (1) – appeal against decision of Industrial Commission

Issues: Contract of employment. Orders sought for continuation of employment. Commission's power under ss. 274,276, 277, 331 and 334

Background: On or about 27 September 2002, Mr Gersten accepted employment with the Cape York Land Council Aboriginal Corporation as a legal officer. By December 2003, significant differences had arisen between Mr Gersten and the Corporation and the terms of his engagement were in dispute. The employee sought relief under s.276 of the *Industrial Relations Act 1999* to amend his contract of employment to ensure that it was a fixed term contract for at least two years so that substantive issues could be reviewed. An interim order relying upon ss.274, 277, 331 and 334 of the Act was sought. Mr Gersten appealed against the decision of the Commission refusing an application of an interim order which would have effectively ensured continuation of employment.

Held: The President confirmed the Commission's decision stating "Here, power to make interim orders of the type sought would be beneficial to the operation of s.276, but is not essential or necessary to the effective exercise of the powers at s.276. In cases such as this the absence of power to make interim orders of the type sought may involve the consequence that persons who wish to resume a career are restricted to remedy by way of money" (at 1085) The President found that the absence of any provision penalising non-compliance suggested strongly that neither s.274 (1) nor s. 276 should be treated as authorising the orders in the nature of mandatory or restrictive injunctions. Also, s. 334(1) does not fill the void. The Commission did not have the express or implied power under which the appellant can be granted the relief sought. The appeal was dismissed.

- **Sherrin Hire Pty Ltd AND the Electrical Traders Union of Employees of Australia Queensland Branch, Union of Employees** (C111 of 2003); Hall P; 7 May 2004; (2004) 176 QGIG 54

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

Issues: Underpayment of wages. Contracts for benefit of third parties. Interpretation s. 55 of Property Law Act 1974

Background: Mr W was employed by Sherrin Hire on a casual basis as a tree lopper/trimmer. The ETU pleaded that pursuant to terms of a contractual arrangement between Sherrin Hire and Energex, the employer was required to pay Mr W contract rates of pay and allowances in aggregate no less than those payable to employees under the *Electricity Supply Industry Employees Award – State*. The union sought an order that Sherrin Hire pay Mr W $13,765-95 in respect of unpaid wages. Mr W claimed benefit of that contract as a third party, pursuant to s. 55 of the *Property Law Act 1974* (Qld). The Commission determined that the employee was not an incidental beneficiary to the contract and was entitled to claim full benefit of unpaid wages. Contrary to equity, good conscience and substantial merits of the case, the employer had wholly retained the monies paid by the principal for the employee's wages. The employer submitted that the Commission's analysis was fatally flawed in respect to finding a standing contractual arrangement between Sherrin Hire and Energex. Sherrin Hire submitted that each placement of a purchase order by Energex constituted as an act of acceptance on its part in that it called for a price for each service giving rise to discrete contracts.

Held: The Court determined that whether the analysis of acceptance of Energex's contracts was of the nature of a standing offer or not, and while Mr W was not party to any discrete contract between Sherrin Hire and Energex, he was an employee of Sherrin Hire engaged in the performance of services, which by those discrete contracts, the employer had undertaken to provide. Mr W was plainly within the category of persons covered by the *Electricity Supply Industry Employees Award – State*. The Court determined that the Commission was correct in its findings about the meaning of s.55 of the *Property Law Act 1974* (Qld) and in finding that Mr W accepted benefit of the promise by statements to his foreman and employer's depot manager. The findings were plainly open on evidence. The appeal was dismissed.

- **Australian Aquaculture Pty Ltd AND Gregory Francis Banks.** (C14 of 2004); Hall P; 14 May 2004; (2004) 176 QGIG 67

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

Issues: Jurisdiction. Whether respondent excluded employee pursuant to s. 72(1) (c)

Background: Mr Banks was employed by Australian Aquaculture Pty Ltd on 31 March 2003 as a handyman to assist with the construction of an aquaculture project. His employment was terminated on 23 July 2003 without notice and without any payment in lieu of notice. The Commission rejected the employer's submission that the employee was a short term casual and, pursuant to s. 72(1) (c) of the *Industrial Relations Act 1999*, was excluded from making an application for reinstatement. Pursuant to s. 72(8) of the Act, a 'short term casual' is a casual employee other than one who is engaged by the same employer on a regular and systematic basis, for several periods of employment during a period of at least one year, and who, but for the employer's decision not to offer further employment, had a reasonable expectation of further employment. Based upon the particular facts of the case, the Commission found that in its performance the engagement displayed the characteristics of an ongoing relationship. The indicia of regular days and regular hours far outweighed the factors supporting a finding of casual employment.

Held: The Court dismissed the appellant's argument that the Commission had erred in law and acted without jurisdiction in treating the employee as other than an excluded employee and had failed to apply cumulative tests at s.72(8) appropriately. The Court held that at the point of inception, the respondent was engaged as a full-time employee to work on the construction of the project. It followed that it was unnecessary to determine whether employment had in fact been on a regular and systematic basis. However, the decision contains a useful discussion of the principles.

- **Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (Appellant) AND Queensland Council of Unions (Appellant) AND The Australian Workers' Union of Employees, Queensland (First Respondent) AND Jupiter's Ltd t/a Gold Coast Convention and Exhibition Centre (Second Respondent)**
  (B63, B64, B75 and B76 of 2004); Hall P, Fisher G, Asbury, I; 25 May 2004; (2004) 176 QGIG 104

Industrial Relations Act 1999 – s.342 – leave to appeal against decision of Industrial Commission

Issues: Certified Agreement. Demarcation order of 1996. Catering Employees.

Background: On 13 January 2004, the Commission certified an agreement between The Australian Workers' Union of Employees, Queensland (AWU) and Jupiter's Ltd Trading as Gold Coast Convention and Exhibition Centre. Certification of the Agreement had been opposed by the Queensland Council of Unions (QCU), which had been made a party to the certification proceedings pursuant to s. 322. It was also opposed by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch (ALHMWU) and The Electrical Trades Union of Australia, Queensland Branch (ETU) who were permitted to be heard pursuant to s.155. The appellants' core submission was that a s.45 Order of 28 February 1996 deprived the AWU of the right to represent the industrial interests of employees engaged in catering in a new business. The Commission was said to have erred in its decision about a demarcation order, in that the reference to "catering" in the order was to businesses, (materially identified as contract catering businesses) or industries, intended to be divided between the parties, rather than to the vocation of employees engaged within a business or industry. With respect to the ETU concerns, no electricians were to be employed under terms of the agreement. The QCU and ALHMWU sought leave to appeal the approval of the agreement pursuant to s.342.

Held: Although the appeal did raise issues of sufficient importance and public interest to warrant leave to appeal, the Bench dismissed the appellant's argument. The demarcation agreements and awards covering the areas of membership and operations of the Unions bound by the Demarcation Order were revealing as to the intended basis of demarcation and the focus was on the calling of the employees, not the enterprise of the employer. The meaning of the term "catering" and "contract catering" were well established at the time of the Demarcation Order. Furthermore, commonly known as "greenfield agreements", s. 156 of the *Industrial Relations Act 1999* allows an agreement for a new business be made with one organisation, entitled to represent more than one employee. There is no requirement that all organisations entitled to represent employees be parties to the Agreement, nor that the organisation that is party to an agreement for a new business has the right to represent all of the employees covered.

Decisions of the Queensland Industrial Relations Commission

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

Decisions of the Full Bench

- **Retailers' Association of Queensland Limited, Union of Employers (RAQ) AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others** (B1437 of 2003); Bloomfield DP, Fisher C, Brown C; 174 QGIG 1339

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

Issues: Whether special, unique or telling features associated with application; Whether potential for flow-on; Balancing of competing merits and arguments; Trial of extended trading hours be allowed in 2003; Subject to six conditions.

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

Held: The Full Bench held that "Previous Full Benches of this Commission have made it clear that all applications coming before the Commission will be heard and determined on their specific merits, having regard to the facts and circumstances of each particular case. However, there will need to be some special, "unique" or particular telling feature about the application before it will be Granted (174 QGIG 912 at 918).

With those considerations in mind, we have decided, after balancing the competing arguments and considerations, to allow retailers at Westfield Chermside (lot 10 Survey Plan 128115, County of Stanley, Parish of Kedron on Title Reference 50382209) to trade during the period from 12:00 midnight on 23 December 2003 until 8:00a.m. on 24 December 2003 on a trail basis only, subject to certain conditions (below)."

In effect Continuous Trading Hours from Opening Time of 9:00 am on 23 December to Normal Closing Time of 5:30 pm on 24 December.

Trial of extended trading hours to be allowed in 2003, subject to the following six conditions:–

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

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

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

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

(5) RAQ are to collect data about:
   - Pedestrian traffic levels in Westfield Chermside over the 14 day period up to and including 24 December 2002;

- Pedestrian traffic levels in Westfield Chermside on an hour by hour basis over the 14 day period up to and including Christmas Eve 2003;
- The level of traffic congestion in the parking areas during the whole of the trading period from opening on 23 December 2003 until closing time on 24 December 2003;
- The names of retailers who traded through the whole of the event and the names and times at which other traders who did not trade for the whole of the event may have closed their doors and reopened them on the morning of 24 December 2003;
- Changes in the turnover of individual stores in the period covering 23 and 24 December 2003 versus the same two dates in 2002;
- Any security incidents attended by security personnel during the period 23 to 24 December 2003 inclusive.

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

- **Application for General Ruling Arbitrated Wage Adjustment and Queensland Minimum Wage**
- **The Australian Workers' Union of Employees, Queensland. And the Queensland Council of Unions and others ((B784 of 2003) & (B777 of 2003))**

Issues: Due to economic hardship within the Sugar Industry the QMCHA opposed both applications and made application under s. 287(5) of the *Industrial Relations Act 1999* for exclusion from the operation of any general ruling the Full Bench may make. That application is was subject of a separate decision and was not granted (No. B777 of 2003 173 QGIG 1255). .

Background: The application sort to apply the same level of arbitrated wage adjustment determined by the Full Bench of the AIRC in the *Safety Net Review – Wages May 2003* into all State awards by way of general ruling; an adjustment of existing allowances within awards which relate to work or conditions which have not changed and service increments by the percentage equivalent increase associated with the C10 rate of pay within the *Engineering Award – State* i.e. an increase of 3.2%;to apply the arbitrated wage adjustment of $17 per week to the Queensland Minimum Wage as it applies to both award and non-award employees consistent with the outcomes provided for in *Gordon Nuttall, Minister for Industrial Relations v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (The Queensland Minimum Wage Case)* (2003) 172 QGIG 2 and (2003) 172 QGIG 1366; the maintenance of the 2002 Declaration of Policy dealing with the *Statement of Principles* (2003) 170 QGIG 438 except for changes in operative dates, the quantum of wage adjustment and consequential amendments to ensure the currency of the Principles; and an operative date of 1 September 2003. The applications were joined and received support from the LGA and State Government. The AIG did not oppose the applications but instead saw it as appropriate in a nexus between the Federal Decision and State Decision. The AIG made further comment how the Commission may best inform itself in relation to safety net adjustments "We see value in a comprehensive, representative and technically robust survey directed to providing direct and contemporary information relevant to the Commission's task in adjusting the wages safety net ... Accordingly we urge the parties and in particular the Commonwealth to give consideration to facilitating survey research of the nature suggested by AiG.". (para 176, PR002003)

The AIG submitted that the Queensland Industrial Relations Commission should also endorse this approach."

The QCCI opposed the applications insofar as the quantum of $17.00 but not the date of operation of 1/9/03. It instead suggested a quantum of $12.00 and 2.5% for allowances.

The RAQ and RCEA opposed the application.

Held: "Almost one quarter of Queensland employees rely on the award system to provide wage increases and there continues to be a wage disparity between this group of workers and those who benefit from individual and collective bargaining. It is important that such workers are not unduly disadvantaged because of an inability to negotiate wage increases with their employers.

There appears to be no compelling social reasons for denying Queensland's lower paid workers the same benefits to be enjoyed by other Australian workers. The flow-on of the *Safety Net Review – Wages May 2003* increase will maintain consistency between the Queensland and federal award systems and ensure that employees who rely on Queensland state awards are not disadvantaged.

Having considered the submissions of all parties, we are of the view that the applications in so far as they relate to arbitrated wage adjustments, the adjustment of allowances that relate to work and service increments and the *Statement of Principles* should be granted. We have also considered the AIG submission on the need for survey research. We have decided to await the outcome of the AIRC's urging of the parties in the *Safety Net Review – Wages May 2003* matter to give consideration to facilitating such survey research. It may be that such research, if it occurs, will provide the necessary data on the Queensland position. We are thus of the view that it is somewhat premature for this Commission to be urging parties to consider separate survey research.

Amendments to the *Industrial Relations Act 1999* in 2002 oblige the Commission to ensure a general ruling about a Queensland Minimum Wage for all employees is made at least once each calendar year: see s. 287(1)(c) and (2) of the Act.

In previous State Wage Case applications, the adjustment and then subsequent operation of the Queensland Minimum Wage has been dealt with through a Statement of Policy, limited to award employees. Since the decision in the *Queensland Minimum Wage Case* the operation of the Queensland Minimum Wage has substantially altered. That decision was released on 18 December 2002 with an operative date of the beginning of the first pay period after 1 April 2003. One reason for the delay in the operative date was to give parties interested in preserving an award exclusion an opportunity to make application for exemption from the proposed general ruling and to have the matter brought before the Commission before the general ruling would have overridden the exclusion. The Full Bench in the *Queensland Minimum Wage Case* did however state that the "anticipation is that once the teething problems are dealt with, General Rulings about a minimum wage will issue at the same time as State Wage decisions".

Whilst we acknowledge there was an increase in the Queensland Minimum Wage effective as and from the first pay period commencing after 1 April 2003 and that the QCU and AWU applications seek a further increase as and from 1 September 2003 it seems to us appropriate to bring the adjustment of the Queensland Minimum Wage into line with the State Wage Case general ruling at this time.

We therefore grant the applications as they relate to the Queensland Minimum Wage from 1 September 2003."

- **Termination, Change and Redundancy State of Policy**
- **Queensland Council of Unions and The Australian Workers' Union of Employees, Queensland (No. B209 of 2002 & No. B308 of 2002)**

Issues: "The applications before the Commission sort he making of a Statement of Policy under s.288 of the Act in relation to TCR entitlements. In making any such determination s.273 (2) of the Act requires

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

Background: In brief terms the applications sort the following:

(i) an increase in the current level of severance pay to the standard adopted by the NSW Industrial Commission (NSWIC) in 1994;

(ii) the introduction of a 25% loading on severance pay paid to employees who are aged 45 years and over;

(iii) a change to the manner in which severance pay is calculated so that allowances, penalty payments and other loadings are included in the calculation;

(iv) the removal of the current TCR standard that permits the offsetting of severance pay by employer-financed superannuation benefits;

(v) the removal of the current exemption from severance payments for small businesses i.e. those employers who employ less than 15 employees;

(vi) the removal of the current exclusion of casuals from an entitlement to severance pay by extending the application of the TCR severance payments to long-term casual employees and seasonal employees; and

(vii) other matters.

Held: On 18 August, 2003 (173 QGIG 1417) and 15 October 2003 (174 QGIG 741) a full bench of the QIRC gazetted its decision following applications seeking a Statement of Policy to improve the current standards for TCR entitlements.

On application, an award may be amended to include termination of employment, introduction of changes and redundancy clauses in accordance with this Statement of Policy.

This Statement of Policy operates from 1 December 2003 and includes:

A. Termination of employment

* Termination by Employer

In calculating any payment in lieu of notice the minimum compensation payable to an employee will be at least the total of the amounts the employer would have been liable to pay the employee if the employee's employment had continued until the end of the required notice period. The total must be worked out on the basis of:

(i) the ordinary working hours to be worked by the employee; and

(ii) the amounts payable to the employee for the hours including for example allowances, loadings and penalties; and

(iii) any other amounts payable under the employee's employment contract.

* Notice of Termination by Employee

Where a particular award prescribes a different amount of notice for an employee such lesser or greater amount of notice will prevail. This is to accommodate those awards where alternative arrangements prevail.

B. Introduction of changes

* Employer's Duty to Notify

Where an employer **decides** to introduce **changes** in production, program, organisation, structure or technology, that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and, where relevant, their union or unions.

* Employer's Duty to **Consult** over Change

C. Redundancy

* **Consultation** Before Terminations

* Transmission of Business

In the "Transmission of Business" clause, "business" includes trade, process, business or occupation and includes a part or **subsidiary (which means a corporation that would be taken to be a subsidiary under the Corporations Law, whether or**

not the Corporations Law applies in the particular case) of any such business and "transmission" includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

* Severance Pay

Period of Continuous Service	Severance Pay (weeks' pay)
Less than 1 year	nil
1 year but not more than 2 years	4
More than 2 years but not more than 3 years	6
More than 3 years but not more than 4 years	7
More than 4 years but not more than 5 years	8
More than 5 years but not more than 6 years	9
More than 6 years but not more than 7 years	10
More than 7 years but not more than 8 years	11
More than 8 years but not more than 9 years	12
More than 9 years but not more than 10 years	13
More than 10 years but not more than 11 years	14
More than 11 years but not more than 12 years	15
More than 12 years	16

"Weeks' Pay" means the ordinary time rate of pay for the employee concerned:*

Provided that the following amounts are excluded from the calculation of the ordinary time rate of pay: overtime, penalty rates, disability allowances, shift allowances, special rates, fares and travelling time allowances, bonuses and any other ancillary payments.

(*In the instance where commission payments, in whole or in part, are a feature of the Award, then reference to s. 7 of the *Industrial Relations Regulations 2000* offers assistance in the method of calculation to be adopted.)

* Superannuation Benefits

An employer may make an application to the Commission for relief from the obligation to make severance payments in circumstances where:

(a) the employer has contributed to a superannuation scheme which provides a particular benefit to an employee in a redundancy situation; and

(b) the particular benefit to the employee is over and above any benefit the employee might obtain from any legislative scheme providing for superannuation benefits (currently the federal Superannuation Guarantee levy) or an award based superannuation scheme

* Employers Exempted

(a) Subject to an order of the Commission, in a particular redundancy case, Section C – **REDUNDANCY** shall not apply to an employer including a company or companies that employ employees working a total of fewer than 550 hours on average per week, excluding overtime, Monday to Sunday. The 550 hours shall be averaged over the previous 12 months.

(b) A "company" shall be defined as:

(i) a company and the entities it controls; or

(ii) a company and its related company or related companies; or

(iii) a company where the company or companies has a common Director or common Directors or a common shareholder or common shareholders with another company or companies.

Industrial Agreements

For legislative reasons, few Industrial Agreements have not been able to be amended since 1997. This has resulted in many Industrial Agreements containing terms that are obsolete.

On 12 September 2003 the Industrial Registrar notified industrial organisations that the Queensland Industrial Relations Commission had decided to embark on a review of Industrial Agreements.

Subsequently the Commission under section 317(2) of the Act started proceedings of its own initiative relating to the intention to declare Industrial Agreements obsolete and for Industrial Agreements to have effect as awards. On 30 June 2004 the Full Bench handed down its decision.

"In our view it is a matter for the parties to a particular Industrial Agreement to determine whether the terms of that Agreement are best incorporated into an award or a certified agreement. The Principle that we have adopted facilitates the incorporation of the terms of an Industrial Agreement into a new or existing award in order to remove the impediments that would otherwise be caused to that process by General Rulings and Declarations of Policy. The Principle should not be construed as removing the options of making or amending a certified agreement or preferring award making or amendment over certified agreement making or amendment.

From the types of Industrial Agreements that parties have indicated they wish to retain it is apparent that some lend themselves more to incorporation within the terms of an award whereas others would be better dealt with by way of certified agreement. A number of Industrial Agreements are either the sole form of industrial instrument that applies to a group of employees and their employer or, alternatively, are used as the industrial instrument for the purposes of applying the no-disadvantage test under s. 160 of the Act. Examples of these types of Industrial Agreement include the Australian Environmental Pest Managers Association Ltd – Industrial Agreement and the Moreton Hire Service Industrial Agreement. In such cases we are of the view that the terms of the Industrial Agreement would be better incorporated into an award.

In contrast, other Industrial Agreements have only limited application by relating to a few employees in an industry or governing a single condition of employment. A number of Local Government Industrial Agreements would fall into this category. In our view, unless that Industrial Agreement is used for the purposes of s. 160 of the present Act or is the only industrial instrument that applies, then those Industrial Agreements that have limited application may be better suited to incorporation into a certified agreement. We accept, however, that in certain limited circumstances some parties may agree that an award amendment is preferable.

We also see merit in the submission of the Department of Industrial Relations (DIR) that where the terms of an Industrial Agreement are proposed to be incorporated into a common rule award that this would be best achieved by adding a Schedule to the Award. This then limits the amendment to the Industrial Agreement parties and would not affect respondents to the Award that were not party to the Industrial Agreement."

Decisions of the Commission

- **The Australian Workers' Union of Employees, Queensland AND Sun Metals Corporation Pty Ltd**
  (B1776 and B1794 of 2002); 27 August 2003; (2003) 174 QGIG 130

Industrial Relations Act 1999 – s.148 – application for assistance in negotiating by conciliation

Issues: Certified Agreement. Metal Industry. Dispute settlement process. Wage rates increased to AWA equivalent

Background: This application was a continuation of a matter arising from arbitration in April 2003 about a certified agreement being negotiated between the parties. A determination had been made in respect to issues outstanding in the certified agreement negotiations. The employer had argued that increased income provisions in Australian Workplace Agreements (AWAs) rewarded the trust employees had in the company in respect to the development and the implementation of performance based wages increases. The Commission was satisfied however, that regardless as to whether individual performance in the ensuing three years was such as to secure a further increase, those who sign AWAs were infinitely better off. That was seen to be the case even if individual performance declined. In all circumstances, the Commission was of the view that certified agreement salary levels should be equivalent to that of an AWA.

The matter now raised was the differential between the dates when productivity assessed wage adjustments were implemented for employees covered by AWAs

and employees covered by the arbitrated agreement. The employer challenged the Commission's jurisdiction in this matter and proposed that the matter should be dealt with through the dispute settlement process within the proposed certified agreement.

Held: The Commission saw no reason why certification should be delayed and held there was insufficient information available to deal with the dispute about the date when productivity adjustments were to be assessed. The Commission advocated that the parties take up the matter as an interpretation issue or an equity issue within the terms of the dispute resolution process of the new certified agreement. The operative date was agreed to and the Agreement was approved and filed.

- **Moray McIntosh AND Tracy Joy Dare and Philip Arthur Hennessy (As Receivers and Managers) at KPMG;**
- **Maria McIntosh AND Tracy Joy Dare and Philip Arthur Hennessy (As Receivers and Managers) at KPMG**
  (B419 and B420 of 2003); 2 September 2003; (2003) 174 QGIG 120

Industrial Relations Act 1999 – s.276 – application to amend or void contracts

Issues: Unfair contract. Jurisdiction. Public interest.

Background: In 1998 the applicants purchased a motel with financial assistance provided by QIDC tenured by certain securities. On the 29 March 2001, pursuant to a Deed of Appointment, the respondents were appointed as receivers and managers of the mortgaged property and as agents of the applicants. An arrangement was entered into whereby the applicants continued to act as managers of the motel for payment of living expenses. The applicants claimed that the contract entered into on the 29 March 2001 was an unfair contract within the meaning of s.276 of the Act in that they received less than a person performing the same work under the *Boarding House Employees Award – State – (Excluding South-East Queensland)*.

Held: The Commission exercised its discretion under s.331 of the Act to dismiss the application both on merit and in the public interest. It was clear from the provisions of the securities and relevant case law, that the respondents were, at all times, acting as agents of the applicants. Consequently, the arrangement entered into between the applicants and the respondents was not a contract of service or a contract for services and was not an arrangement that could be considered under s.276.

- **Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND Queensland Ambulance Service**
- **Ambulance Service Employees' Award – State**
  (B509 of 2003); 4 September 2003; (2003) 174 QGIG 190

Industrial Relations Act 1999 – s.125 – application to amend award; s.129 – application to flow terms of an agreement into an award

Issues: Wage fixation principles. Insertion of certified agreement rates into an award.

Background: The ALHMWU, Queensland Branch made application, pursuant to s.125 of the Act, to amend wage rates and insert new definitions in the *Ambulance Service Employees' Award – State*. The union requested the Commission to utilise provisions of s. 129 of the Act to include new classifications, definitions and wage rates based upon those which appear in the *Queensland Ambulance Service Enterprise Partnership Certified Agreement 1999*. The application was consented to by the Queensland Ambulance Service.

Held: On approval of the variation, the following matters were taken into account. The application would not result in any employee being paid more than what they were currently paid. The inclusion of the new wage rates would not be a disincentive to bargaining and would not distort relativities. The award was a single award applying to a single employer

therefore there was limited scope for flow-on. The application was consistent with the Commission's principles and not contrary to public interest.

- **The Australian Workers' Union of Employees, Queensland AND Aged Care Queensland Inc. and Another**
- **Diversional Therapy – AWU – Industrial Agreement**
  (B971 of 2003); 4 September 2003; (2003) 174 QGIG 188

Industrial Relations Act 1999 – s.713 (5) – industrial agreement to have effect as an award

Issues: Industrial agreement to have effect as award. Award Review process.

Background: An application was lodged by the AWU, Queensland Branch, pursuant to s. 713(5) of the Act requesting the Commission to decide that the *Diversional Therapy – AWU – Industrial Agreement* had effect as an award. The history of the agreement was considered and it was accepted that the agreement covered the majority of diversional therapists employed in Queensland. With the introduction of the *Workplace Relations Act 1997*, and specifically ss. 504(2) and 504(4), industrial agreements as provided for under the repealed 1990 Act could no longer be made and the term of existing industrial agreements could not be extended by agreement. Section 504(1) of 1997 Act provided that an industrial agreement in force immediately before the commencement of that Act continued to have effect after the commencement. However, such agreements could not be varied and accordingly, the agreement had not been varied to include State Wage Case increases since 1997. The power pursuant to s. 713(5) was considered.

Held: The Commission was satisfied s. 713(5) empowered the Commission on its own initiative or an application by a party to an industrial agreement to decide that an agreement has effect as an award. The Commission held that the 1990 Act effectively allowed the agreement to operate as if it was an award and State Wage Case increases were flowed into the agreement. Parties to the agreement were free to make applications, in accordance with the then provisions of the Act, to vary its terms. Furthermore, it was necessary to make the effect of the document plain within its terms, including that coverage is not extended beyond the current parties to the agreement. Directions, in respect to certain consequential changes, were to be made effective from 4/7/03. The Commission held that the agreement now needed to be considered as part of the Award Review process and a future name to be decided.

- **Helen McCallum AND Lend Lease Development Pty Limited**
  (B500 of 2003); 28 November 2003; (2003) 174 QGIG 1366

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

Issues: Application for re-instatement. Whether gross misconduct. Whether serious misconduct.

Background: The applicant was employed by the respondent as an administration manager. The business of the respondent was to develop parcels of land to be marketed and sold to the public for housing purposes. Demand for the blocks of land exceeded the number of parcels and, as such, details of interest expressed by members of the public in each parcel were recorded and entered onto a computerised database. As a business strategy, the company relied upon the integrity of its process of recording expressions of interest as it offered each block in order of the date in which the first expression of interest was shown by prospective purchasers. However, there were two variations to this process. Staff members and builders were given the opportunity to purchase blocks of land, even though their expression of interest post-dated those of the public. Former staff could not jump the queue once they ceased employment but continued to maintain their place in the list.

Mr E, a sales consultant, had at the time of ceasing employment with the respondent in July 2002, expressed interest in purchasing a parcel of land but his details had supposedly been deleted from the database. In early February 2003, the Project Director Mr C became aware of abnormalities in respect of entries onto the database whereby Mr E's interest in the land had been dated 26 November 2001. The Director met with the applicant regarding the entries pertaining to Mr E during which the applicant denied knowledge of the entries. However, on the 10 February 2003 the applicant reported to Mr C that she had been contacted by Mr E over the weekend which "refreshed her memory as to what happened''. The matters included being directed to backdate an entry on the database for Mr E (the previous entry having supposedly been deleted).

The applicant was immediately suspended from duties with pay, while an internal investigation was conducted by the respondent. On 4 March 2003 the applicant was advised that the investigation of her alleged misconduct had been completed and the company had concluded that she had made five unauthorised amendments to the database which constituted gross misconduct. The respondent terminated her employment, effective immediately, without payment in lieu of notice. The applicant argued that her computer was regularly used by other staff members and a number of employees had knowledge of various passwords, and that once a person logged onto the database, all work done would be identified against the person who first logged on, no matter who did the work.

Held: The Commission held that, on the balance of probabilities, the allegations regarding the unauthorised entries on the database levelled against the applicant were substantiated. The actions of the applicant were a clear breach of company policy. Mr E stood to substantially benefit from these actions had they not been discovered. Procedural fairness and natural justice were provided for and in the circumstances, the decision to terminate the applicant's employment was not harsh, unjust or unreasonable. The gravity of her actions was sufficient to warrant the termination of her employment.

The Commission did, however, find that the process by which the respondent company offered land for sale to the public was tainted in that staff and builders could jump the queue. Taking into account this environment, the Commission found that the actions of the applicant were less than that of gross misconduct and more in line with serious misconduct. As such, the company was ordered to pay the applicant the statutory period in lieu of notice, being three weeks' wages ($1,557.69). The Commission dismissed the application.

- **The Australian Workers' Union of Employees, Queensland AND Mt Isa Mines Limited**
  (B1065 of 2003); 5 January 2004; (2004) 175 QGIG 128

Industrial Relations Act 1999 – s.277 – application for orders

Issues: Certified agreement. Dispute in relations to implementation of new roster. Unreasonable obstruction over rosters.

Background: In June 2003, the Australian Workers Union (AWU) filed an application under s.277 of the Act in relation to its withholding of agreement to the implementation of a new roster for certain MIM employees working in the Hilton and George Fisher Mines. Under this proposed roster, workers would perform a 42-hour week, working four consecutive night shifts (a 4 x 4 roster). Previously, these workers had either performed a 42-hour roster with only two consecutive night shifts (a 2 x 2 roster) or had worked a 52-hour a week roster.

Under the terms of the *Mining Area – Mount Isa Mines Limited – Certified Agreement 1996* (the agreement), MIM was required to obtain the consent of the AWU in the introduction of new roster arrangements. If this consent could not be obtained, any new roster could not be implemented without a finding by the

Commission that the AWU had unreasonably denied its consent. MIM argued that this roster was not new for the purposes of the certified agreement and that the consent of the AWU was not needed. In an *ex tempore* judgment on 14 July 2003, the Commission held that the 4 x 4 roster was a new roster for the purposes of the certified agreement. Accordingly, the new roster could not be implemented without a finding that the AWU had unreasonably withheld its consent to the implementing of the roster.

The AWU submitted that, to the question of what was "reasonable'' for the purposes of the certified agreement, there was no definition and it was a question of degree. A logical, soundly based or defensible position with a valid foundation was required. It argued that the AWU's objections to the roster broadly fell under the headings of "employee needs'' and "health and safety'' and that these issues were:

- the ability of workers to cope with four consecutive night shifts;
- sleep during days off and between night shifts;
- risk from fatigue;
- the impact of the proposed roster on employees' lifestyle, social and domestic duties; and
- the impact of the proposed roster on those involved with the workers – i.e. family and friends.

The AWU also contended that the certified agreement required that each of three categories – employee needs, business needs and occupational health and safety – were met before a new roster could be introduced. It submitted that the approach of balancing the business needs against other concerns was not the correct approach but that each of the criteria had to be satisfied. The AWU conceded that workers were struggling under the 2 x 2 roster but argued that this was not a basis for introducing a new roster with longer periods of consecutive night shifts which would augment the difficulties already being experienced.

MIM argued that there was no question that it had a valid business case for introducing the new roster. It noted that the lost time injuries for the past six months were zero and that there had been no deterioration in this statistic over the past few months. There was also no evidence of an increase in the rates of serious injury.

MIM also contended that employee needs should not be seen simply as employee wishes or desires. The new roster did not cause an increase in time lost by workers from their life outside of work and by, increasing the financial viability of the company it would create greater security of employment. Longer periods on shifts meant fewer transmissions between day and night shift and assisted employees in achieving a better balance between rest time and work time. Further, the proposed roster had no detrimental impact on employees' income. Finally, MIM submitted that a broad approach should be taken when assessing unreasonableness, not a narrow one as suggested by the AWU.

Held: The Commission noted that the term "reasonable'' should be given its ordinary meaning and the reasonableness of refusing to work a particular roster should be viewed objectively. Accordingly, the relevant consideration was whether the grounds for refusal to work the roster were, on an objective basis, reasonable, because the roster did not meet occupational health and safety, business needs or employee needs. Whether the roster met these criteria should be examined within the framework of the certified agreement, and this instrument required that the AWU be open to a best practice approach through ongoing workplace change and that employees participate in this change in return for wage increases and other benefits.

The Commission was satisfied that, as well as meeting business needs, the roster met occupational health and safety needs. In particular, it was satisfied that there was enough evidence to show no deterioration in lost time injury rates, disabling injury rates or near misses. There was also sufficient evidence that MIM had reasonable systems to

monitor these matters as well as the issue of fatigue and its effects on shift workers. The Commission also accepted MIM's submissions that a distinction should be drawn between employee needs and wishes. It also held that a number of the issues raised by the AWU as reasons for not implementing the new roster were also associated with the previous roster.

The Commission dismissed the AWU's claim, holding that consent had unreasonably been withheld, as any disadvantages that would exist under the new roster were balanced by the benefits.

- **Amcor limited t/a Amcor Cartonboard AND Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland AND The Australian Workers' Union of Employees, Queensland**
- **Amcor Cartonboard Certified Agreement 2003**
  (CA879 of 2003); 28 January 2004; (2004) 175 QGIG 448

Industrial Relations Act 1999 – Chapter 6 Part 1 – certified agreements

Issues: Application for certification. Amendment of agreement to delete reference to organisation of employees being a party bound by the agreement. Refusal of organisation of employees to sign agreement after ballot for approval.

Background: This application concerned the certification of an agreement entitled the *Amcor Cartonboard Certified Agreement 2003* (the agreement) under Ch 6, Pt 1 of the *Industrial Relations Act 1999* (the Act). The application for certification stated that the agreement was made by Amcor Ltd t/a Amcor Cartonboard (Amcor), the Automotive, Metals, Engineering, Printing and Kindred Industrial Union of Employees, Queensland (AMEPKIU), the Australian Workers Union of Employees, Queensland (AWU) and the Electrical Trades Union of Employees, Queensland (ETU). However, neither the application nor the agreement was signed on behalf of the ETU.

An exemption exists under s. 156(1) (j) of the Act that states an agreement can be made with an employee organisation, other than an agreement for a new business, if the Commission is satisfied that each employee organisation bound by a relevant award or industrial instrument has been given the opportunity to be party to the agreement but does not want to be a party, or has no members who are to bound. In this case, the *Engineering Award State 2002* bound the ETU. Further, s.151 (1) of the Act requires that where a proposed agreement is amended for any reason, the steps in ss.144 (2) and (3) of the Act must be repeated. However, the Commission has the discretion to determine that the steps need not be repeated if the Commission is satisfied that the proposed agreement was amended only for a formal or clerical reason or in another way that does not adversely affect a relevant employee's interests (s.151(3) of the Act). Therefore, the issues for determination were:

- whether the requirements of s.156 (1) (j) as modified by s.156 (2) had been met with respect to the ETU; and
- whether the agreement could be amended to delete reference to the ETU as a party in the manner sought by Amcor.

Amcor submitted evidence that the ETU had been notified of the intention to negotiate the agreement and of the subsequent hearing into the certification of the agreement. The ETU did not attend the hearing or give any indication that it wanted to be heard in relation to the certification of the agreement.

At the request of the Commission, Amcor also prepared a supplementary affidavit to assist the Commission to determine whether the amendment sought was within the exception in s.151 (3) of the Act. The affidavit showed that of a total of 253 employees eligible to be members of the relevant unions; only 16 were eligible to be members of the ETU. Of these 253 employees, 196 participated in the ballot and of these 150 were in favour of the agreement. In addition, in response to a request from the Commission, Amcor, the AMEPKIU and the AWU indicated that they would be prepared to provide an undertaking

to the effect that the ETU would be afforded rights on the same basis as those which would apply if the ETU was a party to the Agreement. The undertaking would also provide that the status of the ETU as a non-party to the agreement would not be used by any of the parties to the Agreement to impede the capacity of the ETU to represent its members or persons eligible to be members under the Agreement.

Held: The Commission was reasonably satisfied that the requirements of s.156 (1) (j) as modified by s. 156(2) had been met as the ETU had been given a reasonable opportunity to be a party to the agreement and declined to do so. The Commission was also of the view that the amendment to delete the ETU as a party to the agreement was for a formal or technical reason for the purposes of s.151 (3). This was because even if reference to the ETU was not deleted from the Agreement, the Agreement could not as a matter of law, be binding on the ETU. The deletion of the ETU from the agreement ensured that the agreement accurately reflected the legal position with respect to parties to the agreement and persons bound by it.

The Commission concluded that it was probable that even if the ETU was included as a party in the agreement, given the small proportion of employees eligible to be members of the ETU, the outcome of the ballot would not have been any different. Therefore, the deletion of the ETU as a party to the agreement did not adversely affect a relevant employee's interests. Therefore, there was no basis for requiring the parties to the agreement to go to the time and expense of resubmitting the Agreement for approval and conducting a second ballot. Therefore, there was no basis for denying the parties to the agreement their rights to have the Agreement certified.

Accordingly, the Commission was satisfied the ETU had not been denied natural justice or a right to be heard on the application for certification of the Agreement. Both exceptions applied and leave was granted to amend the application. The Commission issued a certificate certifying the amended application subject to the proposed undertakings.

- **The Australian Workers' Union of Employees, Queensland AND Parmalat Australia Ltd**
  (W17 of 2004); 20 April 2004; (2004) 176 QGIG 4

Industrial Relations Act 1999 – s.278 – power to recover unpaid wages and superannuation contribution etc.

Issues: Long service leave. Claim for proportionate amount of long service leave. What constitutes "domestic necessity" under ss. 43 (3) and (4) of the *Industrial Relations Act 1999*.

Background: The applicant was employed by Parmalat Australia Ltd Brisbane from April 1994 until her resignation in June 2003, effective 27 June 2003. The employee's employment with the company was for a period of nine years and two months.

In late January 2003 the employee's husband was made redundant and subsequently, commenced new employment at the Gold Coast. The employee and her husband had been married 22 years and prior to February 2003 had not lived apart. The applicant resigned from her employment with the respondent because of the need to live with her husband and the stress of travelling long distances to and from work. The employee's letter of resignation dated 16 June 2003 records that she was "resigning due to the fact that since moving to the Gold Coast with my husband for his work commitments I am finding the extra travelling to and from the Gold Coast very tiring ...".

Whilst in employment, the employee did not make any request or claim for proportionate payment of long service leave on the ground of domestic necessity or any other ground. However, she did afterwards make enquiries of the employer's pay office as to why such payment had not been made and the matter was referred to the employer's remuneration and benefits manager. The manager ultimately

concluded that the major motivator for the employee's resignation was to "effect a lifestyle change'' and her circumstances did not come within the term "domestic or pressing necessity''.

An application was then brought by the AWU, on behalf of the employee, under s. 278 of the *Industrial Relations Act 1999* for the proportionate amount of long service leave accrued by her during her employment with the employer.

Held: The Commission noted that on the 20 May 2003, the employee had had a discussion with the employer's remuneration and benefits manager, concerning an entitlement to pro rata long service leave on resignation. There was conflicting evidence between the employee and the manager as to what was said during that discussion. The Commission observed that much of the material relied upon by the manager in concluding that the employee's resignation was to "effect a lifestyle change'' was factually incorrect and could not be relied upon. The Commission stated that the manager should at least have given the employee the opportunity to respond to that material before relying on it to form a view as to the reason for the employee's resignation.

The Commission then referred to the four questions set out in *Computer Sciences of Aust. Pty Ltd v Leslie* (1983) 83 AR (NSW) 828

- was the reason claimed for termination one which fell within the section?
- was such a reason genuinely held by the worker and not simply colourable or a rationalization?
- although the reason claimed may not be the sole ground which actuated the worker in her decision to terminate, was it the real or motivating reason for it?
- was the reason such that a reasonable person in the circumstances in which the worker found herself placed might have felt compelled to terminate her employment?

Accordingly, the Commission found that the employee decided to resign her employment with the employer because of a "domestic necessity'' within the meaning of that term in ss. 43 (3) and (4) of the *Industrial Relations Act 1999*. The employee was therefore entitled to a proportionate amount of long service leave and an order for payment of the relevant amount was made.

- **Anthony Elliott AND NC Mart Pty Ltd** (B848 of 2003); 29 April 2004; (2004) 176 QGIG 32

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

Issues: Application for reinstatement. Award terms and conditions.

Background: The applicant accepted an offer of full-time employment with the respondent commencing on18 December 2002. On commencement, he was not provided with written advice as to the nature of his employment and only received verbal confirmation that wages and conditions would be "as per the Award". In February 2003, the business was transferred to a new owner who subsequently advised the applicant he would be required to work a fifty hour week. Mr Elliott lodged an objection to the hours being required of him, requesting a reduction in hours to a thirty-eight hour week, and to other issues that were contentious at the time such as the non-payment of penalty rates for work on public holidays. He requested to see a copy of the Award governing his conditions of employment but the employer did not comply with his request. On the 16 April 2003, the applicant was notified that his status was to be changed to "casual" on sharply reduced hours and a significant altering of his duties. Mr Elliott protested at the reduction of hours to no avail and resigned from his employment. A constructive dismissal application was lodged with the Commission.

Held: The Commission found that the demotion of the applicant from a fifty hour per week full-time position to that of a casual, working significantly less hours was, in effect, termination. This action was an effective repudiation of the contract of employment. The applicant had never sought casual status

and the effect of the change was clearly detrimental to his remuneration and duties he had to undertake. Further, there was a clear lack of proper process by the respondent. The dismissal was held to harsh, unjust and unreasonable and the respondent was ordered to pay the applicant a gross amount of $9808.00 based on sixteen weeks salary.

- **The Electrical Trades Union of Employees of Australia, Queensland Branch AND All State Electrical Services Pty Ltd**
  (B1921 of 2003 and B1922 of 2003); 7 June 2004; (2004) 176 QGIG 321

Industrial Relations Act 1999 – s.74 – application for reinstatement; *Industrial Relations Act 1999* – s.120 – application for a remedy

Issues: Unfair dismissal. Whether for a prohibited reason. Freedom of association. Sections.73 (2) (b) and 104(1).

Background: Two applications were lodged by the ETU on behalf of a member. The first application was made under Ch. 4, Freedom of Association under the Act, seeking an order under s. 120 for the payment of penalty and the reinstatement of the member and compensation for lost wages. The second application was made under Ch. 3 Dismissals seeking an order for reinstatement without loss of remuneration plus compensation. The applicant's employment was terminated following an alleged unauthorised absence from his worksite to attend a union delegates' conference. The ETU claimed the worker had been discriminated against on the basis of his trade union activity having a right within terms of s. 104(1) (m) (i) to attend the conference and as such his dismissal was for an invalid reason under s. 73(2) (b). The union further submitted leave was unreasonably withheld and the onus was on the applicant to establish all required matters.

Held: The union's argument was rejected. The Commission found that while the employee's absence was to carry out a duty as an officer of an industrial association, that absence was not to exercise a right as an officer of an industrial association. There was no right under statute or an industrial instrument to attend a delegates' conference and the employer was under no obligation to grant leave. The Commission was satisfied that leave was not unreasonably refused or withheld given the employer's operational requirements. The Commission held that the employee was not dismissed for other prohibited reasons under ss. 104(1) (a), (h), (k) or (n), nor dismissed for an invalid reason. The worker's employment was terminated due to his unexplained absence and the deceitful way in which he had gone about absenting himself. Although this absence was for the reason of attending the union delegate's conference, his union membership was not in itself a contributing factor to the termination. The employee had not therefore been dismissed for an invalid reason and as he was a probationary employee at the time of his dismissal he could not bring an unfair dismissal application.

- **Deirdre Marie Gomm AND Department of Corrective Services**
  (B45 of 2004); 11 June 2004; (2004) 176 QGIG 319

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

Issues: Jurisdiction. Reinstatement of a public service employee. Whether disciplinary action constituted dismissal. Right of appeal under Chapter 3. *Public Service Act 1996* s. 88(3) (b)

Background: The applicant was demoted, pursuant to s.88 (3) (b) of the *Public Service Act 1996* (PS Act), following investigations into alleged behavioural problems in her supervisory relationship with some employees. This demotion caused a substantial reduction in base salary and loss of penalties and reduction of loadings. The applicant contended the demotion amounted to dismissal thereby giving her the right of appeal before the Commission. The employer's contention was that the demotion was a disciplinary process available to it under the PS Act and that the demotion did not constitute dismissal or termination of

employment which would enliven Ch. 3 of *Industrial Relations Act 1999*. The employer argued that the applicant's employment as a public service officer as defined in ss. 8 and 9 of the PS Act continued, that is, there had been no termination of the officer's employment (as a public service officer).

Authorities were discussed. The applicant contended that recent decisions had changed the view to one that a unilateral, contested change in a contract of employment did constitute dismissal. The respondent argued these changes needed to be differentiated from this matter in the context of the scheme of the PS Act. A main object of the PS Act is to provide for management of and employment of public service employees, (s. 3(b)). A principal of public service employment is to give public service employees a reasonable avenue of redress against unfair or unreasonable decisions (s. 33(k)).

Held: The Commission viewed that these changes did not alter the position that the *Industrial Relations Act 1999* reserves to the Public Service Commissioner any appeal under disciplinary law to discipline persons other than by termination of employment. Whilst termination was not defined in the PS Act, it seemed reasonably clear that "terminate of an officers employment" at s. 80 of the PS Act means termination from the Public Service. The jurisdiction of the Commission with respect to appeals relating to termination of employment is limited to action taken by the employing authority to terminate the employment of persons as an officer or employee of the public service. Section 88 of the PS Act gives the "employing authority'', in this case the Department of Corrective Services, the power to take action about discipline that it considers reasonable in the circumstances. That employing authority may reduce classification level and duties, transfer to other employment, forfeit or defer remuneration increments, reduce remuneration and impose penalties on remuneration. The application for reinstatement filed with the Commission was within the timeframe proscribed for an appeal to the Public Service Commissioner. The Commission was confident, under current circumstances and in light of the referred to decisions, appeal provisions of the PS Act would not now be denied to applicant.