# CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF INDUSTRIAL APPEAL COURT, INDUSTRIAL COMMISSION AND INDUSTRIAL MAGISTRATES CONTAINED IN VOL. 72 PART 1, SUB PART 6.

Note: [1]Denotes Industrial Appeal Court Decision. [3]Denotes Commission in Court Session Decision.
[2]Denotes Full Bench Decision. [4]Denotes Decision of President.

Page

ABSENCE WITHOUT LEAVE—

Appeal against decision of Director of Industrial Training Division (DET) *re* refusal to cancel Apprenticeship agreement—Appellant Employer argued misconduct justified termination—Commission adopted previous decision relating to manner of proceedings for these appeals—Commission reviewed authorities and found, having regard for the penalty applied, that there was no reason to interfere with the decision—Dismissed—Brian Gardner Motors Pty Limited *v.* G. Walters—George C.—18/12/91—Automotive ..... 180

Conference referred *re* termination of employee for alleged absenteeism—Applicant Union claimed dismissal was unfair, that employee was not given opportunity to adequately respond and sought reinstatement without loss of accrued rights and entitlements—Respondent argued that repeated warnings both verbally and written were given to the employee over continued absences and unsatisfactory performance at work and therefore termination was justified—Commission found on evidence in favour of Respondent—Dismissed—F.M.W.U. *v.* Hon. Minister for Health—No. CR700 of 1991—Gregor C.—21/11/91—Health ..... 420

ACT—INTERPRETATION OF—

Claim *re* contractual entitlements—Applicant claimed question of loan was not an industrial matter and sought outstanding salary and annual leave benefits—Respondent argued that employee was under obligation to pay balance of "personal loan" and therefore negated claim—Commission found that loan was an obvious way of dealing with a potential cause of deteriorating work performance and considered it a matter within its jurisdiction—Commission found in favour of Applicant however on receipt of decision, proposed order was no longer required—Discontinued—Oughton C. *v.* Environmental Industries—No. 918 of 1991—Salmon C.—4/11/91 ..... 154

Application to vary an order *re* inspection of documents—Preliminary Reason Applicant argued it had not had time at inspection of documents to record contents and sought copies—Respondent argued Commission had no power to order copy of documents to be produced—Commission reviewed authorities and found Regulation 80 could not write down the powers of the I.R. Act and that it would not be an onerous imposition on the Respondent—Granted—C.M.E.U. *v.* R.R.I.A.—No. 41 of 1992—Gregor C.—24/1/92—Iron Ore ..... 432

Conference referred *re* abolition of rostered day off—Applicant Union claimed that employees had been pressured into signing consent forms, actions were contrary to prior agreement between the parties and sought that the signed documents be returned to the said employees—Respondent employer argued that company was following provisions outlined in the award to change the work cycle—Commission reviewed the meaning of equity and found on evidence the respondent had unfairly exercised its rights under the award and had acted against public interest by ignoring State Wages Policy—Granted—S.D.A.E.A. *v.* K-Mart Discount Stores—No. CR525 of 1991—Salmon C.—3/1/92—Retail ..... 423

[2]Appeal against decision of Commission (71 WAIG 2869) *re* variation of award—Full Bench granted leave to intervene to committee members of Appellant Union, the Union and another Union—Respondent argued individual Appellants had no standing to file the appeal, hence it was incompetent or the Full Bench had no jurisdiction and sought that the Full Bench refrain from hearing the matter—Full Bench found separate application to refrain from hearing was incompetent—Full Bench reviewed Union rules and found on evidence nothing to suggest that the appeal was instituted by the Union with the necessary authority—Dismissed—F.L.A.I.E.U. *v.* Burswood (Management) Ltd—No. 1643 of 1991—Sharkey P., Halliwell S.C., Salmon C.—5/2/92—Racing and Gaming ..... 212

[2]Appeal against decision of the Commission (71 WAIG 1984) *re* review of prohibition notice under Occupational Health, Safety and Welfare Act—Appellant argued Commission erred in taking into account its own knowledge of motor vehicles, failed to satisfy itself that there was a serious and imminent risk, and failed to give proper consideration to the term "practicable" and erred in not finding the "duty of care" was fulfilled—Full Bench reviewed authorities, interpreted the Occupational Health, Safety and Welfare Act, "serious and imminent risk", and found on review of the evidence that there was no miscarriage of the Commission's discretion—Dismissed—Wormald Security Australia Pty Ltd *v.* Peter Rohan, D.O.H.S.W—Appeal No. 1161 of 1991—Sharkey P., George C., Beech C.—10/3/92—Security ..... 477

Conference referred *re* dispute over failure to adhere to award provisions—Applicant union claimed Respondent had breached award by abolishing substantive positions without prior consultation with union and sought variation to award to remove ambiguities—Respondent argued Commission had no power to deal with matter and declared dispute had either been resolved or rather that it came under exclusive province of Industrial Magistrate—Respondent further argued dispute was not an industrial matter but one of managerial prerogative—R.C.B. reviewed powers as given to it by the I.R. Act and authorities and determined that its powers under S.44 were limited in that orders issued by it could only be made on an interim basis and the R.C.B. was not empowered to vary the award as sought—Dismissed—R.O.U. *v.* W.A.G.R.C.—No. RCB CR8 of 1991—Fielding C., Thompson/Kemp—6/3/92—Railways ..... 628

Application for alleged denied contractual entitlements and order that dismissal was unfair—Applicant argued that the Order in a first application issued by the Commission did not reflect the Applicant's wish to withdraw the application and also its issuance was unknown—Respondent raised the preliminary point that the matter had already been before the Commission and finalised—Commission found no difference between the substance of the original and the instant application therefore discontinued the application under S.27(i)(a) as opposed to S.23—Brailey B. *v.* Mendex Pty Ltd Trading as Mair and Co Maylands—No. 1300 of 1992—Beech C.—16/3/92—Real Estate—Salesperson ..... 850

Application for orders *re* validity of election of Occupational Health and Safety representative—1st Respondent claimed that election of Health and Safety representative were invalid due to breach of relevant sections of the OHSW Act—2nd Respondent argued that correct procedures as outlined in a working party document, made up by Chamber of Commerce and Industry Health Care Management Committee and representatives from F.M.W.U., Salaried Officers Association and Australian Nursing Federation were followed—Commission found that agreed election procedure did not comply with OHSW Act and no injustice was created as a result of proper application to Section 29 of the OHSW Act—Commission further commented on the Commission's arbitral role on Application by Commissioner for Occupational Health, Safety and Welfare—Ordered and Declared Accordingly—Commissioner for Occupational Health, Safety and Welfare *v.* F.M.W.U. and Another—No. OHSW 4 of 1991—Gregor C.—25/3/92—Nursing ..... 932

[4]Application for orders *re* observance of Union Rules issued by consent—President issued Reasons to express view that Registrar would not correctly exercise his discretion under Section 69(1) to conduct an election and would not have power to do so in the face of orders or an inquiry by the President pursuant to Section 66—Ordered Accordingly—Power A.G. *v.* P.G.E.U. and Another—Nos. 1866 & 1867 of 1991 and 339 of 1992—Sharkey P.—23/3/92—Unions ..... 769

Application to vary award *re* recognition of conscience—Applicant argued Unions were not of God and on the basis of the Constitution, sought exemption from dealing with the Respondent Union under the award—Respondent Union argued granting application would affect scope of award and the matter was broad such as to require an application pursuant to Section 50 of the Act—Commission reviewed authorities, including that relating to the Constitution, I.R. Act and found that though the Applicant's belief was sincere it was not to be persuaded that the legitimate recognition of registered organisations and their role by Parliament should be put to one side—Dismissed—Concept Products *v.* F.P.F.A.I.U.—No. 1820 of 1991—Beech C.—13/4/92—Furniture ..... 1137

CUMULATIVE DIGEST—*continued*

Page

ACT—INTERPRETATION OF—*continued*

[2]Applications for alteration of Union Rules *re* Name and Eligibility for Membership—Objection withdrawn after amendment to application—Full Bench reviewed authorities and used expressio unius rule to find that the new name clearly indicated that the organisation was of employees—Granted—W.A.F.B.E.U.—No. 1256 of 1991—Sharkey P., Kennedy C., Parks C.—11/2/92—Emergency Services ..... 984

Appeal against decision of Director of Industrial Training division (DET) *re* suspension of apprenticeship—Appellant Employer argued that due to number of absences and unsatisfactory attitude to work apprenticeship suspension was justified—Commission adopted previous decision relating to the manner of proceedings of these appeals—Commission reviewed Industrial Training Act 1975 and having considered all material before it found no grounds to interfere with decision—Dismissed—Christopher John Boon T/A Bernie's Panelworks *v.* Doulis R.R.—No. 636 of 1990—George C.—16/4/92—Motor Vehicle ..... 1213

[2]Question of law referred to Full Bench *re* whether a selection process agreed between the parties was contrary to Section 80Y of the I.R. Act as vacancies in promotion positions were not being advertised as they arose—Full Bench reviewed I.R. Act and found that the words were plain and that the existing process was ultra vires the Act—Commissioner expressed view that Section 80X and 80Y did not fetter managerial prerogative—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. C579A of 1991—Sharkey P., Fielding C., Negus C.—7/4/92—Emergency Services ..... 981

[2]Application for a declaration that Union's Rules relating to qualification for membership and prescribed offices are the same as for the Federal Counterpart Body and alteration of Rules—Applicant argued Full Bench should take a broad approach when comparing rules and that it was not intended to be an arithmetic exercise—Full Bench reviewed I.R. Act, Union Rules and found qualifications for membership were not substantially or fundamentally the same, as Section 71(2), the I.R. Act was not satisfied then the application with respect to offices could not be granted and the rule change was a matter for the Registrar—Dismissed—A.P.E.—No. 1583 of 1991—Sharkey P., Halliwell S.C. , Negus C.—4/6/92—Unions ..... 1295

[4]Application for orders *re* breach of union rules—Applicant argued that articles and use of union resources for the production and distribution of electoral material were designed to give the Respondent an electoral advantage over the Applicant, was a gross abuse of union resources, breached the rules of the Union and sought *inter alia* orders for the election to be declared void and a new election be called—President allowed Counsel to appear for the Union President as intervener and the Union—Respondent argued matter of advertisement in publication was not within the President's jurisdiction and that he was not the proper Respondent—President reviewed I.R. Act, Union Rules, matters of self incrimination of witnesses, the definition of irregularity, whether the President was bound by the decisions of the High Court, the relationship between the publication editor, the Union Secretary and the Union President, allegations made in the article and found that there was jurisdiction and power to make orders under Section 66 of the I.R. Act based on the findings of irregularity on proven breaches of the rules—President found it was the misuse of resources by one party when they were not available to be so used by the other parties which was at the seat of the irregularity under the rules—President reviewed further authorities and found the equity, good conscious and substantial merits of the cases as well as the interests of the union and its members were best served by declaring null and void the election and ordering a new election—In Supplementary Reasons President dealt with submissions as to vacating the senior officers position and consequential orders—President found that as the election was null and void, offices were vacant and ordered senior officers be deemed to hold office until completion of election with the Union President's power limited—In further Supplementary Reasons President dealt with further consequential matters including an emergency committee meeting and appeal rights—President gave reasons for various interim orders—Ordered Accordingly—Dornan B.A. and Others *v.* Harken E.J., President SSTU and Another—No. 1607 of 1991—Sharkey P.—31/3/92, 13/4/92, 16/4/92 and Others—Unions ..... 1008

ALLOWANCES—

Conference referred *re* claim for asbestos eradication allowance—Applicant Union claimed that work performed by employees was eligible for allowance as prescribed in award—Commission found that claim fell within the allowances principle and asked parties to draft an order to reflect payment for work done on actual eradication only—Order Not Issued—A.B.L.F. *v.* Hon. Minister for Works and Services—No. CR393 of 1989—Halliwell S.C.—23/11/89—Construction ..... 409

Application to vary award *re* Hours, by consent and Rates of Pay and Allowances—Parties sought to resolve dispute over interpretation of certificate allowances—Commission reviewed evidence from both parties as to an appropriate allowance, fixed a maximum amount to be applied and declared that salary maintenance if to be paid, should be applicable to all employees who have been receiving the two allowances and be done administratively—Granted in Part—W.A.P.N.A. *v.* Hon. Minister for Health—No. 1336(B) of 1990—Negus C.—13/8/91—Health ..... 550

Conference referred *re* claim for field allowance—Applicant Union claimed that extreme conditions under which work was to be performed in the field and the change in the method of work justified an allowance—Respondent argued that there had not been a significant net addition to work value before any allowance could be paid under the allowances Principle—Commission found on evidence and from inspections that the work which was subject to application was different in circumstances to that which was compensated for in the award and thus in line with the Principles—Granted—A.M.W.S.U. *v.* Newcrest Mining Limited—No. CR728 of 1991—Gregor C.—12/3/92—Mining ..... 875

Conference referred *re* claim for allowances—Applicant Unions claimed that work performed by employees was eligible for allowances—Commission reviewed authorities, found an order should issue and gave reasons therefore—Granted—M.E.W. and Others *v.* John Holland Pty Ltd and Others—Nos. CR755 of 1991 & CR7 of 1992—George C.—26/3/92 ..... 879

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

Conference referred *re* claim for an all-purpose allowance—Applicant union claimed that changes that had occurred in the system of work of employees and the changing technology warranted the payment of an allowance—Respondent argued that the carpenter locksmith worked in a narrower field and were less trained than a tradesperson locksmith—Commission found on evidence that although the nature of the work was changing the Applicant was not able to show under strict test of the Wage Fixing Principles that the application should be granted—Dismissed—C.M.E.U. *v.* B.M.A.—No. CR490 of 1991—Beech C.—12/3/92—Building ..... 878

Application to vary award to more accurately reflect current conditions of employment—Applicant Union sought to amend salaries provision for overtime, redeployment of officers and severance payment in case of redundancy—Respondent sought adjournment pending further discussions of above matters—Parties reached agreement on provision for part-time employment, hours of attendance, allowances and leave of absence—Commission was satisfied that changes were within the ambit of State Wage Principles and reflected standard Public Service conditions—Granted and Adjourned Sine Die—C.S.A. *v.* Joint House Committee of Parliament of W.A.—No. 343 of 1991—Fielding C.—22/5/92—Public Administration ..... 1330

ANNUAL LEAVE—

Applications to vary award *re* 1st and 2nd SEP and 2.5% Wage Adjustments and Minimum Rates Adjustments—Commission decided matters of Annual Leave, Sick Leave, Contract of Service, Probationary Clause, Apparel, Shortages and Change Money and Training Leave—Commission reduced time between operative dates in deference to a reduced initial increase in wages by employers—Ordered Accordingly—T.W.U. *v.* Portius Pty Ltd t/a Flash Foods Canteen and Others—No. 1713 of 1991 (R2) and 1714 of 1991—Halliwell S.C.—17/1/92—Transport (Mobile Food Vendors) ..... 361

CUMULATIVE DIGEST—*continued*

Page

APPEAL—

Appeal against decision of Director of Industrial Training Division (DET) *re* refusal to cancel Apprenticeship agreement—Appellant Employer argued misconduct justified termination—Commission adopted previous decision relating to manner of proceedings for these appeals—Commission reviewed authorities and found, having regard for the penalty applied, that there was no reason to interfere with the decision—Dismissed—Brian Gardner Motors Pty Limited *v.* G. Walters—George C.—18/12/91—Automotive ..... 180

[2]Appeal against decision of Commission (71 WAIG 2655) *re* redundancy—Appellant argued appeal had identical grounds as to jurisdiction as a matter before the Industrial Appeal Court and sought adjournment—Full Bench found both parties would suffer injustice if the matter was heard at the time—Granted—Gromark Packaging Pty Ltd *v.* F.M.W.U.—Appeal No. 1568 of 1991—Sharkey P., Negus C., George C.—31/1/92—Packaging ..... 215

[2]Appeal against decision of Commission (71 WAIG 2869) *re* variation of award—Full Bench granted leave to intervene to committee members of Appellant Union, the Union and another Union—Respondent argued individual Appellants had no standing to file the appeal, hence it was incompetent or the Full Bench had no jurisdiction and sought that the Full Bench refrain from hearing the matter—Full Bench found separate application to refrain from hearing was incompetent—Full Bench reviewed Union rules and found on evidence nothing to suggest that the appeal was instituted by the Union with the necessary authority—Dismissed—F.L.A.I.E.U. *v.* Burswood (Management) Ltd—No. 1643 of 1991—Sharkey P., Halliwell S.C., Salmon C.—5/2/92—Racing and Gaming ..... 212

[1]Appeal against decision of Full Bench (71 WAIG 903) *re* dismissal of appeal against order that employer pay for working time lost during strike action—Industrial Appeal Court reviewed evidence and authorities and found that it was incumbent upon the Full Bench to consider whether there was any evidence to support the finding of the Commission that there were "genuine and reasonably health concerns about safety" not in terms of general apprehension of safety—I.A.C. found as there was no evidence to support such a finding then there was no need to examine further grounds of appeal—There was further no compliance with award provisions as to dispute resolution or safety code procedures—Upheld—Hamersley Iron Pty Ltd *v.* C.M.E.U.—IAC Appeal No. 4 of 1991—Rowland J, Franklyn & Nicholson JJ—17/12/91—Iron Ore ..... 461

[2]Appeal against decision of the Commission (71 WAIG 1984) *re* review of prohibition notice under Occupational Health, Safety and Welfare Act—Appellant argued Commission erred in taking into account its own knowledge of motor vehicles, failed to satisfy itself that there was a serious and imminent risk, and failed to give proper consideration to the term "practicable" and erred in not finding the "duty of care" was fulfilled—Full Bench reviewed authorities, interpreted the Occupational Health, Safety and Welfare Act, "serious and imminent risk", and found on review of the evidence that there was no miscarriage of the Commission's discretion—Dismissed—Wormald Security Australia Pty Ltd *v.* Peter Rohan, D.O.H.S.W—Appeal No. 1161 of 1991—Sharkey P., George C., Beech C.—10/3/92—Security ..... 477

[2]Appeal against decision of Industrial Magistrate (71 WAIG 2161) *re* unproven breach of award—Appellant argued Industrial Magistrate had erred in giving weight to the employees evidence and that the lack of findings was inconsistent with determinations made—Full Bench reviewed authorities and found the Industrial Magistrate was unable to make a finding of fact as he was unable to accept the evidence of one lot of witnesses in preference to the others and that the Complainant had not therefore established any of the facts in dispute—Dismissed—F.C.U. *v.* Brocklebank Pty Ltd Trading as Kwinana Lodge Hotel—Appeal Nos. 1170, 1171 and 1172 of 1991—Sharkey P., Halliwell S.C., Negus C.—14/2/92—Hotels ..... 486

[2]Appeal against decision of Commission (71 WAIG 2397) *re* denied contractual entitlements—Appellant argued Commission failed to make primary findings of fact that a decision had occurred and that the contract of service had terminated as a result of the Respondents' failure to comply with an implied duty—Appellant further argued the Commission misdirected itself as to burden of proof and the Appellant's defence—Full Bench reviewed authorities and found Commission's description of the burdens whilst not accurate, was not in error—The evidence for the Appellant was rejected in circumstances where demeanour was implicitly involved and there was no palpable error in so doing—Full Bench further found Commission was entitled to rely on correspondence of the Appellant—Dismissed—CFA Corporate Finance Associates Pty Ltd *v.* Yeoward M.I.—Appeal No. 1453 of 1991—Sharkey P., Negus C., Gregor C.—9/3/92—Finance ..... 474

[1]Appeal against decision of Full Bench (71 WAIG 2024) dismissing Appeal against decision of Commission *re* alleged unfair dismissal—Employee subject of original proceedings was summarily dismissed for assaulting a patient—Section 90(2) of I.R. Act, 1979 limits right of appeal to Industrial Appeal Court to grounds that decision is erroneous in law—In this case the grounds of appeal assert that there was no credible evidence to support Respondent's allegation that subject employee had assaulted patient—Industrial Appeal Court found the original evidence before the Commission was capable of being accepted and was not inherently unlikely—Further, once there is evidence which is credible and is capable of belief, then error of law cannot be established—Dismissed—F.M.W.U. *v.* Board of Management Narambeen District Hospital—IAC Appeal No. 11 of 1991—Rowland J., Franklyn & Nicholson J.J.—25/2/92—Health ..... 471

[2]Appeal against decision of Commission (71 WAIG 2616) *re* dismissed claim for reinstatement and contractual entitlements—Respondent argued there was no unfair dismissal because there was no dismissal and that the real dispute was over quantum of pay owing—Full Bench assessed evidence and determined that it was not possible to say Commission at first instance did not take proper advantage of or misused its advantage in seeing the parties—Full Bench further found the Commission's finding that there was a unilateral termination of the contract which did not constitute a dismissal was not exceptional—Dismissed—Gould J. *v.* Wensley Nominees Pty Ltd C/- Bus Stop Coffee Lounge—Sharkey P., Negus C., Kennedy C.—19/3/92—Retail Food ..... 684

[2]Appeals against decision of Industrial Magistrate *re* Breach of Award—Appellant argued Industrial Magistrate erred in fact and in law in finding Appellant was bound by Award—Full Bench found reasons were those given as recorded on transcript rather than extempore decision—Full Bench reviewed authorities, common object test and found grounds relating to "industry" whilst made out were not fatal—However Full Bench found Industrial Magistrate erred in purporting to convict the Appellant and vary decision accordingly—Upheld in Part—Burswood Executive Health Centre *v.* F.M.W.U.—No. 1145 of 1991—Sharkey P., Coleman C.C., Kennedy C.—19/3/92—Health & Fitness ..... 687

Appeal against decision of Director of Industrial Training division (DET) *re* suspension of apprenticeship—Appellant Employer argued that due to number of absences and unsatisfactory attitude to work apprenticeship suspension was justified—Commission adopted previous decision relating to the manner of proceedings of these appeals—Commission reviewed Industrial Training Act 1975 and having considered all material before it found no grounds to interfere with decision—Dismissed—Christopher John Boon T/A Bernie's Panelworks *v.* Doulis R.R.—No. 636 of 1990—George C.—16/4/92—Motor Vehicle ..... 1213

[2]Appeal against decision of the Commission (71 WAIG 1912) *re* denied contractual entitlements—Appellant argued Commission erred in finding the contract of employment was from year to year and in not finding that a reasonable notice period was implied and given—Appellant further argued Commission erred in calculating the value of shares or not writing off bad debts against the shares in determining additional salary—Full Bench reviewed authorities and found on the evidence that on none of the submissions or any of the grounds did the Commission err in law or in fact and no reason to substitute the decision at first instance—Dismissed—BNZ North Ltd *v.* Breeze D.L.—Appeal No. 981 of 1991—Sharkey P., Salmon C., George C.—5/5/92—Finance ..... 1268

[2]Appeal against decision of Industrial Magistrate (71 WAIG 3009) *re* breach of award—Appellant argued that work performed by the employee was not that of an electrical fitter other than for a miniscule time and the Industrial Magistrate had erred in assessing the evidence—Full Bench reviewed definitions, award, found allowance was for the holding of the qualification and that it was opened on the evidence for the Industrial Magistrate to find as he did—Dismissed—Infrapulse Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 1697 of 1991—Sharkey P., Kennedy C., Parks C.—5/6/92—Electrical Manufacturing ..... 1285

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeals against decision Industrial Magistrate remitted from Industrial Appeal Court for further hearing (71 WAIG 2259) *re* breach of Award—Appellant argued Industrial Magistrate failed to make findings as to the amount actually paid and whether those amounts were as particularised or not more than those amounts—Respondent argued that to establish that the employee earned a certain amount per week did not falsify the particulars supported by her evidence—Full Bench found without more evidence as to what was received and due on a weekly basis it was not possible to find the figures alleged as underpayments on balance of probabilities—Upheld and Quashed—Como Investments Pty Ltd *v.* McCorry G.—Appeal No. 1133 of 1990—Sharkey P., Fielding C., George C.—5/5/92—Restaurants & Catering ..... 1282

[1]Appeal against decision of the Commission (71 WAIG 582) *re* issuance of award—Appellant argued Commission erred in criticising its conduct in retiring from an industrial agreement thus having regard for irrelevant considerations, that there had been procedural unfairness, a denial of natural justice, that Section 26(3) of I.R. Act had been breached, that the Commission had miscarried in its exercise of its discretion and sought that the decision be quashed—The Hon. Minister, intervening, argued the Commission had dealt with the award as a whole, notwithstanding the assessment of a number of aspects, as it was entitled to do—Full Bench reviewed authorities and found *inter alia* the application was clearly an application for a new award, the Commission was entitled to place significant weight on the First Award Principle and was bound to give great significance to all existing rates and conditions of employment including those evidenced by an award or formal agreement and those more informally added as terms and conditions—Full Bench found the defacto principle was no more than part of the rationale of the application of the First Award Principle and the Commission's reliance on it was not in error—Full Bench found that a statement made by the Commission was not the decision under appeal and represented no fatal flaw—Full Bench found Comparative Wage Justice Principle achieved the same result as the First Award Principle and its application was therefore not in error—Full Bench found the retirement from the Agreement clearly became part of the equity, good conscious and substantial merits of the matter, the Commission was right to have regard to this and make findings in relation to it and that the submission that it was not an industrial matter was erroneous—Full Bench found there was no miscarriage of the discretion of the Commission established in accordance with the authorities in House *v.* King, there was no procedural unfairness or denial of natural justice in relation to the so called statement, in relation to Section 41 of the I.R. Act or any feature of the proceedings and there was no consideration of irrelevant matters—Dismissed—R.R.I.A. v- A.M.W.S.U. and Others—Appeal No. 436 of 1991—Sharkey P., Coleman C.C., Gregor C.—20/12/91—Iron Ore ..... 25

[2]Appeal against decision of the Commission (71 WAIG 2411) *re* dismissed applications for reinstatement on the grounds of unfair dismissal—Appellant argued *inter alia* Commission erred in finding that the Respondent had discharged the evidentiary onus of proof that misconduct had occurred and failed to determine central issue of fairness of the dismissals—Full Bench reviewed authorities and found there was ample evidence to find as the Commission did, there was no misuse of the advantage of seeing witnesses and observing their demeanour and no error in the exercise of the Commission's discretion—Dismissed—F.M.W.U. *v.* Board of Management, St John of God Hospital, Bunbury—Appeal No. 1352 of 1991—Sharkey P., Coleman C.C., Halliwell S.C.,—4/6/92—Health ..... 1274

[2]Application to expedite hearing of an appeal against the decision of the Commission *re* dismissed application to vary award—Appellants argued if appeals were not heard before Anzac day then they might lose the benefits the appeal might bring—Full Bench refused appearance by Counsel—Full Bench reviewed authorities and found that it was necessary for the Appellant to establish that the interests of justice were served by the expedition occurring—Full Bench further found that the Appellant represented only some of the employers in the industry and that they would not lose their appeal rights if the claim is not granted—Full Bench granted substituted service—Dissenting Member gave reasons for finding in favour of Appellant—Ordered Accordingly—Stamco Pty Ltd and Others *v.* S.D.A.—No. 453 and 454 of 1992—Sharkey P., Fielding C., Parks C.—8/5/92—Retail ..... 1279

[1]Appeal against decision of Full Bench (71 WAIG 764) *re* claim of unfair dismissal—Appellant argued Full Bench erred in law when it held that the true construction of the Federal award applicable to the Appellant's employment rendered invalid Section 29 of the I.R. Act 1979 and that the reasoning in Gersdorf's Case was wrong—IAC reviewed authorities and found there was a line of cases including decisions of courts of the highest authority in which like views had been expressed regarding similar awards and legislation and that the considerations applying to the appeal were identical to those resolved in Gersdorf's Case—Dismissed—Martindale I.E. *v.* British Petroleum Refinery—IAC Appeal No. 17 of 1991—Rowland J., Walsh J., Ipp J.—4/5/92—Petroleum ..... 1263

[1]Appeal against decision of President (72 WAIG 698) *re* interpretation of Union Rules over filling of a vacant union office—IAC reviewed rules and found overall thrust was that if a vacancy was to be filled it was to be filled by an election and that was consistent with the Reasons of the President in Mellor *v.* Horn—Dismissed—Carter L.B. *v.* Drake M.A.—Appeal No. 19 of 1991—Rowland J., Ipp J., Owen J.—11/5/92—Unions ..... 1266

[1]Application to lift stay of execution of Interim Order *re* union resolution and award variation negotiations pending Appeal to IAC—IAC Judge found it should be slow to refuse the lifting of a stay where the simple lodging of an appeal can stifle interim or interlocutory relief given after a hearing when the main dispute is only a few weeks away—Granted—Carter L.B. and Others *v.* Green E.M. and Others—IAC No. 1 of 1992—Rowland J.—4/2/92—Unions ..... 210

APPRENTICES AND JUNIORS—

Appeal against decision of Director of Industrial Training Division (DET) *re* refusal to cancel Apprenticeship agreement—Appellant Employer argued misconduct justified termination—Commission adopted previous decision relating to manner of proceedings for these appeals—Commission reviewed authorities and found, having regard for the penalty applied, that there was no reason to interfere with the decision—Dismissed—Brian Gardner Motors Pty Limited *v.* G. Walters—George C.—18/12/91—Automotive ..... 180

Appeal against decision of Director of Industrial Training division (DET) *re* suspension of apprenticeship—Appellant Employer argued that due to number of absences and unsatisfactory attitude to work apprenticeship suspension was justified—Commission adopted previous decision relating to the manner of proceedings of these appeals—Commission reviewed Industrial Training Act 1975 and having considered all material before it found no grounds to interfere with decision—Dismissed—Christopher John Boon T/A Bernie's Panelworks *v.* Doulis R.R.—No. 636 of 1990—George C.—16/4/92—Motor Vehicle ..... 1213

AWARDS—

Application for a new award—Applicant submitted position of objector had changed since preliminary matter ( WAIG )—Respondents and CWAI intervening argued to apply construction conditions to factory operations would be unfair, inequitable and possibly excessive compared with other awards—Commission found in applying First Award Principle the major players in the industry applied construction rates and consented to the award without coercion—There was no flow on possibly—Commission however found that in some factories a few construction conditions were not appropriate—Granted in part—OPDU *v.* Gardner Brothers and Perrott (WA) Pty Ltd—No. A33 of 1987—Halliwell S.C.—7/5/91—Industrial Spraypainting and Sandblasting ..... 65

Application for a new minimum rates award by consent—Parties sought to replace another award insofar as it bound the Applicant employer and to increase rates in accordance with the 4%—2nd Tier Principle and the Structural Efficiency Principle 1989—Commission found award would result in considerable flexibly improvements and did not offend Wage Principles—Commission amended term of award—Award Varied—Burswood Resort (Management) Ltd *v.* WATAEA—No. A10 of 1991—Kennedy C.—6/12/91—Casinos ..... 58

Application to vary Award *re* proposals to extend maximum hours for casuals as a special case—Respondent Union opposed claim and proposed modified definition of casual worker and argued that proposed changes would be used to make inroads into levels of permanent employees—Commission deemed that concerns of employees were a matter to by dealt with according to award provision and not by reconsidering proposed changes relating to casual employees—Commission refused no extra claim clause—Granted—Foodland Associated Limited *v.* Shop, Distributive and Allied Employees' Association—No. 1222 of 1991—Salmon C.—3/12/91—Retail ..... 114

CUMULATIVE DIGEST—*continued*

Page

AWARDS—*continued*

Application to vary award *re* removal of Classification Level from "Area and Scope" clause to correct an alleged error when the award was issued—Respondent argued no position in the Dept. of Marine and Harbours covered by the Award had been classified level 4 as a result of Broadbanding Classification—CSA intervened and argued that such classification were already covered by CSA Agreements and Awards—The PSA reviewed principles of industrial coverage and found it did not have the benefits of submissions and evidence so as to determine the matter and adjourned it—On hearing further submissions PSA found that CSA rules precluded coverage of employees already covered by an award and therefore the objection failed—PSA found Applicant's claim had merit—Granted—FCU *v.* W.A. Coastal Shipping Commission & Others—No. P24 of 1990—Kennedy C. PSA—16/7/91—Port Authorities ..... 91

Application to vary award by consent—Parties sought an increase of 2.5% in wage rates pursuant to State Wage Decision June 1991—Commission raised question of commitment and was satisfied that the Principle criteria had been met and variations sought should issue—Granted—A.W.U. *v.* James Hardie and Co Pty Ltd—No. 1562 of 1991—Beech C.—19/12/91—Fibre Cement Manufacture ..... 308

Application to vary award *re* Hours of Duty, Overtime, Transfers, Travelling on Brigade Business and Relieving—Parties sought to remedy deficiencies in the expression in the award of obligations and entitlements—Union argued only against changes to Relieving Clause saying it should be tackled administratively—Commission later determined that Applicant employer had not discharged onus to make a finding that the Respondent had breached an agreement made—Commission found however where the is no expense from utilisation of accommodation then no entitlement arose—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. 797 of 1991—Kennedy C.—14/11/91 and 29/1/92—Emergency Services ..... 309

[3]Applications to vary Awards *re* Second S.E.P. increase, Broadbanding, First Minimum Rates Adjustment and 3% Allowance Adjustment as a Special Case—Respondent argued no wage increase other than S.E.P. was justified without a proper work value exercise—Respondent further argued claims to adjust shift loadings and wages of juniors were comparative conditions justice arguments and proscribed by the Principles—Commission found Respondents' arguments similar to original matter where they were not accepted and that SEP and MRA claims should be granted—Commission refused claim to *re* align junior wages under the Inequities Principle, found penalty rate claims were outside SEP and no special circumstances to grant retrospectivity—In Supplementary Reasons Commission gave reasons for issuance and addressed matters of payment of wages, accrual of annual leave, Part-time and Training Leave—Granted in Part—T.W.U. *v.* Central Districts Bakery and Others—No. 1037 and 1038 of 1990(R2)—Halliwell S.C., Salmon C., Gregor C.—14/11/91 and 21/1/92—Bakery ..... 223

Applications to vary award *re* 1st and 2nd SEP and 2.5% Wage Adjustments and Minimum Rates Adjustments—Commission decided matters of Annual Leave, Sick Leave, Contract of Service, Probationary Clause, Apparel, Shortages and Change Money and Training Leave—Commission reduced time between operative dates in deference to a reduced initial increase in wages by employers—Ordered Accordingly—T.W.U. *v.* Portius Pty Ltd t/a Flash Foods Canteen and Others—No. 1713 of 1991 (R2) and 1714 of 1991—Halliwell S.C.—17/1/92—Transport (Mobile Food Vendors) ..... 361

Application for exemption from providing superannuation payment to award preferred fund—Applicant argued arrangements had been made to pay into another fund in good faith prior to the award provisions being enacted—Commission reviewed decisions, including appeals on previous cases and found that the ideological battle had been settled by CICS in nominating a single fund and that there were no good reasons for granting the exemption—Further applications would be dealt with on the basis of the evidence presented—Dismissed—Kani Pty Ltd t/a The Body Shop and S.D.A.—Part of No. 1158 of 1989—Negus C.—8/10/91—Retail ..... 375

[3]Proceedings instituted on Commission's Own Motion *re* consideration of October 1991 National Wage Decision pursuant to Section 51(2) of I.R. Act 1979—Thrust of NWD was to continue process of Structural Efficiency and establish an Enterprise Bargaining Principle to focus on improvements in efficiency and productivity at the work place level with future wage increases to be linked to those productivity improvements—All parties advocated that Commission should give effect to NWD but critical issue for Commission in Court Session was to accommodate requirements of Enterprise Bargaining within legislative scheme of I.R. Act—Chamber additionally argued that once Wage Fixing Principles had been adopted Section 51(2) gave them a statutory force which displaced Commission's discretionary powers contained in Section 26—CICS rejected this argument—CICS further found there were no good reasons for it not to give effect to NWD and considered Section 41 to be most appropriate avenue within Act to effect registration and enforcement of enterprise bargaining agreements—Ordered—Commission's Own Motion—No. 1752 of 1991—Commission in court Session—Coleman C.C., Halliwell S.C., Kennedy C., George C., Parks C.—31/1/92—State Wage Case ..... 191

Applications to vary awards by consent—Parties sought *inter alia* an increase of 2.5% in wage rates and certain work related allowances pursuant to State Wage Decision—PSA was satisfied that the criteria of the principles had been met and that the variations sought, despite some minor amendments, PSA found no reduction clause for income maintenance of low paid workers was contrary to Wage Principles should issue—Granted in Part—C.S.A. and Others *v.* Country High Schools Hostels and Authority—Nos. P22—31 of 1991—Negus C.—21/11/91—Public Administration ..... 244

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent argued that Commission did not have jurisdiction to deal with the matter as the employee was covered by a Federal Award—Commission found it had no authority to hear application due to Federal Award and direct inconsistency between State and Federal Law save any benefit which did not arise out of the award—Dismissed in Part and adjourned sine die—Newbound P.J. *v.* Western United Insurance Brokers Pty Ltd—No. 1382 of 1991—Parks C.—17/1/92 ..... 389

Application to vary award *re* Hours, by consent and Rates of Pay and Allowances—Parties sought to resolve dispute over interpretation of certificate allowances—Commission reviewed evidence from both parties as to an appropriate allowance, fixed a maximum amount to be applied and declared that salary maintenance if to be paid, should be applicable to all employees who have been receiving the two allowances and be done administratively—Granted in Part—W.A.P.N.A. *v.* Hon. Minister for Health—No. 1336(B) of 1990—Negus C.—13/8/91—Health ..... 550

Application to vary awards *re* superannuation by consent save question of choices of funds to be available, exclusion of apprentices from fund and operative date—Parties sought to insert into awards, provision in same terms as determined by Australian Commission with minor changes—Commission determined that the variations sought on whole should issue bringing the awards into line with the National Award—Granted in Part—C.M.E.W.U. and Others *v.* Adsigns Pty Ltd and Others—Nos. 315, 346 and 347 of 1991—Beech C.—27/2/92—Construction ..... 504

Application to vary award *re* Structural Efficiency Wage Increase 1991 by consent—Commission found, after the correction of an oversight by inserting a subclause into the Contract of Service clause, that the tests as laid down in January 1992 State Wage Case were being met—Granted—W.A.C.A.T.U. *v.* Fullin Tailoring and Others—No. 1303 of 1991—Kennedy C.—27/2/92—Clothing ..... 511

Application to vary award *re* shift work allowances—Parties sought to adjust allowances in line with 2.5% State Wage Case and also realign them with those in Federal award—Commission deemed it appropriate that award be varied in terms of amended schedule—Granted—R.O.U. *v.* W.A.G.R.C.—No. R1 of 1992—Fielding C., Thompson A., Kemp D.—3/3/92—Railways ... 558

Applications to vary awards by consent *re* wages pursuant to "special case" provisions—Commission initially determined that the "special case" consideration was warranted and that an interim salary increase was justified on the changes and work value grounds identified (71 WAIG 2538)—Commission subsequently found that the efficacy of the package remained intact; that progress was made in the implementation of changes; and that there was no digression from the original parameters and format of the agreement—Commission further made an order to divide applications which would allow for further stages of the package to be considered separately at a later date—Ordered Accordingly—W.A. Police Union of Workers *v.* Hon. Minister for Police—No. P10/1 of 1991 and No. 1294/1 of 1991—Kennedy C.—17/1/92—Emergency Services ..... 257

Application to vary award *re* Second Structural Efficiency Wage Adjustment by consent—Parties sought to vary *inter alia* contract of service, overtime, public holiday rates and meal allowance provisions—Commission found that having regard for the Principle the variations sought should issue—Granted—Perth Theatre Trust *v.* T.A.E.A.—No. 1960 of 1991 (R2)—Kennedy C.—18/12/92—Entertainment ..... 561

CUMULATIVE DIGEST—*continued*

Page

AWARDS—*continued*

Complaint *re* breach of award—Complainant claimed that Defendant had failed to make available time and wages record to a duly accredited union official—Defendant argued that it did not fall within scope of award and therefore was not required to produce documents—Industrial Magistrate reviewed the award and determined that the Defendant's activities brought it within the scope of the award and thus it did not comply with its obligations—Proven—F.M.W.U. *v.* Burswood Executive Health Centre—Complaint No. 31 of 1991—Tarr S.M.—4/7/91—Health Recreation ..... 848

Application to vary award *re* Holidays—Applicant employers sought to amend award to facilitate and reduce costs incurred as a result of public holidays falling on Saturday trading—Respondent union argued that claim was inconsistent with spirit and intent of Commissions defacto wage principle and that application was almost identical to a series of claims lodged by the Applicant in recent years with the object of reducing penalty rates in which the Commission had continually rejected—Commission reviewed evidence and taking into account equity, good conscience and the substantial merits of the case failed to be convinced that the Applicant had discharged its onus of proving there was a special case and that costs were not prohibitive enough to vary the award—Dismissed—Myer Stores Limited and Others *v.* S.D.A.—No. 221 of 1991—Salmon C.—31/3/92—Retail . 839

Application to vary award *re* control room operations—Applicant employer claimed that only one operator was needed to remain in the control room during crib breaks as the current system was inefficient and unnecessary and contrary to Structural Efficiency Principles—Respondent argued substantial expansion of duties referred to prior agreement in which there would be two people present at all times and that work was essential to control of whole operation—Commission attended inspections of work area and on evidence found that Applicant had failed to discharge onus to convince the Commission that there has been a change to justify the outcome suggested by it—Discontinued—BHP Iron Ore Limited *v.* A.W.U.—No. 1363 of 1991—Gregor C.—16/4/92—Iron Ore ..... 1139

[3]Applications to vary awards *re* scope—Applicant Union argued the scope clause was required to allow change from an age based classification structure to a skills based structure and give effect to Structural Efficiency initiatives—T.L.C. argued Applicant's proposals would make award more relevant to modern industry—Respondent argued national approach to classification structure ignored particular requirements of W.A. Industry and that to include employees in an administrative capacity extended the scope clause beyond the Applicant's Constitutional Rule—Commission found application did not fall under Wage Fixing Principles—Commission reviewed authorities and found that the Applicant's proposal extended beyond its Constitutional Rule and the Respondent's counter proposals failed to recognise the scope within which the awards quite properly operated—Dismissed—F.C.U. *v.* Bunnings Ltd and Others—Nos. 637—639 of 1991—Coleman C.C., Negus C., Parks C.—20/2/92—Various (Clerical) ..... 990

Application for a new award to cover operations of Applicant Employer by consent—Parties sought to replace conglomerate structure of awards with one award—Commission found the outcome of negotiations of the parties represented an excellent example of what can be achieved co-operatively, that the award represented part of an ongoing process of Structural Efficiency and did not offend the State Wages Principles—Commission granted retrospective date of operation—Granted—Cockburn Cement Ltd *v.* A.W.U. and Others—No. A14 of 1991—Beech C.—2/4/92—Cement Manufacture ..... 1054

Application to vary award *re* recognition of conscience—Applicant argued Unions were not of God and on the basis of the Constitution, sought exemption from dealing with the Respondent Union under the award—Respondent Union argued granting application would affect scope of award and the matter was broad such as to require an application pursuant to Section 50 of the Act—Commission reviewed authorities, including that relating to the Constitution, I.R. Act and found that though the Applicant's belief was sincere it was not to be persuaded that the legitimate recognition of registered organisations and their role by Parliament should be put to one side—Dismissed—Concept Products *v.* F.P.F.A.I.U.—No. 1820 of 1991—Beech C.—13/4/92—Furniture ..... 1137

Application to vary award *re* Definitions and insertion of provision for occupational superannuation—Commission found definition change was formal to account for change to Commonwealth Pension title and was satisfied that the superannuation variations sought should issue—Granted—Disabled Workers Union *v.* Good Samaritan Industries and Others—No. 178 of 1992—Fielding C.—23/4/92—Health ..... 1134

Application to vary award *re* new cross-trade classification and pay rate—Parties sought a determination of the dispute regarding the percentage pay relationship between the new classification and a base tradesman—Commission found that the matter was primarily a work value case, which involved value judgement based on comparative criteria—Commission reviewed authorities, award comparison, changing emphasis on negotiations and found no case for the percentage wage relationship as claimed on the grounds of employee expectations—Ordered Accordingly—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 1502 of 1990—Salmon C.—20/3/92—Electricity Supply ..... 1128

Application to vary award *re* Memorandum of Agreement (Employee Superannuation)—Applicant sought to amend provision to require a report be made not on a quarterly basis but half yearly—Commission was satisfied that variation sought should issue—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 262 of 1992—Fielding C.—19/3/92—Iron Ore ..... 831

Applications to vary awards by consent *re* salary rate increases, provision for position of advanced skills teacher and establishment of rights and obligations for parties to consult on industrial matters—Parties sought to give effect to an agreement reached following extensive negotiations to reflect teaching conditions in other States—Commission determined that applications constituted a "special case" and provided for a further adoption of an approach developing nationally—Commission accepted parties changes to meet the concerns expressed over specification of time release for teachers to be designated as "Key Teachers"—Granted—S.S.T.U. *v.* Hon. Minister for Education and Another—Nos. T3 and T7 of 1991—Kennedy C., Reeves/McKinnon—28/1/92—Education ..... 924

[3]Application for a new award to replace an existing award—Commission had previously determined as a preliminary point that an award should issue—Employers argued award would cause a conflict of interest between foreman and members of the workforce in the same union, that there was a lack of perceived need for any change and finally there was a fear that the CMEU would institute a campaign of unionising foremen—CICS found as a preliminary point that the application had been advertised and the Commission was of the opinion that the changes which had occurred to the application since were not of a nature that required a further advertisement—CICS found those arguments against the issuance of the award had been presented and dealt within the earlier decision of the Commission—CICS further found that the application was to bring the award up to date with current conditions, to prevent the rectification of the situation would be such an interpretation of the principles that an injustice would result, it was a special case and fit within the anomalies principle—CICS proceeded to determine whether provisions fit within the State Wage Principles and issued the award subject to discussion as to the implementation of structural efficiency—Award Issued—C.M.E.U. and Another *v.* M.B.A. and others—No. A5 of 1987—Halliwell S.C., George C., Beech C.—29/10/87, 15/8/90, 6/12/91—Halliwell S.C.—29/10/87—Building ..... 1302

Application to vary award pursuant to Second Stage Structural Efficiency Wage Adjustment—Parties were in agreement with exception of new provision, Consultative Process and changes to Hours of Work clause which was later deleted from application—Applicant employer claimed that variations sought were justified in terms of time frame prescribed under State Wage decision and in terms of progress towards implementation of structural efficiency—Respondent Union opposed wording of proposed new clause and submitted an amended schedule—Commission reviewed opposing arguments and in the finality rejected both, substituting a combination of views held in State Wage Principles and those in Joint Statement on Participative Practices to form new provision—Ordered Accordingly—BHP Steel International, Rod and Bar Products Division *v.* A.W.U. and Others—No. 1444 of 1990(R2)—George C.—22/5/92—Iron Ore ..... 1335

Application to vary award to more accurately reflect current conditions of employment—Applicant Union sought to amend salaries provision for overtime, redeployment of officers and severance payment in case of redundancy—Respondent sought adjournment pending further discussions of above matters—Parties reached agreement on provision for part-time employment, hours of attendance, allowances and leave of absence—Commission was satisfied that changes were within the ambit of State Wage Principles and reflected standard Public Service conditions—Granted and Adjourned Sine Die—C.S.A. *v.* Joint House Committee of Parliament of W.A.—No. 343 of 1991—Fielding C.—22/5/92—Public Administration ..... 1330

CUMULATIVE DIGEST—*continued*

Page

AWARDS—*continued*

Application to vary award to provide that Respondent not implement decisions to make changes without prior consultation with the Union and employees to be affected—Applicant Union also sought to include new Schedule in case of change involving deletion of classified positions—Respondent argued that claim was not an industrial matter, it sought to deny Respondent right to manage the enterprise and would set a precedent for other public sector awards—RCB reviewed concept of industrial matter, found that insertion of guidelines would add inflexibility to management of change and have potential to be used as a mechanism to delay reform and therefore no justification for claim—Dismissed—W.A.R.O.U. *v.* W.A.G.R.C.—No. R3 of 1992—Fielding C., Thompson/Munyard—29/5/92—Railways ..... 1371

Application for an order to effectively vary award in order that an abattoir might continue to operate and provide a source of employment—Commission found as enterprise agreement complied with the State Wage Principles and commented on the avenues for future applications—Granted—M.I.E.U. *v.* Derby Meat Processing Company Ltd—No. 598 of 1992—Fielding C.—25/5/92—Meat ..... 1344

[1]Appeal against decision of the Commission (71 WAIG 582) *re* issuance of award—Appellant argued Commission erred in criticising its conduct in retiring from an industrial agreement thus having regard for irrelevant considerations, that there had been procedural unfairness, a denial of natural justice, that Section 26(3) of I.R. Act had been breached, that the Commission had miscarried in its exercise of its discretion and sought that the decision be quashed—The Hon. Minister, intervening, argued the Commission had dealt with the award as a whole, notwithstanding the assessment of a number of aspects, as it was entitled to do—Full Bench reviewed authorities and found *inter alia* the application was clearly an application for a new award, the Commission was entitled to place significant weight on the First Award Principle and was bound to give great significance to all existing rates and conditions of employment including those evidenced by an award or formal agreement and those more informally added as terms and conditions—Full Bench found the defacto principle was no more than part of the rationale of the application of the First Award Principle and the Commission's reliance on it was not in error—Full Bench found that a statement made by the Commission was not the decision under appeal and represented no fatal flaw—Full Bench found Comparative Wage Justice Principle achieved the same result as the First Award Principle and its application was therefore not in error—Full Bench found the retirement from the Agreement clearly became part of the equity, good conscious and substantial merits of the matter, the Commission was right to have regard to this and make findings in relation to it and that the submission that it was not an industrial matter was erroneous—Full Bench found there was no miscarriage of the discretion of the Commission established in accordance with the authorities in House *v.* King, there was no procedural unfairness or denial of natural justice in relation to the so called statement, in relation to Section 41 of the I.R. Act or any feature of the proceedings and there was no consideration of irrelevant matters—Dismissed—R.R.I.A. v- A.M.W.S.U. and Others—Appeal No. 436 of 1991—Sharkey P., Coleman C.C., Gregor C.—20/12/91—Iron Ore ..... 25

Applications to vary three awards *re* 2.5%, third minimum rates adjustments, hours, annual leave, addition of respondent variously by consent—Commission was satisfied that criteria Principles had been met and that variations sought should issue—Granted—F.M.W.U. *v.* Guildford Grammar and Others—Nos. 1416, 1849, 1436, 1850 and 1438 of 1991—Kennedy C.—13/1/92—Education ..... 353

BOARD OF REFERENCE—

Application against requirement to register under CIPPLSL Act—Board of Reference reviewed CIPPLSL Act and found that employees did not come under classification of work in prescribed award—Granted—Phillips Scientific and Industrial Pty Ltd *v.* Construction Industry, Long Service Leave Payments Board—No. 26 of 1991—Carrigg Registrar/Latter/Jones—18/12/91 ..... 145

Board of Reference *re* Long Service Leave entitlement—Applicant sought pro-rata entitlement to long service leave—B.O.R. found that Respondent company was in liquidation and subject to an Order for Winding up and therefore did not have jurisdiction to determine matter—Dismissed—Williams R.—Danebrook Holdings Pty Ltd—No. 32 of 1991—Yewers/Beech/Uphill—9/2/92 ..... 374

Claim against requirement to register as an employer under the Construction Industry Portable Paid Long Service Leave Act—Board of Reference found on evidence that the Claimant was not within the "Construction Industry" within the meaning of the CIPPLSL Act—Granted—Kununurra Earthmoving Plant *v.* Construction Industry Long Service Leave Payments Board—Carrigg, Registrar/Latter/Uphill—File No. 1 of 1992—26/2/92—Earthmoving ..... 570

BREACH OF AWARD—

Conference referred *re* dispute over failure to adhere to award provisions—Applicant union claimed Respondent had breached award by abolishing substantive positions without prior consultation with union and sought variation to award to remove ambiguities—Respondent argued Commission had no power to deal with matter and declared dispute had either been resolved or rather that it came under exclusive province of Industrial Magistrate—Respondent further argued dispute was not an industrial matter but one of managerial prerogative—R.C.B. reviewed powers as given to it by the I.R. Act and authorities and determined that its powers under S.44 were limited in that orders issued by it could only be made on an interim basis and the R.C.B. was not empowered to vary the award as sought—Dismissed—R.O.U. *v.* W.A.G.R.C.—No. RCB CR8 of 1991—Fielding C., Thompson/Kemp—6/3/92—Railways ..... 628

[2]Appeal against decision of Industrial Magistrate (71 WAIG 2161) *re* unproven breach of award—Appellant argued Industrial Magistrate had erred in giving weight to the employees evidence and that the lack of findings was inconsistent with determinations made—Full Bench reviewed authorities and found the Industrial Magistrate was unable to make a finding of fact as he was unable to accept the evidence of one lot of witnesses in preference to the others and that the Complainant had not therefore established any of the facts in dispute—Dismissed—F.C.U. *v.* Brocklebank Pty Ltd Trading as Kwinana Lodge Hotel—Appeal Nos. 1170, 1171 and 1172 of 1991—Sharkey P., Halliwell S.C., Negus C.—14/2/92—Hotels ..... 486

Complaint *re* breach of award—Complainant claimed that Defendant had failed to make available time and wages record to a duly accredited union official—Defendant argued that it did not fall within scope of award and therefore was not required to produce documents—Industrial Magistrate reviewed the award and determined that the Defendant's activities brought it within the scope of the award and thus it did not comply with its obligations—Proven—F.M.W.U. *v.* Burswood Executive Health Centre—Complaint No. 31 of 1991—Tarr S.M.—4/7/91—Health Recreation ..... 848

[2]Appeal against decision of Industrial Magistrate (71 WAIG 3009) *re* breach of award—Appellant argued that work performed by the employee was not that of an electrical fitter other than for a miniscule time and the Industrial Magistrate had erred in assessing the evidence—Full Bench reviewed definitions, award, found allowance was for the holding of the qualification and that it was opened on the evidence for the Industrial Magistrate to find as he did—Dismissed—Infrapulse Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 1697 of 1991—Sharkey P., Kennedy C., Parks C.—5/6/92—Electrical Manufacturing ..... 1285

[2]Appeals against decision Industrial Magistrate remitted from Industrial Appeal Court for further hearing (71 WAIG 2259) *re* breach of Award—Appellant argued Industrial Magistrate failed to make findings as to the amount actually paid and whether those amounts were as particularised or not more than those amounts—Respondent argued that to establish that the employee earned a certain amount per week did not falsify the particulars supported by her evidence—Full Bench found without more evidence as to what was received and due on a weekly basis it was not possible to find the figures alleged as underpayments on balance of probabilities—Upheld and Quashed—Como Investments Pty Ltd *v.* McCorry G.—Appeal No. 1133 of 1990—Sharkey P., Fielding C., George C.—5/5/92—Restaurants & Catering ..... 1282

CUMULATIVE DIGEST—*continued*

Page

CASUAL WORK—

Application to vary Award *re* proposals to extend maximum hours for casuals as a special case—Respondent Union opposed claim and proposed modified definition of casual worker and argued that proposed changes would be used to make inroads into levels of permanent employees—Commission deemed that concerns of employees were a matter to by dealt with according to award provision and not by reconsidering proposed changes relating to casual employees—Commission refused no extra claim clause—Granted—Foodland Associated Limited *v.* Shop, Distributive and Allied Employees' Association—No. 1222 of 1991—Salmon C.—3/12/91—Retail ..... 114

Conference referred *re* continued employment and/or termination of so called "temporary" employees—Commission in previous hearing determined letters of appointment invalid and that employees in terms of the award were permanent—Respondent argued that employees were validly temporary and that to terminate at end of contract would be deemed lawful—Commission reviewed evidence and the award and determined that employees were entitled to the positions held and that to terminate their services on the grounds given would be industrially unfair—Declared Accordingly—A.W.U. *v.* Newcrest Mining Limited—No. CR739 of 1991—Gregor C.—22/1/92—Mining ..... 402

Application to vary award *re* State Wage Case June 1991 Wage Increase, Second, Third and Fourth minimum rates adjustment—Commission found wage rates nexus with Federal Award reasonable and casual employment provision appropriate—Commission stood part-time provisions over for negotiation as philosophical objections were not satisfactory—Ordered Accordingly—T.W.U. *v.* Australian Glass Manufacturing Co Pty Ltd and Others—No. 1299 of 1991—Halliwell S.C.—24/1/92—Transport ..... 563

CLASSIFICATION—

Application to vary award *re* removal of Classification Level from "Area and Scope" clause to correct an alleged error when the award was issued—Respondent argued no position in the Dept. of Marine and Harbours covered by the Award had been classified level 4 as a result of Broadbanding Classification—CSA intervened and argued that such classification were already covered by CSA Agreements and Awards—The PSA reviewed principles of industrial coverage and found it did not have the benefits of submissions and evidence so as to determine the matter and adjourned it—On hearing further submissions PSA found that CSA rules precluded coverage of employees already covered by an award and therefore the objection failed—PSA found Applicant's claim had merit—Granted—FCU *v.* W.A. Coastal Shipping Commission & Others—No. P24 of 1990—Kennedy C. PSA—16/7/91—Port Authorities ..... 91

Application to adjourn application to vary award *re* Classifications—Respondent argued it was contrary to the interest of the industry to have a separate parallel process for a small sector of workers when there was a comprehensive review being carried out under structural efficiency—Commission reviewed history of claim, critized the Respondent for the time taken to resolve issues and reluctantly granted the adjournment with liberty to apply as the best solution was for the matters to be resolved together—Granted—F.M.W.U. *v.* The Board of Management, Albany Regional Hospital and Others—No. 1058/89 Gregor C.—27/2/92—Health ..... 566

Conference referred *re* dispute over renumeration for various professional groups in Public Teaching Hospitals—Applicant Employers submitted a schedule of proposed salary classifications employed by them in administrative and supervisory role—Respondent claimed that the classifications awarded should be at a higher levels on the respective scales—The Public Service Arbitrator extensively reviewed the classifications structure and strongly supported the creation of personal classifications as an appropriate recognition for those officers who earn international accolades—The PSA found on evidence that the new Level 11 classification was not warranted for any of the Medical Laboratory Technologist positions and determined specific operative dates which were calculated in accordance with the dictates of S.26(i)(a) of the Industrial Relations Act—In Supplementary Reasons PSA addressed broadbanded salary scales—Granted in Part—The Board of Management, RPH and Others *v.* H.S.O.A.—No. PSA CR57 of 1990—Negus C.—28/11/91—Health ..... 1187

[3]Applications to vary awards *re* scope—Applicant Union argued the scope clause was required to allow change from an age based classification structure to a skills based structure and give effect to Structural Efficiency initiatives—T.L.C. argued Applicant's proposals would make award more relevant to modern industry—Respondent argued national approach to classification structure ignored particular requirements of W.A. Industry and that to include employees in an administrative capacity extended the scope clause beyond the Applicant's Constitutional Rule—Commission found application did not fall under Wage Fixing Principles—Commission reviewed authorities and found that the Applicant's proposal extended beyond its Constitutional Rule and the Respondent's counter proposals failed to recognise the scope within which the awards quite properly operated—Dismissed—F.C.U. *v.* Bunnings Ltd and Others—Nos. 637—639 of 1991—Coleman C.C., Negus C., Parks C.—20/2/92—Various (Clerical) ..... 990

Application to replace an order *re* conditions of employment to include new wage rates and classification as a special case, by consent—Parties argued that although classification structure and titles had not altered the skills duties and responsibilities had changed so radically as to enable new classifications to be identified and sought the same operative date from which the second S.E.P. adjustment was approved—Commission found strict test of Work Value Principle had been met and warranted a new of pay rate rather than an allowance—Commission further found increase to security control officer allowance was appropriate and addressed wages structure—Granted—F.M.W.U. *v.* Wormald Security—No. 184 of 1990 (R2)B—George C.—9/4/92—Security ..... 1100

Application to vary award *re* new cross-trade classification and pay rate—Parties sought a determination of the dispute regarding the percentage pay relationship between the new classification and a base tradesman—Commission found that the matter was primarily a work value case, which involved value judgement based on comparative criteria—Commission reviewed authorities, award comparison, changing emphasis on negotiations and found no case for the percentage wage relationship as claimed on the grounds of employee expectations—Ordered Accordingly—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 1502 of 1990—Salmon C.—20/3/92—Electricity Supply ..... 1128

Application for an order *re* employment classification be deemed to be that of permanent employee and entitlement to maternity leave—Applicant union argued that employee should be re-appointed at same level with Respondent on completion of maternity leave—Public Service Arbitrator found that as employee was a temporary officer, there was no provision in the award to recognise her leave entitlements—Dismissed—F.C.U. *v.* Fremantle Port Authority—No. P48 of 1991—Negus C.—26/3/92—Port Operations ..... 845

Applications to vary awards by consent *re* salary rate increases, provision for position of advanced skills teacher and establishment of rights and obligations for parties to consult on industrial matters—Parties sought to give effect to an agreement reached following extensive negotiations to reflect teaching conditions in other States—Commission determined that applications constituted a "special case" and provided for a further adoption of an approach developing nationally—Commission accepted parties changes to meet the concerns expressed over specification of time release for teachers to be designated as "Key Teachers"—Granted—S.S.T.U. *v.* Hon. Minister for Education and Another—Nos. T3 and T7 of 1991—Kennedy C., Reeves/McKinnon—28/1/92—Education ..... 924

Application to adjourn application to vary award *re* salary rate, provision for position of associate director (academic) in Government Technical and Further Education Institutions—Parties argued that due to delays in advertising and filling of position, withdrawal of appointed persons and incomplete nature of new agreed career structure and as neither party were able to put forward work value cases the hearing ought to be postponed 6 months or more—G.S.T.T. found due to inability to proceed with work value case discontinued the application, cancelled interim orders without precluding subsequent applications and commented similarly on the part matter of the interim orders—Order Accordingly—Hon. Minister for Education *v.* S.S.T.U.—No. T4(2) of 1990—Kennedy C./Reeves/McKinnon—9/6/92—Education ..... 1427

CUMULATIVE DIGEST—*continued*

Page

COMPARATIVE WAGE JUSTICE—
[1]Appeal against decision of the Commission (71 WAIG 582) *re* issuance of award—Appellant argued Commission erred in criticising its conduct in retiring from an industrial agreement thus having regard for irrelevant considerations, that there had been procedural unfairness, a denial of natural justice, that Section 26(3) of I.R. Act had been breached, that the Commission had miscarried in its exercise of its discretion and sought that the decision be quashed—The Hon. Minister, intervening, argued the Commission had dealt with the award as a whole, notwithstanding the assessment of a number of aspects, as it was entitled to do—Full Bench reviewed authorities and found *inter alia* the application was clearly an application for a new award, the Commission was entitled to place significant weight on the First Award Principle and was bound to give great significance to all existing rates and conditions of employment including those evidenced by an award or formal agreement and those more informally added as terms and conditions—Full Bench found the defacto principle was no more than part of the rationale of the application of the First Award Principle and the Commission's reliance on it was not in error—Full Bench found that a statement made by the Commission was not the decision under appeal and represented no fatal flaw—Full Bench found Comparative Wage Justice Principle achieved the same result as the First Award Principle and its application was therefore not in error—Full Bench found the retirement from the Agreement clearly became part of the equity, good conscious and substantial merits of the matter, the Commission was right to have regard to this and make findings in relation to it and that the submission that it was not an industrial matter was erroneous—Full Bench found there was no miscarriage of the discretion of the Commission established in accordance with the authorities in House *v.* King, there was no procedural unfairness or denial of natural justice in relation to the so called statement, in relation to Section 41 of the I.R. Act or any feature of the proceedings and there was no consideration of irrelevant matters—Dismissed—R.R.I.A. *v.* A.M.W.S.U. and Others—Appeal No. 436 of 1991—Sharkey P., Coleman C.C., Gregor C.—20/12/91—Iron Ore ..... 25

COMPENSATION—
Claim *re* redundancy payments greater than provided—Applicant employees sought redundancy provisions in line with K-Mart agreement—Respondent argued that payments already made were fair by comparison with the Metal Trades (General) Award provisions and there was no provision in the Applicant's contracts of service upon which claims could be based—Commission reviewed authorities and found that Respondent had failed to notify employees of impending retrenchments and that employees were entitled to the benefit of the non-discrimination rule—Granted—Ryan N.W. and others *v.* Coles/Myer Ltd T/A Coles Supermarkets—Nos. 1264, 1276 and 1277 of 1991—Salmon C.—10/4/92—Retail Food ..... 1163
Application for reinstatement on the grounds of unfair dismissal—Respondent claimed lost confidence and trust in employee which justified summary dismissal—Commission determined in preliminary reasons that employee had not set out to deceive employer, had been wrongly accused of dishonesty to achieve financial gain and found in favour of Applicant—Commission was further informed subsequent to hearing that she intended to live outside of the state and therefore Commission did not have jurisdiction to award damages in the light that reinstatement could not be effected—Dismissed—Briggs M.C. *v.* Eva's Garden Cafe—No. 839 of 1991—Parks C.—9/4/92—Fast Foods ..... 1364

CONFERENCE—
Conference referred *re* dispute over interpretation of Seniority Agreement—Applicant argued that agreement outlined in a previous order should be replaced by a Schedule to the Application as anomalies had arisen with respect to permanent and seasonal employees—Respondent opposed claim as it would reduce flexibility and impinge upon employers rights as to selection and retention of labour—Commission on reviewing evidence determined that Respondent had not abused its prerogative nor acted unfairly towards employees and was not prepared to intervene in the matter further—Dismissed—Meat Industry Employees Union *v.* WA Meat Commission—No. CR 630 of 1991—Halliwell S.C.—18/12/91—Meat ..... 165
Conference referred *re* continued employment and/or termination of so called "temporary" employees—Commission in previous hearing determined letters of appointment invalid and that employees in terms of the award were permanent—Respondent argued that employees were validly temporary and that to terminate at end of contract would be deemed lawful—Commission reviewed evidence and the award and determined that employees were entitled to the positions held and that to terminate their services on the grounds given would be industrially unfair—Declared Accordingly—A.W.U. *v.* Newcrest Mining Limited—No. CR739 of 1991—Gregor C.—22/1/92—Mining ..... 402
Conference referred *re* jurisdiction to deal with dispute over contract system and respondency to award—Applicant claimed that there were no employees eligible to be members of union—Respondent argued that members of union were employees of Applicant Company and not independent contractors—Commission reviewed indicia for contract of service as opposed to contract for service and declared that whilst some factors of service had the appearance of being of an independent nature on balance a contract of service existed and therefore Commission had jurisdiction—Declared Accordingly—Preston River Abattoir *v.* M.I.E.U.—No. CR44 of 1992—Halliwell S.C.—14/2/92—Meat ..... 625
Conference referred *re* dispute over failure to adhere to award provisions—Applicant union claimed Respondent had breached award by abolishing substantive positions without prior consultation with union and sought variation to award to remove ambiguities—Respondent argued Commission had no power to deal with matter and declared dispute had either been resolved or rather that it came under exclusive province of Industrial Magistrate—Respondent further argued dispute was not an industrial matter but one of managerial prerogative—R.C.B. reviewed powers as given to it by the I.R. Act and authorities and determined that its powers under S.44 were limited in that orders issued by it could only be made on an interim basis and the R.C.B. was not empowered to vary the award as sought—Dismissed—R.O.U. *v.* W.A.G.R.C.—No. RCB CR8 of 1991—Fielding C., Thompson/Kemp—6/3/92—Railways ..... 628
Conference *re* claim for reinstatement on the grounds of unfair dismissal—Applicant argued delay due to police investigation—Respondent argued that the delay rendered the application no longer an industrial matter—Commission examined the N.S.W. Case and distinguished it from the instant matter and further found that the Applicant did not offer a satisfactory explanation for the delay—Dismissed—S.D.A. *v.* Calahan T/A Bi Lo Midland—No. CR777 of 1991—Salmon C.—16/3/92—Shop Assistant ..... 884
Conference referred *re* claim for field allowance—Applicant Union claimed that extreme conditions under which work was to be performed in the field and the change in the method of work justified an allowance—Respondent argued that there had not been a significant net addition to work value before any allowance could be paid under the allowances Principle—Commission found on evidence and from inspections that the work which was subject to application was different in circumstances to that which was compensated for in the award and thus in line with the Principles—Granted—A.M.W.S.U. *v.* Newcrest Mining Limited—No. CR728 of 1991—Gregor C.—12/3/92—Mining ..... 875
Conference referred *re* dispute over deduction of wages for two days lost—Applicant union claimed that dispute arose over lack of amenities due to Respondent's non-compliance with industry standards in relation to electrical tagging and as a safety issue, wages should not be deducted—Respondent argued that interruption to power was part of an industrial campaign which occurred in several sites that day—Commission found that whilst Respondent was not in breach of any regulation regarding tagging there was concern over potential electrical safety hazard and that there was an entitlement to payment for some of the workforce for some of the time—Granted in Part—B.T.A. *v.* B.M.A.—No. CR23 of 1992—Beech C. 9/4/92—Construction ..... 1183
Conference referred *re* back payment of wages and extra payment in lieu of notice—Applicant union claimed employees had been assured both verbally and written of continued employment and had had no knowledge of impending redundancy—Respondent argued redundancies were necessary for economic viability—Commission whilst commending Respondent in assisting employees to find employment determined that an additional four weeks pay in lieu of notice was equitable—Granted in Part—T.W.U. *v.* Arnotts Mills & Ware—No. CR43 of 1992—Halliwell S.C.—15/4/92—Retail (Food) ..... 1190

CUMULATIVE DIGEST—*continued*

Page

CONFERENCE—*continued*

Conference referred *re* threat to withhold payment—Applicant claimed that cessation of work during alterations on site safety shed at CSIRO site did not warrant non payment for that time and sought order for payments—Respondent argues that changes had been made as soon as issue was raised, although no health risk was apparent and that cessation of work should not have occurred—Commission found on evidence that rectification work was appropriate and employee had a legitimate expectation that there be proper treatment of injured workers—Granted—B.T.A. *v.* B.M.A.—No. CR194 of 1992—Beech C.—23/4/92—Building ..... 1181

Conference referred *re* dismissal of employee *re* absence from work—Respondent Union argued that dismissal was unfair and sought declaration—Commission found payment in lieu of notice did not change the fact that the dismissal was summary, but cancelled it before hearing—Commission further found on evidence and from examining the internal investigation undertaken by Applicant Company, the dismissal was not unfair and application be dismissed—Ordered Accordingly—W.A. Newspapers Ltd *v.* A.M.W.S.U.—No. CR254 of 1991—Gregor C.—9/6/92—Printing ..... 1399

CONTRACT OF SERVICE—

Claim *re* contractual entitlements—Applicant sought payment for outstanding salary—Respondent failed to appear—Commission found Applicant had established claim for monies due up to the date of his summary dismissal—Granted—Carlson D.C. *v.* Joseph Charles Learmonth Duffy Limited—No. 1631 of 1991—George C.—19/12/91—Financial Services ..... 148

Claim *re* contractual entitlements—Applicant claimed question of loan was not an industrial matter and sought outstanding salary and annual leave benefits—Respondent argued that employee was under obligation to pay balance of "personal loan" and therefore negated claim—Commission found that loan was an obvious way of dealing with a potential cause of deteriorating work performance and considered it a matter within its jurisdiction—Commission found in favour of Applicant however on receipt of decision, proposed order was no longer required—Discontinued—Oughton C. *v.* Environmental Industries—No. 918 of 1991—Salmon C.—4/11/91 ..... 154

Application for denied contractual entitlements—re payment in lieu of notice—Commission found principle that notice period quoted to wage payment period unless there were other indicators, applied—Granted—Saunders C *v.* Lifesport Superdrome—No. 1373 of 1991—Halliwell S.C.—20/12/91 ..... 157

Application for an order that an employee be granted permanent status—Applicant Union argued Respondent had agreed to employ another full time employee and a representative had led the employee to believe that one of two would be appointed if the necessary qualifications were obtained—Respondent argued it had no need for a permanent employee and the representative was without authority—Parties agreed circumstances were different to the previous Appealed application—Commission found on evidence in favour of Respondent—Dismissed—CMEU *v.* FPA—No. 1354 of 1991—Parks C.—13/12/91—Port Authority ..... 145

Conference referred *re* continued employment and/or termination of so called "temporary" employees—Commission in previous hearing determined letters of appointment invalid and that employees in terms of the award were permanent—Respondent argued that employees were validly temporary and that to terminate at end of contract would be deemed lawful—Commission reviewed evidence and the award and determined that employees were entitled to the positions held and that to terminate their services on the grounds given would be industrially unfair—Declared Accordingly—A.W.U. *v.* Newcrest Mining Limited—No. CR739 of 1991—Gregor C.—22/1/92—Mining ..... 402

Claim *re* contractual entitlements—Applicant sought payment for outstanding benefits arising from contract of employment—Respondent argued Applicant was not its employee and there was no jurisdiction—Alternatively that the Applicant was in debt to the Respondent—Commission reviewed authorities and found that the relationship between the parties was one of employer and employee and that the Applicant was entitled to a sum of remuneration subject to various deductions—Granted in Part—Geikie G.N. *v.* Orchard Holdings—No. 717 of 1991—Parks C.—9/8/91—Fishing ..... 380

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent argued that Commission did not have jurisdiction to deal with the matter as the employee was covered by a Federal Award—Commission found it had no authority to hear application due to Federal Award and direct inconsistency between State and Federal Law save any benefit which did not arise out of the award—Dismissed in Part and adjourned sine die—Newbound P.J. *v.* Western United Insurance Brokers Pty Ltd—No. 1382 of 1991—Parks C.—17/1/92 ..... 389

Application for allegedly denied contractual entitlements—Applicant sought outstanding commissions and reimbursement of costs occurred as a result of contract of service—Respondent conceded part of claim and argued that monies were owing to him and therefore this should be offset against claim—Commission preferred respondents evidence as to contractual arrangements, however found no authorisation for offsetting of costs—Respondents possession to be returned—Granted in Part—Brailey D. *v.* Conti Sheffield Real Estate—No. 2618 of 1989—Halliwell S.C.—23/1/92—Real Estate ..... 378

Claim for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued that he had been dismissed because he was on worker's compensation—Respondent argued that the Applicant's services were terminated because of his attitude and his failure as a Manager to recognise his responsibilities to the Company—Commission, in light of all the evidence, found that there was no basis upon which it should interfere in the decision of the Respondent to terminate the services of the Applicant—Commission also found that there was no basis for allegation made by Applicant that the Respondent's witnesses had given false evidence and further the written material did not affect the outcome of the case—Dismissed—Kaigg W.J. *v.* Australian Wool Testing Authority Ltd—No. 633 of 1991—George C.—9/1/92—Wool ..... 386

Application for allegedly denied contractual entitlements *re* unpaid commissions—Commission found from the evidence that the applicant was employed by the respondent during the period in question and that the unpaid commissions were a benefit due to the applicant under his contract of employment—Commission further found that it was not unreasonable to award an amount for interest that could have been earned on the monies—Granted—Tong S.S.O. *v.* Nationwide Financial Services Pty Ltd t/a Helliard Financial Planning—No. 203 of 1991—Parks C.—13/8/91—Insurance ..... 392

Application for allegedly denied contractual entitlements—Applicant failed to appear—Commission having regard for the record of the claim and the failure of the Applicant to appear at the hearing, the onus being on him, dismissed the matter for want of prosecution—Roussel R. *v.* Setlaw Pty Ltd—No. 1003 of 1991—Kennedy C.—15/1/92 ..... 391

Conference referred *re* dispute over new contract of employment—Applicant union claimed employee should be paid wage rates consistent with former position including shift allowance—Commission found that whilst it had sympathy with employee's financial position the Respondent employers offer was not unfair provided that all available shifts be offered to employee when they occurred but declined to grant 15% shift allowance penalty—Ordered Accordingly—M.W.U. *v.* Board of Management, Attadale Private Hospital—No. CR 626 of 1991—Halliwell S.C.—13/2/92—Health ..... 627

Application for benefits said to be due under contract of service including pay in lieu of notice—Respondent claimed dismissal due to misconduct and therefore no notice was required—Commission found no period of notice specified in contract and applied indicia of cases *re* period of notice as implied provision of contract—Commission determined six months notice to be appropriate but taking into account speed with which new employment was gained found three months in lieu of notice should be paid and observed that any claim for damages would be appropriate for another jurisdiction—Granted in Part—Blewitt J.D. *v.* Slee and Stockden Pty Ltd—No. 454 of 1991—Gregor C.—6/11/91—Financial Services ..... 575

Application to vary award *re* Structural Efficiency Wage Increase 1991 by consent—Commission found, after the correction of an oversight by inserting a subclause into the Contract of Service clause, that the tests as laid down in January 1992 State Wage Case were being met—Granted—W.A.C.A.T.U. *v.* Fullin Tailoring and Others—No. 1303 of 1991—Kennedy C.—27/2/92—Clothing ..... 511

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

[2]Appeal against decision of Commission (71 WAIG 2397) *re* denied contractual entitlements—Appellant argued Commission failed to make primary findings of fact that a decision had occurred and that the contract of service had terminated as a result of the Respondents' failure to comply with an implied duty—Appellant further argued the Commission misdirected itself as to burden of proof and the Appellant's defence—Full Bench reviewed authorities and found Commission's description of the burdens whilst not accurate, was not in error—The evidence for the Appellant was rejected in circumstances where demeanour was implicitly involved and there was no palpable error in so doing—Full Bench further found Commission was entitled to rely on correspondence of the Appellant—Dismissed—CFA Corporate Finance Associates Pty Ltd *v.* Yeoward M.I.—Appeal No. 1453 of 1991—Sharkey P., Negus C., Gregor C.—9/3/92—Finance ..... 474

Application for allegedly denied contractual entitlements—Commission found that Applicants had not exercised their rights to re-employment as previously ordered and therefore there was no establishment of employment relationship in which to award residual compensation claim—Dismissed—Maasen P.J. and C.A. *v.* Golden Hotels Pty Ltd—Nos. 583B and 584B of 1991—Parks C.—4/2/92—Hospitality ..... 583

Application for allegedly denied contractual entitlements—Respondent argued that employee had not completed whole season and therefore was not entitled to bonus payments—Commission determined that as the contractual requirements were not met the claim must fail—Dismissed—Collier J. *v.* Mecca Holdings Pty Ltd and Reuben Holdings Pty Ltd Trading as Casuarina Valley Orchard—No. 1907 of 1991—Halliwell S.C.—5/3/92 ..... 581

Board of Reference *re* pro-rata long service leave claim—Applicant claimed that termination of employment was effected to avoid payment of long service leave—Respondent argued that a "fall off" in business and lack of work was the true reflection of the situation—B.O.R. preferred the evidence of Respondent and that employee did not have an entitlement to contractual benefits—Dismissed—Jamieson S. *v.* Williams Gale Photography Pty Ltd—File No. 40 of 1991—Carrigg, Registrar/Latter/Uphill—27/2/92 ..... 569

Application for allegedly denied contractual entitlements—Respondent sought to have question of jurisdiction determined as a preliminary point as to whether there was a contract of service or contract for service—Commission examined indicia from authorities cited and from the evidence determined that there was a contract for service and therefore lacked jurisdiction to deal with matter—Dismissed—Maddrell K. *v.* Admont Holdings Pty Ltd—No. 399 of 1991—Halliwell S.C.—21/2/92 ..... 584

Claim *re* contractual entitlements—Applicant sought payment for outstanding salary—Respondent argued that employee forfeited one week's pay as one week's notice to terminate the contract was not given—Commission preferred evidence of Applicant to submissions of Respondent from bar table and found that the Respondent had engaged in improper conduct and in these circumstances employee's decision to terminate contract was warranted—Granted—Andreatta P. *v.* Beni Magjarraj Trading as Nova Air Conditioning—No. 1652 of 1991—Beech C.—11/02/92—Air Conditioning ..... 571

Claim *re* contractual entitlements—Applicant claimed payment for outstanding accrued overtime—Respondent argued a different interpretation of the "normal hours of work" to that of Applicant—Commission found that Applicant had established merit of claim—Granted—Sedgwick K *v.* Larrikins Family Restaurant—No. 768 of 1991—George C.—6/2/92—Hospitality ..... 588

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent denied that Applicant was dismissed and that the employee actually terminated the employment contract—Respondent further argued that due to misconduct by Applicant the company had suffered loss and damage which should be offset against monies owing to Applicant therefore cancelling claim—Commission on reviewing evidence found that Applicant had not discharged onus of establishing that he was in fact dismissed and therefore Application must fail—Commission divided application to hear claim for contractual entitlements at a later date—Dismissed in Part and Adjourned—Bates E.R. *v.* Victoria Park Holdings Pty Ltd Trading as Welch World Travel—No. 1464 of 1991—Kennedy C.—21/2/92—Travel ..... 573

Application for reinstatement on the grounds of unfair dismissal, subsequently amended to include contractual entitlements—Applicant denied allegations of theft therefore summary dismissal was unfair and resulted in loss of benefits—Respondent argued that the Applicant had committed theft and that the contract of employment was regulated by an award therefore the Commission did not have jurisdiction—Commission found upon evidence that the dismissal was justified therefore the question of jurisdiction did not need to be addressed—Dismissed—Bayley M.E. *v.* Wanilla Nominees Pty Ltd Trading Jadana—No. 1768 of 1991—Parks C.—26/3/92 ..... 850

Application for alleged denied contractual entitlements and order that dismissal was unfair—Applicant argued that the Order in a first application issued by the Commission did not reflect the Applicant's wish to withdraw the application and also its issuance was unknown—Respondent raised the preliminary point that the matter had already been before the Commission and finalised—Commission found no difference between the substance of the original and the instant application therefore discontinued the application under S.27(i)(a) as opposed to S.23—Brailey B. *v.* Mendex Pty Ltd Trading as Mair and Co Maylands—No. 1300 of 1992—Beech C.—16/3/92—Real Estate—Salesperson ..... 850

Application for alleged denied contractual entitlements—Applicant sought payment for overtime and pro-rata leave entitlements—Respondent disputed hours worked by the Applicant—Commission found on evidence in favour of the Applicant—Granted—Mullan L. *v.* St. Croix Pty Ltd & Others—George C.—27/2/92 ..... 860

Application for reinstatement on the grounds of unfair dismissal and alleged denied contractual entitlements—Applicant only pursued contractual entitlements including payment in lieu of notices and holiday pay leave loading as the basis in the contract of service—Respondent did not appear—Commission decided to hear matter exparte due to Respondent's history of failures to appear—Simpson L.F. *v.* King Mining Corporation Ltd—No. 1575 of 1991—Gregor C.—24/2/92—Secretary ..... 868

Application for alleged denied contractual entitlements—Applicant sought payment for outstanding wages due under a contract of service and payment in lieu of notice—Respondent argued that a contract of employment was not entered into—Commission found on evidence in favour of Respondent—Dismissed—Wilson N.W. *v.* Newgem Nominees Pty Ltd—No. 1571 of 1991—Parks C.—13/3/92—Production Manager ..... 869

Application for reinstatement on the grounds of unfair dismissal and allegedly denied contractual entitlements—Respondent argued poor work performance—Commission found upon evidence that the Applicant was not unfairly dismissed and no reason to imply a greater period of notice on damages in lieu than that afforded on termination—Dismissed—Woods I. *v.* Farmer Furniture Pty Ltd—No. 207 of 1992—Parks C.—30/2/92—Manufacturing—Manager ..... 870

Application for allegedly denied contractual entitlements—Commission having considered the Truck Act 1899—1904 and Federal proceedings, found on evidence that no benefits were due under the contract of employment—Dismissed—Melville G.E. *v.* David John Coates, Receiver and Manager for Vapac Ltd—No. 705 of 1991—Halliwell S.C.—14/2/92 ..... 858

Application for allegedly denied contractual entitlements—Applicant claimed unpaid wages, holiday pay and superannuation contributions—Respondent questioned quantum of Applicant's claim with respect to wages in filing answers but failed to appeal at hearing—Commission was satisfied from evidence that Applicant was a credible witness and had made out her claim—Granted—Harrison F. *v.* Rosalie Wittenoon T/A Design Aids—No. 234 of 1992—Fielding C.—Secretarial ..... 1162

Conference referred *re* back payment of wages and extra payment in lieu of notice—Applicant union claimed employees had been assured both verbally and written of continued employment and had had no knowledge of impending redundancy—Respondent argued redundancies were necessary for economic viability—Commission whilst commending Respondent in assisting employees to find employment determined that an additional four weeks pay in lieu of notice was equitable—Granted in Part—T.W.U. *v.* Arnotts Mills & Ware—No. CR43 of 1992—Halliwell S.C.—15/4/92—Retail (Food) ..... 1190

Application for allegedly denied contractual entitlements—Applicant claimed he had not received full payment for work completed as a lesser amount was agreed upon on an understanding of undertaking further work—Respondent argued that Applicant accepted payment unconditionally and that there had been no promise made to the Applicant for second stage of work—Commission determined that Applicant was not an employee of the Respondent, there was no contract of employment drawn up and therefore Commission was without jurisdiction—Dismissed—Anderson M.J. *v.* Tommotek (W.A.) Pty Ltd—No. 2 of 1992—Fielding C.—13/4/92—Computer Programming ..... 1148

Application for allegedly denied contractual entitlements—Applicant claimed payment in lieu of notice—Commission found on evidence in favour of Applicant however determined that one weeks pay in lieu of notice was appropriate—Ordered Accordingly—Dent D. *v.* Coral Reef Holdings Pty Ltd T/A West Coast Mussells—No. 294 of 1992—Salmon C.—2/4/92—Fishing ..... 853

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

Claim *re* redundancy payments greater than provided—Applicant employees sought redundancy provisions in line with K-Mart agreement—Respondent argued that payments already made were fair by comparison with the Metal Trades (General) Award provisions and there was no provision in the Applicant's contracts of service upon which claims could be based—Commission reviewed authorities and found that Respondent had failed to notify employees of impending retrenchments and that employees were entitled to the benefit of the non-discrimination rule—Granted—Ryan N.W. and others *v.* Coles/Myer Ltd T/A Coles Supermarkets—Nos. 1264, 1276 and 1277 of 1991—Salmon C.—10/4/92—Retail Food ..... 1163

Application for allegedly denied contractual entitlements—Applicant sought sum for removal expenses from transferring from Canberra to Perth and return air fare on the basis that reimbursement had been agreed—Respondent argued that no contract in terms alleged was constructed and air fare and removal claim was raised only after the Applicant was appointed—Commission found on evidence in favour of Respondent—Dismissed—Connelly P *v.* Edith Cowan University Student Guild—No. 126 of 1992—Fielding C.—30/4/92—Tertiary Education ..... 1158

[2]Appeal against decision of the Commission (71 WAIG 1912) *re* denied contractual entitlements—Appellant argued Commission erred in finding the contract of employment was from year to year and in not finding that a reasonable notice period was implied and given—Appellant further argued Commission erred in calculating the value of shares or not writing off bad debts against the shares in determining additional salary—Full Bench reviewed authorities and found on the evidence that on none of the submissions or any of the grounds did the Commission err in law or in fact and no reason to substitute the decision at first instance—Dismissed—BNZ North Ltd *v.* Breeze D.L.—Appeal No. 981 of 1991—Sharkey P., Salmon C., George C.—5/5/92—Finance ..... 1268

Application for allegedly denied contractual benefits *re* deductions from commissions—Applicant sought payment of $63.51 and further deductions being withheld—Respondent argued that deductions taken from commissions were to cover expenses—Commission found that Applicant was entitled to payment of deduction made from commission as a benefit under contract—Commission further found that the basis for calculating transactions cost were unreasonable and submitted own deductions for each transaction—Granted in Part—Couper T.B. *v.* W.N. Currie T/A Mair & Co. Midland—No. 1229 of 1991—Coleman C.C.—8/5/92—Real Estate ..... 1396

Application for allegedly denied contractual entitlements—Applicant claimed outstanding commission on the grounds it was payable under her contract of service—Respondent failed to appear—Commission was satisfied that Applicant had established claim for monies due—Granted—Giles K. *v.* Chittering Constructions and Chittering Real Estate—No. 1663 of 1991—George C.—28/2/92—Real Estate ..... 1379

Application for allegedly denied contractual entitlements—Applicant claimed that he was made redundant and sought nine months payment in lieu of notice—Respondent argued that Applicant's services were still required and contract had not been repudiated—Commission considering alternative position offered, found on evidence that Applicant's position was made redundant—Commission further found taking all circumstances into account that payment for 3 months wages was reasonable—Granted in Part—Sinclair P. *v.* The Eagle Pty Limited C/- Radio West—No. 1316 of 1991—Salmon C.—5/5/92—Entertainment/Media ..... 1393

Application for allegedly denied contractual entitlements—Applicant claimed one months outstanding wages as cheque given in payment was dishonoured—Respondent failed to appear—Commission was satisfied that Applicant had established claim for monies due—Granted—Laurence E. *v.* Rangeview Enterprises Pty Ltd—No. 67 of 1992—Kennedy C. 10/4/92 ..... 1381

Application for allegedly denied contractual entitlements—Applicant claimed outstanding annual leave and termination pay benefits—Commission determined as a preliminary issue whether matter should come before Industrial Magistrate or itself and whether employee was covered by an award or contract of employment—Commission found that in the absence of an expressed written contract any inconsistency between the award or order on the one part and any purported agreement reached between the parties, the award or order overrides—Commission further found that the matter of annual leave was not within its jurisdiction whilst claim for termination pay was a contractual benefit and therefore justified—Granted in part and Dismissed for Want of Jurisdiction—De Berner K.E. *v.* Parcae Pty Ltd as Trustee for Parcae Unit Trust T/A Perth Finance and Insurance Services—No. 1447 of 1991—Beech C.—3/3/92—Financial Services ..... 1159

Application for allegedly denied contractual entitlements—Applicant claimed outstanding wages and payment in lieu of notice and argued that he had terminated employment without notice as Respondent had failed to provide a safe system of work—Respondent failed to appear—Commission found there was sufficient material before it to make a proper decision in favour of the Applicant—Granted—Fisher C. *v.* Eden Bay Pty Ltd T/A Aust Rural—No. 235 of 1992—Salmon C.—28/5/92 ..... 1378

Application for allegedly denied contractual entitlements—Respondent argued that Commission lacked jurisdiction as Applicants were independent contractors and not employees—Commission applied the control test, compared previous cases and found that Applicants were in an employer/employee relationship and written agreement meant what it said—Granted—Beavis D. and Skuse R.P. *v.* Admont Holdings Pty Ltd—Nos. 396 and 398 of 1991—Halliwell S.C.—17/2/92 ..... 1362

DANGEROUS WORK—

Conference referred *re* claim for asbestos eradication allowance—Applicant Union claimed that work performed by employees was eligible for allowance as prescribed in award—Commission found that claim fell within the allowances principle and asked parties to draft an order to reflect payment for work done on actual eradication only—Order Not Issued—A.B.L.F. *v.* Hon. Minister for Works and Services—No. CR393 of 1989—Halliwell S.C.—23/11/89—Construction ..... 409

Application for payment for lost time over alleged safety issue—Commission determined as a preliminary point whether Industrial Magistrate or Commission had jurisdiction to hear matter, compared the OHSW Act with the IR Act and found it had power to deal with claim—Applicant Union claimed that employees refused to work in vicinity of "exclusion zone" as there were strong grounds to believe they would be exposed to risk of imminent and serious injury—Respondent argued that it had received advice from experts and that at the time of the dispute the stack did not present a problem—Commission reviewed authorities and found on evidence that exposure to perceived risk was immediate and probable, that the company had not fully informed the workforce, therefore displayed an indifference to the safety of the employees—Granted—A.W.U. *v.* Swan Portland Cement Limited—No. OHSW 6 of 1991—Beech C.—7/2/92—Cement ..... 1203

DATE OF OPERATION—

[3]Applications to vary Awards *re* Second S.E.P. increase, Broadbanding, First Minimum Rates Adjustment and 3% Allowance Adjustment as a Special Case—Respondent argued no wage increase other than S.E.P. was justified without a proper work value exercise—Respondent further argued claims to adjust shift loadings and wages of juniors were comparative conditions justice arguments and proscribed by the Principles—Commission found Respondents' arguments similar to original matter where they were not accepted and that SEP and MRA claims should be granted—Commission refused claim to *re* align junior wages under the Inequities Principle, found penalty rate claims were outside SEP and no special circumstances to grant retrospectivity—In Supplementary Reasons Commission gave reasons for issuance and addressed matters of payment of wages, accrual of annual leave, Part-time and Training Leave—Granted in Part—T.W.U. *v.* Central Districts Bakery and Others—No. 1037 and 1038 of 1990(R2)—Halliwell S.C., Salmon C., Gregor C.—14/11/91 and 21/1/92—Bakery ..... 223

Applications to vary award *re* 1st and 2nd SEP and 2.5% Wage Adjustments and Minimum Rates Adjustments—Commission decided matters of Annual Leave, Sick Leave, Contract of Service, Probationary Clause, Apparel, Shortages and Change Money and Training Leave—Commission reduced time between operative dates in deference to a reduced initial increase in wages by employers—Ordered Accordingly—T.W.U. *v.* Portius Pty Ltd t/a Flash Foods Canteen and Others—No. 1713 of 1991 (R2) and 1714 of 1991—Halliwell S.C.—17/1/92—Transport (Mobile Food Vendors) ..... 361

CUMULATIVE DIGEST—*continued*

Page

DATE OF OPERATION—*continued*

Application for a new award to cover operations of Applicant Employer by consent—Parties sought to replace conglomerate structure of awards with one award—Commission found the outcome of negotiations of the parties represented an excellent example of what can be achieved co-operatively, that the award represented part of an ongoing process of Structural Efficiency and did not offend the State Wages Principles—Commission granted retrospective date of operation—Granted—Cockburn Cement Ltd *v.* A.W.U. and Others—No. A14 of 1991—Beech C.—2/4/92—Cement Manufacture ..... 1054

Conference referred *re* dispute over renumeration for various professional groups in Public Teaching Hospitals—Applicant Employers submitted a schedule of proposed salary classifications employed by them in administrative and supervisory role—Respondent claimed that the classifications awarded should be at a higher levels on the respective scales—The Public Service Arbitrator extensively reviewed the classifications structure and strongly supported the creation of personal classifications as an appropriate recognition for those officers who earn international accolades—The PSA found on evidence that the new Level 11 classification was not warranted for any of the Medical Laboratory Technologist positions and determined specific operative dates which were calculated in accordance with the dictates of S.26(i)(a) of the Industrial Relations Act—In Supplementary Reasons PSA addressed broadbanded salary scales—Granted in Part—The Board of Management, RPH and Others *v.* H.S.O.A.—No. PSA CR57 of 1990—Negus C.—28/11/91—Health ..... 1187

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

DEMARCATION—

Application to vary award *re* removal of Classification Level from "Area and Scope" clause to correct an alleged error when the award was issued—Respondent argued no position in the Dept. of Marine and Harbours covered by the Award had been classified level 4 as a result of Broadbanding Classification—CSA intervened and argued that such classification were already covered by CSA Agreements and Awards—The PSA reviewed principles of industrial coverage and found it did not have the benefits of submissions and evidence so as to determine the matter and adjourned it—On hearing further submissions PSA found that CSA rules precluded coverage of employees already covered by an award and therefore the objection failed—PSA found Applicant's claim had merit—Granted—FCU *v.* W.A. Coastal Shipping Commission & Others—No. P24 of 1990—Kennedy C. PSA—16/7/91—Port Authorities ..... 91

[2]Application to alter Union Rule *re* eligibility for membership—Various Unions objected on the basis of competition and demarcation due to conflict of constitutional coverage—Objectors further argued alteration sought went beyond covering the three to ten employees claimed by the Applicant—Full Bench found it was not satisfied that there would not be overlapping and that Section 55(5) prevented the Full Bench authorising the Registration of an alteration unless it was satisfied there was good reason consistent with Section 6 of the I.R. Act—Dismissed—F.P.F.A.I.I.U. *v.* A.M.W.S.U. and Others (Objectors)—No. 1009 of 1991—Sharkey P., Coleman C.C., Beech C.—10/3/92—Unions ..... 489

DISABILITIES—

Conference referred *re* claim for asbestos eradication allowance—Applicant Union claimed that work performed by employees was eligible for allowance as prescribed in award—Commission found that claim fell within the allowances principle and asked parties to draft an order to reflect payment for work done on actual eradication only—Order Not Issued—A.B.L.F. *v.* Hon. Minister for Works and Services—No. CR393 of 1989—Halliwell S.C.—23/11/89—Construction ..... 409

Conference referred *re* claim for field allowance—Applicant Union claimed that extreme conditions under which work was to be performed in the field and the change in the method of work justified an allowance—Respondent argued that there had not been a significant net addition to work value before any allowance could be paid under the allowances Principle—Commission found on evidence and from inspections that the work which was subject to application was different in circumstances to that which was compensated for in the award and thus in line with the Principles—Granted—A.M.W.S.U. *v.* Newcrest Mining Limited—No. CR728 of 1991—Gregor C.—12/3/92—Mining ..... 875

Conference referred *re* claim for allowances—Applicant Unions claimed that work performed by employees was eligible for allowances—Commission reviewed authorities, found an order should issue and gave reasons therefore—Granted—M.E.W. and Others *v.* John Holland Pty Ltd and Others—Nos. CR755 of 1991 & CR7 of 1992—George C.—26/3/92 ..... 879

Claim *re* unfair dismissal—Applicant claimed he had not provided full medical history as he had received an opinion from his doctors recommending this employment opportunity in view of his inability to perform manual type occupations—Respondent argued that employee had deliberately set out to deceive the Respondent which in terms of his application form amounted to fraud which justified termination—Commission reviewed cases cited and evidence found that whilst having sympathy for Applicant's position, the Respondent had been mislead in a material manner pertinent to the work situation and therefore dismissal was not harsh or unfair—Dismissed—Baxter E.D. *v.* Burswood Resort Management Limited—No. 1381 of 1991—George C.—14/4/92—Casino ..... 1153

Application for interpretation of an award *re* at what point in time does an employee become entitled to payment for lost time due to inclement weather—Applicant employer claimed that credited hours should be reduced from when employees stopped work—Respondent Union argued that it should be reduced from the time that employees physically leave the site—Commission analysed clause, found that entitlement to payment was for ordinary time lost through inclement weather when an employee had ceased work whether or not the employee remains or leaves the site—Declared Accordingly—F.C.C. and Another *v.* B.T.A.—No. 1326 of 1991—Beech C.—11/5/92—Construction ..... 1358

DISCRIMINATION—

Claim *re* redundancy payments greater than provided—Applicant employees sought redundancy provisions in line with K-Mart agreement—Respondent argued that payments already made were fair by comparison with the Metal Trades (General) Award provisions and there was no provision in the Applicant's contracts of service upon which claims could be based—Commission reviewed authorities and found that Respondent had failed to notify employees of impending retrenchments and that employees were entitled to the benefit of the non-discrimination rule—Granted—Ryan N.W. and others *v.* Coles/Myer Ltd T/A Coles Supermarkets—Nos. 1264, 1276 and 1277 of 1991—Salmon C.—10/4/92—Retail Food ..... 1163

EMPLOYEE—

Claim *re* contractual entitlements—Applicant sought payment for outstanding benefits arising from contract of employment—Respondent argued Applicant was not its employee and there was no jurisdiction—Alternatively that the Applicant was in debt to the Respondent—Commission reviewed authorities and found that the relationship between the parties was one of employer and employee and that the Applicant was entitled to a sum of remuneration subject to various deductions—Granted in Part—Geikie G.N. *v.* Orchard Holdings—No. 717 of 1991—Parks C.—9/8/91—Fishing ..... 380

Conference referred *re* jurisdiction to deal with dispute over contract system and respondency to award—Applicant claimed that there were no employees eligible to be members of union—Respondent argued that members of union were employees of Applicant Company and not independent contractors—Commission reviewed indicia for contract of service as opposed to contract for service and declared that whilst some factors of service had the appearance of being of an independent nature on balance a contract of service existed and therefore Commission had jurisdiction—Declared Accordingly—Preston River Abattoir *v.* M.I.E.U.—No. CR44 of 1992—Halliwell S.C.—14/2/92—Meat ..... 625

CUMULATIVE DIGEST—*continued*

Page

EMPLOYEE—*continued*

Application for allegedly denied contractual entitlements—Respondent sought to have question of jurisdiction determined as a preliminary point as to whether there was a contract of service or contract for service—Commission examined indicia from authorities cited and from the evidence determined that there was a contract for service and therefore lacked jurisdiction to deal with matter—Dismissed—Maddrell K. *v.* Admont Holdings Pty Ltd—No. 399 of 1991—Halliwell S.C.—21/2/92 ..... 584

Application for alleged denied contractual entitlements—Applicant sought payment for outstanding wages due under a contract of service and payment in lieu of notice—Respondent argued that a contract of employment was not entered into—Commission found on evidence in favour of Respondent—Dismissed—Wilson N.W. *v.* Newgem Nominees Pty Ltd—No. 1571 of 1991—Parks C.—13/3/92—Production Manager ..... 869

Application for allegedly denied contractual entitlements—Applicant claimed he had not received full payment for work completed as a lesser amount was agreed upon on an understanding of undertaking further work—Respondent argued that Applicant accepted payment unconditionally and that there had been no promise made to the Applicant for second stage of work—Commission determined that Applicant was not an employee of the Respondent, there was no contract of employment drawn up and therefore Commission was without jurisdiction—Dismissed—Anderson M.J. *v.* Tommotek (W.A.) Pty Ltd—No. 2 of 1992—Fielding C.—13/4/92—Computer Programming ..... 1148

Application for allegedly denied contractual entitlements—Respondent argued that Commission lacked jurisdiction as Applicants were independent contractors and not employees—Commission applied the control test, compared previous cases and found that Applicants were in an employer/employee relationship and written agreement meant what it said—Granted—Beavis D. and Skuse R.P. *v.* Admont Holdings Pty Ltd—Nos. 396 and 398 of 1991—Halliwell S.C.—17/2/92 ..... 1362

ENFORCEMENT OF AWARDS/ORDERS—

[2]Appeal against decision of Industrial Magistrate (71 WAIG 2161) *re* unproven breach of award—Appellant argued Industrial Magistrate had erred in giving weight to the employees evidence and that the lack of findings was inconsistent with determinations made—Full Bench reviewed authorities and found the Industrial Magistrate was unable to make a finding of fact as he was unable to accept the evidence of one lot of witnesses in preference to the others and that the Complainant had not therefore established any of the facts in dispute—Dismissed—F.C.U. *v.* Brocklebank Pty Ltd Trading as Kwinana Lodge Hotel—Appeal Nos. 1170, 1171 and 1172 of 1991—Sharkey P., Halliwell S.C., Negus C.—14/2/92—Hotels ..... 486

Complaint *re* breach of award—Complainant claimed that Defendant had failed to make available time and wages record to a duly accredited union official—Defendant argued that it did not fall within scope of award and therefore was not required to produce documents—Industrial Magistrate reviewed the award and determined that the Defendant's activities brought it within the scope of the award and thus it did not comply with its obligations—Proven—F.M.W.U. *v.* Burswood Executive Health Centre—Complaint No. 31 of 1991—Tarr S.M.—4/7/91—Health Recreation ..... 848

[2]Appeal against decision of Industrial Magistrate (71 WAIG 3009) *re* breach of award—Appellant argued that work performed by the employee was not that of an electrical fitter other than for a miniscule time and the Industrial Magistrate had erred in assessing the evidence—Full Bench reviewed definitions, award, found allowance was for the holding of the qualification and that it was opened on the evidence for the Industrial Magistrate to find as he did—Dismissed—Infrapulse Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 1697 of 1991—Sharkey P., Kennedy C., Parks C.—5/6/92—Electrical Manufacturing ..... 1285

[2]Appeals against decision Industrial Magistrate remitted from Industrial Appeal Court for further hearing (71 WAIG 2259) *re* breach of Award—Appellant argued Industrial Magistrate failed to make findings as to the amount actually paid and whether those amounts were as particularised or not more than those amounts—Respondent argued that to establish that the employee earned a certain amount per week did not falsify the particulars supported by her evidence—Full Bench found without more evidence as to what was received and due on a weekly basis it was not possible to find the figures alleged as underpayments on balance of probabilities—Upheld and Quashed—Como Investments Pty Ltd *v.* McCorry G.—Appeal No. 1133 of 1990—Sharkey P., Fielding C., George C.—5/5/92—Restaurants & Catering ..... 1282

ENTRY: RIGHT OF—

Application to vary award *re* recognition of conscience—Applicant argued Unions were not of God and on the basis of the Constitution, sought exemption from dealing with the Respondent Union under the award—Respondent Union argued granting application would affect scope of award and the matter was broad such as to require an application pursuant to Section 50 of the Act—Commission reviewed authorities, including that relating to the Constitution, I.R. Act and found that though the Applicant's belief was sincere it was not to be persuaded that the legitimate recognition of registered organisations and their role by Parliament should be put to one side—Dismissed—Concept Products *v.* F.P.F.A.I.U.—No. 1820 of 1991—Beech C.—13/4/92—Furniture ..... 1137

HOURS OF WORK—

Conference referred *re* abolition of rostered day off—Applicant Union claimed that employees had been pressured into signing consent forms, actions were contrary to prior agreement between the parties and sought that the signed documents be returned to the said employees—Respondent employer argued that company was following provisions outlined in the award to change the work cycle—Commission reviewed the meaning of equity and found on evidence the respondent had unfairly exercised its rights under the award and had acted against public interest by ignoring State Wages Policy—Granted—S.D.A.E.A. *v.* K-Mart Discount Stores—No. CR525 of 1991—Salmon C.—3/1/92—Retail ..... 423

Application to vary award *re* Hours, by consent and Rates of Pay and Allowances—Parties sought to resolve dispute over interpretation of certificate allowances—Commission reviewed evidence from both parties as to an appropriate allowance, fixed a maximum amount to be applied and declared that salary maintenance if to be paid, should be applicable to all employees who have been receiving the two allowances and be done administratively—Granted in Part—W.A.P.N.A. *v.* Hon. Minister for Health—No. 1336(B) of 1990—Negus C.—13/8/91—Health ..... 550

Application for interpretation of an award *re* at what point in time does an employee become entitled to payment for lost time due to inclement weather—Applicant employer claimed that credited hours should be reduced from when employees stopped work—Respondent Union argued that it should be reduced from the time that employees physically leave the site—Commission analysed clause, found that entitlement to payment was for ordinary time lost through inclement weather when an employee had ceased work whether or not the employee remains or leaves the site—Declared Accordingly—F.C.C. and Another *v.* B.T.A.—No. 1326 of 1991—Beech C.—11/5/92—Construction ..... 1358

Application to vary award to more accurately reflect current conditions of employment—Applicant Union sought to amend salaries provision for overtime, redeployment of officers and severance payment in case of redundancy—Respondent sought adjournment pending further discussions of above matters—Parties reached agreement on provision for part-time employment, hours of attendance, allowances and leave of absence—Commission was satisfied that changes were within the ambit of State Wage Principles and reflected standard Public Service conditions—Granted and Adjourned Sine Die—C.S.A. *v.* Joint House Committee of Parliament of W.A.—No. 343 of 1991—Fielding C.—22/5/92—Public Administration ..... 1330

INDUSTRY—

Claim against requirement to register as an employer under the Construction Industry Portable Paid Long Service Leave Act—Board of Reference found on evidence that the Claimant was not within the "Construction Industry" within the meaning of the CIPPLSL Act—Granted—Kununurra Earthmoving Plant *v.* Construction Industry Long Service Leave Payments Board—Carrigg, Registrar/Latter/Uphill—File No. 1 of 1992—26/2/92—Earthmoving ..... 570

CUMULATIVE DIGEST—*continued*

Page

INDUSTRY—*continued*

[2]Appeals against decision of Industrial Magistrate *re* Breach of Award—Appellant argued Industrial Magistrate erred in fact and in law in finding Appellant was bound by Award—Full Bench found reasons were those given as recorded on transcript rather than extempore decision—Full Bench reviewed authorities, common object test and found grounds relating to "industry" whilst made out were not fatal—However Full Bench found Industrial Magistrate erred in purporting to convict the Appellant and vary decision accordingly—Upheld in Part—Burswood Executive Health Centre *v.* F.M.W.U.—No. 1145 of 1991—Sharkey P., Coleman C.C., Kennedy C.—19/3/92—Health & Fitness ..... 687

INDUSTRIAL ACTION—

Conference referred *re* claim for lost time over safety issue—Respondent argued Employees had not followed safety dispute procedures—Commission reviewed authorities and found no evidence to conclude that the employees with a legitimate claim under the Occupational Health Safety and Welfare Act did not have their entitlements maintained—However Commission found respondent partly responsible for the Industrial Action and having regard to S.26 of the I.R. Act ordered some payment for lost time—Granted in part—AMWSU *v.* CBI Construction Pty Ltd—No. CR 607 of 1991—George C.—11/12/91—Construction ..... 158

Conference *re* work stoppage over inadequate first aid facilities and deduction of wages—Applicant union requested interim order requiring Respondent to pay one hour's pay to employees prepared to sign authorisation for employer to deduct appropriate amount following determination of matter—Respondent argued that employees had engaged in industrial action and that if the claim was granted, a division would be created on site with employees covered by Federal award—Commission reviewed evidence and determined that several considerations had to be answered, that the claim would not be appropriate in these circumstances and listed matter for further hearing and determination—B.T.A. *v.* B.M.A.—No. C194 of 1992—Beech C.—7/4/92—Construction ..... 1173

Conference referred *re* summary dismissal of an employee for alleged misconduct—Applicant employer claimed the termination had been justified as incident was an unprovoked assault and considering nature of employee's work in the community—Respondent union argued dismissal was harsh and unfair in the light that employee had been punished twice—Commission reviewed authorities and found that there had been no double jeopardy and that Applicant had not acted unfairly in its decision to terminate contract of service—Dismissed—BHP Minerals Limited *v.* A.W.U.—No. CR108 of 1992—Gregor C.—7/4/92—Mining ..... 1174

Conference referred *re* strike action over termination of an employee—Applicant employer claimed that decision to terminate was warranted as employee had engaged in aggressive behaviour towards other employees over a reasonably extensive period—Respondent Union argued that employers failure to deal with Applicant pleas for assistance on work difficulties created a heavily stressful situation and sought reinstatement without loss of entitlements—Commission found that employee had shown a propensity to violent action in respect of his co-workers and that a full investigation had confirmed this therefore dismissal was justified—Dismissed—BHP Minerals Limited *v.* A.E.E.F.E.U.—No. CR211 of 1991—Gregor C.—26/5/92—Mining .... 1411

Conference referred *re* dismissal of employee *re* absence from work—Respondent Union argued that dismissal was unfair and sought declaration—Commission found payment in lieu of notice did not change the fact that the dismissal was summary, but cancelled it before hearing—Commission further found on evidence and from examining the internal investigation undertaken by Applicant Company, the dismissal was not unfair and application be dismissed—Ordered Accordingly—W.A. Newspapers Ltd *v.* A.M.W.S.U.—No. CR254 of 1991—Gregor C.—9/6/92—Printing ..... 1399

INDUSTRIAL MATTER—

Conference *re* claim for reinstatement on the grounds of unfair dismissal—Applicant argued delay due to police investigation—Respondent argued that the delay rendered the application no longer an industrial matter—Commission examined the N.S.W. Case and distinguished it from the instant matter and further found that the Applicant did not offer a satisfactory explanation for the delay—Dismissed—S.D.A. *v.* Calahan T/A Bi Lo Midland—No. CR777 of 1991—Salmon C.—16/3/92—Shop Assistant ..... 884

Application to vary award to provide that Respondent not implement decisions to make changes without prior consultation with the Union and employees to be affected—Applicant Union also sought to include new Schedule in case of change involving deletion of classified positions—Respondent argued that claim was not an industrial matter, it sought to deny Respondent right to manage the enterprise and would set a precedent for other public sector awards—RCB reviewed concept of industrial matter, found that insertion of guidelines would add inflexibility to management of change and have potential to be used as a mechanism to delay reform and therefore no justification for claim—Dismissed—W.A.R.O.U. *v.* W.A.G.R.C.—No. R3 of 1992—Fielding C., Thompson/Munyard—29/5/92—Railways ..... 1371

INTERPRETATION—WORDS AND PHRASES—

Conference referred *re* abolition of rostered day off—Applicant Union claimed that employees had been pressured into signing consent forms, actions were contrary to prior agreement between the parties and sought that the signed documents be returned to the said employees—Respondent employer argued that company was following provisions outlined in the award to change the work cycle—Commission reviewed the meaning of equity and found on evidence the respondent had unfairly exercised its rights under the award and had acted against public interest by ignoring State Wages Policy—Granted—S.D.A.E.A. *v.* K-Mart Discount Stores—No. CR525 of 1991—Salmon C.—3/1/92—Retail ..... 423

[2]Appeal against decision of the Commission (71 WAIG 1984) *re* review of prohibition notice under Occupational Health, Safety and Welfare Act—Appellant argued Commission erred in taking into account its own knowledge of motor vehicles, failed to satisfy itself that there was a serious and imminent risk, and failed to give proper consideration to the term "practicable" and erred in not finding the "duty of care" was fulfilled—Full Bench reviewed authorities, interpreted the Occupational Health, Safety and Welfare Act, "serious and imminent risk", and found on review of the evidence that there was no miscarriage of the Commission's discretion—Dismissed—Wormald Security Australia Pty Ltd *v.* Peter Rohan, D.O.H.S.W—Appeal No. 1161 of 1991—Sharkey P., George C., Beech C.—10/3/92—Security ..... 477

[2]Appeals against decision of Industrial Magistrate *re* Breach of Award—Appellant argued Industrial Magistrate erred in fact and in law in finding Appellant was bound by Award—Full Bench found reasons were those given as recorded on transcript rather than extempore decision—Full Bench reviewed authorities, common object test and found grounds relating to "industry" whilst made out were not fatal—However Full Bench found Industrial Magistrate erred in purporting to convict the Appellant and vary decision accordingly—Upheld in Part—Burswood Executive Health Centre *v.* F.M.W.U.—No. 1145 of 1991—Sharkey P., Coleman C.C., Kennedy C.—19/3/92—Health & Fitness ..... 687

[2]Applications for alteration of Union Rules *re* Name and Eligibility for Membership—Objection withdrawn after amendment to application—Full Bench reviewed authorities and used expressio unius rule to find that the new name clearly indicated that the organisation was of employees—Granted—W.A.F.B.E.U.—No. 1256 of 1991—Sharkey P., Kennedy C., Parks C.—11/2/92—Emergency Services ..... 984

Application for an order *re* employment classification be deemed to be that of permanent employee and entitlement to maternity leave—Applicant union argued that employee should be re-appointed at same level with Respondent on completion of maternity leave—Public Service Arbitrator found that as employee was a temporary officer, there was no provision in the award to recognise her leave entitlements—Dismissed—F.C.U. *v.* Fremantle Port Authority—No. P48 of 1991—Negus C.—26/3/92—Port Operations ..... 845

CUMULATIVE DIGEST—*continued*

Page

INTERPRETATION—WORDS AND PHRASES—*continued*

[4]Applications for interpretation of Union Rules *re* whether one person can hold two offices—Applicant argued election of Respondent to office of Secretary/Treasurer rendered the office of President vacant—Respondent argued claim was vexatious and that there was nothing explicit in the Rules requiring her to vacate the position—President reviewed Union Rules, authorities, in particular Mellor *v.* Horn and found the Respondent had implicitly resigned from one office as the two offices were incompatible—President further found there was a casual vacancy in the office of President which was required to be filled by election if the Committee of Management decided—In Supplementary Reasons the President dealt with further submissions and gave reasons for ordering that an election be held—Granted—Carter L.B. *v.* Drake M.A.—No. 965 of 1991—Sharkey P.—30/8/91 and 8/10/91—Unions ..... 698

[2]Appeal against decision of Industrial Magistrate (71 WAIG 3009) *re* breach of award—Appellant argued that work performed by the employee was not that of an electrical fitter other than for a miniscule time and the Industrial Magistrate had erred in assessing the evidence—Full Bench reviewed definitions, award, found allowance was for the holding of the qualification and that it was opened on the evidence for the Industrial Magistrate to find as he did—Dismissed—Infrapulse Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 1697 of 1991—Sharkey P., Kennedy C., Parks C.—5/6/92—Electrical Manufacturing ..... 1285

[2]Application for a declaration that Union's Rules relating to qualification for membership and prescribed offices are the same as for the Federal Counterpart Body and alteration of Rules—Applicant argued Full Bench should take a broad approach when comparing rules and that it was not intended to be an arithmetic exercise—Full Bench reviewed I.R. Act, Union Rules and found qualifications for membership were not substantially or fundamentally the same, as Section 71(2), the I.R. Act was not satisfied then the application with respect to offices could not be granted and the rule change was a matter for the Registrar—Dismissed—A.P.E.—No. 1583 of 1991—Sharkey P., Halliwell S.C. , Negus C.—4/6/92—Unions ..... 1295

[2]Question of law referred to Full Bench *re* whether a selection process agreed between the parties was contrary to Section 80Y of the I.R. Act as vacancies in promotion positions were not being advertised as they arose—Full Bench reviewed I.R. Act and found that the words were plain and that the existing process was ultra vires the Act—Commissioner expressed view that Section 80X and 80Y did not fetter managerial prerogative—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. C579A of 1991—Sharkey P., Fielding C., Negus C.—7/4/92—Emergency Services ..... 981

Application for interpretation of an award *re* at what point in time does an employee become entitled to payment for lost time due to inclement weather—Applicant employer claimed that credited hours should be reduced from when employees stopped work—Respondent Union argued that it should be reduced from the time that employees physically leave the site—Commission analysed clause, found that entitlement to payment was for ordinary time lost through inclement weather when an employee had ceased work whether or not the employee remains or leaves the site—Declared Accordingly—F.C.C. and Another *v.* B.T.A.—No. 1326 of 1991—Beech C.—11/5/92—Construction ..... 1358

[1]Appeal against decision of President (72 WAIG 698) *re* interpretation of Union Rules over filling of a vacant union office—IAC reviewed rules and found overall thrust was that if a vacancy was to be filled it was to be filled by an election and that was consistent with the Reasons of the President in Mellor *v.* Horn—Dismissed—Carter L.B. *v.* Drake M.A.—Appeal No. 19 of 1991—Rowland J., Ipp J., Owen J.—11/5/92—Unions ..... 1266

Conference referred *re* claim for pro rata long service leave entitlements—Applicant claimed continuous employment for 10 years and that although the ownership and employer changed over the period of her employment, she was entitled to her benefits—Respondent argued that in each case there had not been a transmission of business between the various employers and the absence of consideration of goodwill between several employers would seem to indicate this — — Commission reviewed authorities and found on evidence that as there had been a transmission of business for the purposes of the long service leave standard provisions, the Applicant had discharged the onus of establishing her claim—Granted—Hawkins Y.L. *v.* Treen D.E. and F.W. T/A Exchange Hotel—Pinjarra—No. CR492 of 1991—Beech C.—19/2/92—Hospitality ..... 1414

[4]Application for order *re* breach of Union Rules—Applicant argued Respondent Union had erred in granting full membership status to the second respondent pursuant to the Union eligibility rule and sought order revoking it and conference delegate status—Applicant further argued second respondent was ineligible to occupy position of Secretary—Respondent argued that having become a member he remained a member on the authority of judgements of the Federal Court—President reviewed authorities, Union Rules, I.R. Act and found the second respondent had ceased to be a member of the Union on termination of employment and hence was ineligible to hold office—Second Respondent was however not ineligible to hold position of General Secretary—In Supplementary Reasons President heard submissions arising out of original reasons relating to changes to Rules regarding references to the General Secretary, TLC delegate and the term "officer"—President found submissions had merit—Ordered Accordingly—Dornan B.A. *v.* S.S.T.U. and Another—No. 1515 of 1991—Sharkey P.—10/10/91—Unions ..... 997

[4]Application for orders *re* breach of union rules—Applicant argued that articles and use of union resources for the production and distribution of electoral material were designed to give the Respondent an electoral advantage over the Applicant, was a gross abuse of union resources, breached the rules of the Union and sought *inter alia* orders for the election to be declared void and a new election be called—President allowed Counsel to appear for the Union President as intervener and the Union—Respondent argued matter of advertisement in publication was not within the President's jurisdiction and that he was not the proper Respondent—President reviewed I.R. Act, Union Rules, matters of self incrimination of witnesses, the definition of irregularity, whether the President was bound by the decisions of the High Court, the relationship between the publication editor, the Union Secretary and the Union President, allegations made in the article and found that there was jurisdiction and power to make orders under Section 66 of the I.R. Act based on the findings of irregularity on proven breaches of the rules—President found it was the misuse of resources by one party when they were not available to be so used by the other parties which was at the seat of the irregularity under the rules—President reviewed further authorities and found the equity, good conscious and substantial merits of the cases as well as the interests of the union and its members were best served by declaring null and void the election and ordering a new election—In Supplementary Reasons President dealt with submissions as to vacating the senior officers position and consequential orders—President found that as the election was null and void, offices were vacant and ordered senior officers be deemed to hold office until completion of election with the Union President's power limited—In further Supplementary Reasons President dealt with further consequential matters including an emergency committee meeting and appeal rights—President gave reasons for various interim orders—Ordered Accordingly—Dornan B.A. and Others *v.* Harken E.J., President SSTU and Another—No. 1607 of 1991—Sharkey P.—31/3/92, 13/4/92, 16/4/92 and Others—Unions ..... 1008

INTERVENTION—

[2]Appeal against decision of Commission (71 WAIG 2869) *re* variation of award—Full Bench granted leave to intervene to committee members of Appellant Union, the Union and another Union—Respondent argued individual Appellants had no standing to file the appeal, hence it was incompetent or the Full Bench had no jurisdiction and sought that the Full Bench refrain from hearing the matter—Full Bench found separate application to refrain from hearing was incompetent—Full Bench reviewed Union rules and found on evidence nothing to suggest that the appeal was instituted by the Union with the necessary authority—Dismissed—F.L.A.I.E.U. *v.* Burswood (Management) Ltd—No. 1643 of 1991—Sharkey P., Halliwell S.C., Salmon C.—5/2/92—Racing and Gaming ..... 212

[4]Application for stay of order pending Appeal to Full Bench—President reviewed background of whole dispute including S.66 matters—President found application could not be treated as having been made by F.L.A.I.E.U. as resolutions of Committee of Management of that body had not been struck down as invalid—President however found individually named Applicants had sufficient interest in a stay of the order until serious issues regarding the basis of consent to the variation had been determined—President further found these serious issues were subsumed by the strength of the Applicants' interest—President further found balance of convenience favoured Applicants and their colleagues as employees subject to conditions of employment which were allegedly consented to on the basis of invalid resolutions of the Committee of Management—Granted in Part—F.L.A.I.E.U. and Others *v.* Burswood Resort (Management) Limited and Another—No. 1644 of 1991—Sharkey P.—6/12/91—Gaming ..... 231

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—

Claim *re* contractual entitlements—Applicant claimed question of loan was not an industrial matter and sought outstanding salary and annual leave benefits—Respondent argued that employee was under obligation to pay balance of "personal loan" and therefore negated claim—Commission found that loan was an obvious way of dealing with a potential cause of deteriorating work performance and considered it a matter within its jurisdiction—Commission found in favour of Applicant however on receipt of decision, proposed order was no longer required—Discontinued—Oughton C. *v.* Environmental Industries—No. 918 of 1991—Salmon C.—4/11/91 ..... 154

Claim *re* contractual entitlements—Applicant sought payment for outstanding benefits arising from contract of employment—Respondent argued Applicant was not its employee and there was no jurisdiction—Alternatively that the Applicant was in debt to the Respondent—Commission reviewed authorities and found that the relationship between the parties was one of employer and employee and that the Applicant was entitled to a sum of remuneration subject to various deductions—Granted in Part—Geikie G.N. *v.* Orchard Holdings—No. 717 of 1991—Parks C.—9/8/91—Fishing ..... 380

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent argued that Commission did not have jurisdiction to deal with the matter as the employee was covered by a Federal Award—Commission found it had no authority to hear application due to Federal Award and direct inconsistency between State and Federal Law save any benefit which did not arise out of the award—Dismissed in Part and adjourned sine die—Newbound P.J. *v.* Western United Insurance Brokers Pty Ltd—No. 1382 of 1991—Parks C.—17/1/92 ..... 389

Application to vary an order *re* inspection of documents—Preliminary Reason Applicant argued it had not had time at inspection of documents to record contents and sought copies—Respondent argued Commission had no power to order copy of documents to be produced—Commission reviewed authorities and found Regulation 80 could not write down the powers of the I.R. Act and that it would not be an onerous imposition on the Respondent—Granted—C.M.E.U. *v.* R.R.I.A.—No. 41 of 1992—Gregor C.—24/1/92—Iron Ore ..... 432

Conference referred *re* abolition of rostered day off—Applicant Union claimed that employees had been pressured into signing consent forms, actions were contrary to prior agreement between the parties and sought that the signed documents be returned to the said employees—Respondent employer argued that company was following provisions outlined in the award to change the work cycle—Commission reviewed the meaning of equity and found on evidence the respondent had unfairly exercised its rights under the award and had acted against public interest by ignoring State Wages Policy—Granted—S.D.A.E.A. *v.* K-Mart Discount Stores—No. CR525 of 1991—Salmon C.—3/1/92—Retail ..... 423

Board of Reference *re* Long Service Leave entitlement—Applicant sought pro-rata entitlement to long service leave—B.O.R. found that Respondent company was in liquidation and subject to an Order for Winding up and therefore did not have jurisdiction to determine matter—Dismissed—Williams R.—Danebrook Holdings Pty Ltd—No. 32 of 1991—Yewers/Beech/Uphill—9/2/92 ..... 374

[2]Appeal against decision of Commission (71 WAIG 2655) *re* redundancy—Appellant argued appeal had identical grounds as to jurisdiction as a matter before the Industrial Appeal Court and sought adjournment—Full Bench found both parties would suffer injustice if the matter was heard at the time—Granted—Gromark Packaging Pty Ltd *v.* F.M.W.U.—Appeal No. 1568 of 1991—Sharkey P., Negus C., George C.—31/1/92—Packaging ..... 215

[2]Appeal against decision of Commission (71 WAIG 2869) *re* variation of award—Full Bench granted leave to intervene to committee members of Appellant Union, the Union and another Union—Respondent argued individual Appellants had no standing to file the appeal, hence it was incompetent or the Full Bench had no jurisdiction and sought that the Full Bench refrain from hearing the matter—Full Bench found separate application to refrain from hearing was incompetent—Full Bench reviewed Union rules and found on evidence nothing to suggest that the appeal was instituted by the Union with the necessary authority—Dismissed—F.L.A.I.E.U. *v.* Burswood (Management) Ltd—No. 1643 of 1991—Sharkey P., Halliwell S.C., Salmon C.—5/2/92—Racing and Gaming ..... 212

[1]Appeal against decision of Full Bench (71 WAIG 903) *re* dismissal of appeal against order that employer pay for working time lost during strike action—Industrial Appeal Court reviewed evidence and authorities and found that it was incumbent upon the Full Bench to consider whether there was any evidence to support the finding of the Commission that there were "genuine and reasonably health concerns about safety" not in terms of general apprehension of safety—I.A.C. found as there was no evidence to support such a finding then there was no need to examine further grounds of appeal—There was further no compliance with award provisions as to dispute resolution or safety code procedures—Upheld—Hamersley Iron Pty Ltd *v.* C.M.E.U.—IAC Appeal No. 4 of 1991—Rowland J, Franklyn & Nicholson JJ—17/12/91—Iron Ore ..... 461

Conference referred *re* dispute over failure to adhere to award provisions—Applicant union claimed Respondent had breached award by abolishing substantive positions without prior consultation with union and sought variation to award to remove ambiguities—Respondent argued Commission had no power to deal with matter and declared dispute had either been resolved or rather that it came under exclusive province of Industrial Magistrate—Respondent further argued dispute was not an industrial matter but one of managerial prerogative—R.C.B. reviewed powers as given to it by the I.R. Act and authorities and determined that its powers under S.44 were limited in that orders issued by it could only be made on an interim basis and the R.C.B. was not empowered to vary the award as sought—Dismissed—R.O.U. *v.* W.A.G.R.C.—No. RCB CR8 of 1991—Fielding C., Thompson/Kemp—6/3/92—Railways ..... 628

[2]Application to alter Union Rule *re* eligibility for membership—Various Unions objected on the basis of competition and demarcation due to conflict of constitutional coverage—Objectors further argued alteration sought went beyond covering the three to ten employees claimed by the Applicant—Full Bench found it was not satisfied that there would not be overlapping and that Section 55(5) prevented the Full Bench authorising the Registration of an alteration unless it was satisfied there was good reason consistent with Section 6 of the I.R. Act—Dismissed—F.P.F.A.I.I.U. *v.* A.M.W.S.U. and Others (Objectors)—No. 1009 of 1991—Sharkey P., Coleman C.C., Beech C.—10/3/92—Unions ..... 489

Application for allegedly denied contractual entitlements—Commission found that Applicants had not exercised their rights to re-employment as previously ordered and therefore there was no establishment of employment relationship in which to award residual compensation claim—Dismissed—Maasen P.J. and C.A. *v.* Golden Hotels Pty Ltd—Nos. 583B and 584B of 1991—Parks C.—4/2/92—Hospitality ..... 583

Application for allegedly denied contractual entitlements—Respondent sought to have question of jurisdiction determined as a preliminary point as to whether there was a contract of service or contract for service—Commission examined indicia from authorities cited and from the evidence determined that there was a contract for service and therefore lacked jurisdiction to deal with matter—Dismissed—Maddrell K. *v.* Admont Holdings Pty Ltd—No. 399 of 1991—Halliwell S.C.—21/2/92 ..... 584

Conference referred *re* jurisdiction to deal with dispute over contract system and respondency to award—Applicant claimed that there were no employees eligible to be members of union—Respondent argued that members of union were employees of Applicant Company and not independent contractors—Commission reviewed indicia for contract of service as opposed to contract for service and declared that whilst some factors of service had the appearance of being of an independent nature on balance a contract of service existed and therefore Commission had jurisdiction—Declared Accordingly—Preston River Abattoir *v.* M.I.E.U.—No. CR44 of 1992—Halliwell S.C.—14/2/92—Meat ..... 625

Application for reinstatement on the grounds of unfair dismissal, subsequently amended to include contractual entitlements—Applicant denied allegations of theft therefore summary dismissal was unfair and resulted in loss of benefits—Respondent argued that the Applicant had committed theft and that the contract of employment was regulated by an award therefore the Commission did not have jurisdiction—Commission found upon evidence that the dismissal was justified therefore the question of jurisdiction did not need to be addressed—Dismissed—Bayley M.E. *v.* Wanilla Nominees Pty Ltd Trading Jadana—No. 1768 of 1991—Parks C.—26/3/92 ..... 850

Conference *re* claim for reinstatement on the grounds of unfair dismissal—Applicant argued delay due to police investigation—Respondent argued that the delay rendered the application no longer an industrial matter—Commission examined the N.S.W. Case and distinguished it from the instant matter and further found that the Applicant did not offer a satisfactory explanation for the delay—Dismissed—S.D.A. *v.* Calahan T/A Bi Lo Midland—No. CR777 of 1991—Salmon C.—16/3/92—Shop Assistant ..... 884

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

Application for allegedly denied contractual entitlements—Commission having considered the Truck Act 1899—1904 and Federal proceedings, found on evidence that no benefits were due under the contract of employment—Dismissed—Melville G.E. *v.* David John Coates, Receiver and Manager for Vapac Ltd—No. 705 of 1991—Halliwell S.C.—14/2/92 ..... 858

[4]Application for Stay of Order *re* effect of consent and return signed agreements to alter 19 day work cycle pending appeal to Full Bench—President found there was a serious issue to be tried insofar as the grounds of appeal related to the question of enforcement of an award—President found little inconvenience in drawing up new rosters and no inconvenience in returning signed agreements as there would be no assumed difficulty in compliance with the agreement if found valid—Dismissed—Coles/Myer Ltd T/A K-Mart Discount Stores *v.* S.D.A.—No. 202 of 1992—Sharkey P.—18/3/92—Retail ..... 696

[4]Application for orders *re* observance of Union Rules issued by consent—President issued Reasons to express view that Registrar would not correctly exercise his discretion under Section 69(1) to conduct an election and would not have power to do so in the face of orders or an inquiry by the President pursuant to Section 66—Ordered Accordingly—Power A.G. *v.* P.G.E.U. and Another—Nos. 1866 & 1867 of 1991 and 339 of 1992—Sharkey P.—23/3/92—Unions ..... 769

Application for allegedly denied contractual entitlements—Applicant claimed he had not received full payment for work completed as a lesser amount was agreed upon on an understanding of undertaking further work—Respondent argued that Applicant accepted payment unconditionally and that there had been no promise made to the Applicant for second stage of work—Commission determined that Applicant was not an employee of the Respondent, there was no contract of employment drawn up and therefore Commission was without jurisdiction—Dismissed—Anderson M.J. *v.* Tommotek (W.A.) Pty Ltd—No. 2 of 1992—Fielding C.—13/4/92—Computer Programming ..... 1148

Application for review of Prohibition Notice *re* extension of time for lodging of Reference—Commission determined that ability to extend time was a matter for the discretion of the Commissioner for Occupational Health, Safety and Welfare, that as this had been declined the review notice lodged was invalid and therefore the Commission did not have jurisdiction to hear matter—Struck Out For Want Of Jurisdiction—Brookbridge Horizons Pty Ltd *v.* Inspector A. Svenson, Department of Occupational Health, Safety and Welfare—No. OHSW 1 of 1992—Beech C.—13/4/92 ..... 1212

[2]Applications for alteration of Union Rules *re* Name and Eligibility for Membership—Objection withdrawn after amendment to application—Full Bench reviewed authorities and used expressio unius rule to find that the new name clearly indicated that the organisation was of employees—Granted—W.A.F.B.E.U.—No. 1256 of 1991—Sharkey P., Kennedy C., Parks C.—11/2/92—Emergency Services ..... 984

Conference *re* work stoppage over inadequate first aid facilities and deduction of wages—Applicant union requested interim order requiring Respondent to pay one hour's pay to employees prepared to sign authorisation for employer to deduct appropriate amount following determination of matter—Respondent argued that employees had engaged in industrial action and that if the claim was granted, a division would be created on site with employees covered by Federal award—Commission reviewed evidence and determined that several considerations had to be answered, that the claim would not be appropriate in these circumstances and listed matter for further hearing and determination—B.T.A. *v.* B.M.A.—No. C194 of 1992—Beech C.—7/4/92—Construction ..... 1173

Application for orders *re* validity of election of Occupational Health and Safety representative—1st Respondent claimed that election of Health and Safety representative were invalid due to breach of relevant sections of the OHSW Act—2nd Respondent argued that correct procedures as outlined in a working party document, made up by Chamber of Commerce and Industry Health Care Management Committee and representatives from F.M.W.U., Salaried Officers Association and Australian Nursing Federation were followed—Commission found that agreed election procedure did not comply with OHSW Act and no injustice was created as a result of proper application to Section 29 of the OHSW Act—Commission further commented on the Commission's arbitral role on Application by Commissioner for Occupational Health, Safety and Welfare—Ordered and Declared Accordingly—Commissioner for Occupational Health, Safety and Welfare *v.* F.M.W.U. and Another—No. OHSW 4 of 1991—Gregor C.—25/3/92—Nursing ..... 932

[1]Appeal against decision of Full Bench (71 WAIG 764) *re* claim of unfair dismissal—Appellant argued Full Bench erred in law when it held that the true construction of the Federal award applicable to the Appellant's employment rendered invalid Section 29 of the I.R. Act 1979 and that the reasoning in Gersdorf's Case was wrong—IAC reviewed authorities and found there was a line of cases including decisions of courts of the highest authority in which like views had been expressed regarding similar awards and legislation and that the considerations applying to the appeal were identical to those resolved in Gersdorf's Case—Dismissed—Martindale I.E. *v.* British Petroleum Refinery—IAC Appeal No. 17 of 1991—Rowland J., Walsh J., Ipp J.—4/5/92—Petroleum ..... 1263

Application for reinstatement on grounds of unfair dismissal—Applicant claimed dismissal was unfair due to position being terminated but later being refilled by new employee—Respondent argued that application should not continue due to the prosecution not being done with due expedition—Commission reviewed authorities and found from indicia that jurisdiction was limited to question of the Applicant's actual dismissal and that dismissal was unchallenged by Applicant until he found who had filled his position—Dismissed—Carlyon G. *v.* Singer Australia—No. 1772 of 1991—Negus C. 18/5/92—Retail ..... 1376

Application for allegedly denied contractual entitlements—Applicant claimed outstanding annual leave and termination pay benefits—Commission determined as a preliminary issue whether matter should come before Industrial Magistrate or itself and whether employee was covered by an award or contract of employment—Commission found that in the absence of an expressed written contract any inconsistency between the award or order on the one part and any purported agreement reached between the parties, the award or order overrides—Commission further found that the matter of annual leave was not within its jurisdiction whilst claim for termination pay was a contractual benefit and therefore justified—Granted in part and Dismissed for Want of Jurisdiction—De Berner K.E. *v.* Parcae Pty Ltd as Trustee for Parcae Unit Trust T/A Perth Finance and Insurance Services—No. 1447 of 1991—Beech C.—3/3/92—Financial Services ..... 1159

Application for allegedly denied contractual entitlements—Respondent argued that Commission lacked jurisdiction as Applicants were independent contractors and not employees—Commission applied the control test, compared previous cases and found that Applicants were in an employer/employee relationship and written agreement meant what it said—Granted—Beavis D. and Skuse R.P. *v.* Admont Holdings Pty Ltd—Nos. 396 and 398 of 1991—Halliwell S.C.—17/2/92 ..... 1362

[2]Application for a declaration that Union's Rules relating to qualification for membership and prescribed offices are the same as for the Federal Counterpart Body and alteration of Rules—Applicant argued Full Bench should take a broad approach when comparing rules and that it was not intended to be an arithmetic exercise—Full Bench reviewed I.R. Act, Union Rules and found qualifications for membership were not substantially or fundamentally the same, as Section 71(2), the I.R. Act was not satisfied then the application with respect to offices could not be granted and the rule change was a matter for the Registrar—Dismissed—A.P.E.—No. 1583 of 1991—Sharkey P., Halliwell S.C. , Negus C.—4/6/92—Unions ..... 1295

[4]Applications for orders *re* compliance with union rules—President dealt with various applications for interim orders, interlocutory matters in a set of inter related applications—Applicant sought orders concerning the financial management, address, status of offices, and general business of the union—President dealt with application for leave to withdraw and other matters and found the interests of equity, good conscience and substantial merits of the case, the parties the Union Committee of Management and membership would be best effected by attempting to facilitate a comprehensive hearing of all the issues raised as soon as possible since they went to the ability of the union to operate correctly or even perhaps at all—President determined that it had jurisdiction to hear an application for directions, whether to consolidate one application with another, orders relating to the conduct of the union over an application to vary an award—President reviewed authorities and found that the right to make an application of bias was waived, there was no ostensible bias established and that necessity prevented the President from disqualifying himself—President dealt with an application to discharge interim orders made and found the balance of convenience favoured the Secretary being placed back in her proper role—President dealt with application for interim orders regarding a special general meeting—Ordered and Declared Accordingly—Carter L.B. *v.* Drake M.A. and Others—Nos. 1053, 1478, 1479, 1482, 1529 of 1991 and 127 of 1992—Sharkey P.—Various dates—Unions ..... 706

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

[4]Application for orders *re* breach of union rules—Applicant argued that articles and use of union resources for the production and distribution of electoral material were designed to give the Respondent an electoral advantage over the Applicant, was a gross abuse of union resources, breached the rules of the Union and sought *inter alia* orders for the election to be declared void and a new election be called—President allowed Counsel to appear for the Union President as intervener and the Union—Respondent argued matter of advertisement in publication was not within the President's jurisdiction and that he was not the proper Respondent—President reviewed I.R. Act, Union Rules, matters of self incrimination of witnesses, the definition of irregularity, whether the President was bound by the decisions of the High Court, the relationship between the publication editor, the Union Secretary and the Union President, allegations made in the article and found that there was jurisdiction and power to make orders under Section 66 of the I.R. Act based on the findings of irregularity on proven breaches of the rules—President found it was the misuse of resources by one party when they were not available to be so used by the other parties which was at the seat of the irregularity under the rules—President reviewed further authorities and found the equity, good conscious and substantial merits of the cases as well as the interests of the union and its members were best served by declaring null and void the election and ordering a new election—In Supplementary Reasons President dealt with submissions as to vacating the senior officers position and consequential orders—President found that as the election was null and void, offices were vacant and ordered senior officers be deemed to hold office until completion of election with the Union President's power limited—In further Supplementary Reasons President dealt with further consequential matters including an emergency committee meeting and appeal rights—President gave reasons for various interim orders—Ordered Accordingly—Dornan B.A. and Others *v.* Harken E.J., President SSTU and Another—No. 1607 of 1991—Sharkey P.—31/3/92, 13/4/92, 16/4/92 and Others—Unions ..... 1008

LIVING AWAY FROM HOME ALLOWANCE—

Application to vary award *re* Hours of Duty, Overtime, Transfers, Travelling on Brigade Business and Relieving—Parties sought to remedy deficiencies in the expression in the award of obligations and entitlements—Union argued only against changes to Relieving Clause saying it should be tackled administratively—Commission later determined that Applicant employer had not discharged onus to make a finding that the Respondent had breached an agreement made—Commission found however where the is no expense from utilisation of accommodation then no entitlement arose—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. 797 of 1991—Kennedy C.—14/11/91 and 29/1/92—Emergency Services ..... 309

Application for payment for lost time over alleged safety issue—Commission determined as a preliminary point whether Industrial Magistrate or Commission had jurisdiction to hear matter, compared the OHSW Act with the IR Act and found it had power to deal with claim—Applicant Union claimed that employees refused to work in vicinity of "exclusion zone" as there were strong grounds to believe they would be exposed to risk of imminent and serious injury—Respondent argued that it had received advice from experts and that at the time of the dispute the stack did not present a problem—Commission reviewed authorities and found on evidence that exposure to perceived risk was immediate and probable, that the company had not fully informed the workforce, therefore displayed an indifference to the safety of the employees—Granted—A.W.U. *v.* Swan Portland Cement Limited—No. OHSW 6 of 1991—Beech C.—7/2/92—Cement ..... 1203

LONG SERVICE LEAVE—

Application against requirement to register under CIPPLSL Act—Board of Reference reviewed CIPPLSL Act and found that employees did not come under classification of work in prescribed award—Granted—Phillips Scientific and Industrial Pty Ltd *v.* Construction Industry, Long Service Leave Payments Board—No. 26 of 1991—Carrigg Registrar/ Latter/ Jones—18/12/91 ..... 145

Board of Reference *re* Long Service Leave entitlement—Applicant sought pro-rata entitlement to long service leave—B.O.R. found that Respondent company was in liquidation and subject to an Order for Winding up and therefore did not have jurisdiction to determine matter—Dismissed—Williams R.—Danebrook Holdings Pty Ltd—No. 32 of 1991—Yewers/Beech/Uphill—9/2/92 ..... 374

Board of Reference *re* pro-rata long service leave claim—Applicant claimed that termination of employment was effected to avoid payment of long service leave—Respondent argued that a "fall off" in business and lack of work was the true reflection of the situation—B.O.R. preferred the evidence of Respondent and that employee did not have an entitlement to contractual benefits—Dismissed—Jamieson S. *v.* Williams Gale Photography Pty Ltd—File No. 40 of 1991—Carrigg, Registrar/Latter/Uphill—27/2/92 ..... 569

Claim against requirement to register as an employer under the Construction Industry Portable Paid Long Service Leave Act—Board of Reference found on evidence that the Claimant was not within the "Construction Industry" within the meaning of the CIPPLSL Act—Granted—Kununurra Earthmoving Plant *v.* Construction Industry Long Service Leave Payments Board—Carrigg, Registrar/Latter/Uphill—File No. 1 of 1992—26/2/92—Earthmoving ..... 570

Conference referred *re* claim for pro rata long service leave entitlements—Applicant claimed continuous employment for 10 years and that although the ownership and employer changed over the period of her employment, she was entitled to her benefits—Respondent argued that in each case there had not been a transmission of business between the various employers and the absence of consideration of goodwill between several employers would seem to indicate this— Commission reviewed authorities and found on evidence that as there had been a transmission of business for the purposes of the long service leave standard provisions, the Applicant had discharged the onus of establishing her claim—Granted—Hawkins Y.L. *v.* Treen D.E. and F.W. T/A Exchange Hotel—Pinjarra—No. CR492 of 1991—Beech C.—19/2/92—Hospitality ..... 1414

MANAGERIAL PREROGATIVE—

Conference referred *re* dispute over failure to adhere to award provisions—Applicant union claimed Respondent had breached award by abolishing substantive positions without prior consultation with union and sought variation to award to remove ambiguities—Respondent argued Commission had no power to deal with matter and declared dispute had either been resolved or rather that it came under exclusive province of Industrial Magistrate—Respondent further argued dispute was not an industrial matter but one of managerial prerogative—R.C.B. reviewed powers as given to it by the I.R. Act and authorities and determined that its powers under S.44 were limited in that orders issued by it could only be made on an interim basis and the R.C.B. was not empowered to vary the award as sought—Dismissed—R.O.U. *v.* W.A.G.R.C.—No. RCB CR8 of 1991—Fielding C., Thompson/Kemp—6/3/92—Railways ..... 628

Conference referred *re* dispute over retrenchment of 32 workers—Applicant argued unfair and discriminatory criteria were used to select retrenched employees, that clause 25 of award was breached and sought termination notices be rescinded—Respondent argued that formula and criterion used to determine retrenched employees was reasonably standard and acceptable—Commission reviewed authorities and found on evidence in favour of Applicant—Granted—A.W.U. and Another *v.* Newcrest Mining Limited—No. CR186 of 1992—Gregor C.—9/4/92—Mining ..... 1176

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant claimed that he was not given the opportunity to respond to his termination of employment—Respondent argued that it was a matter of redundancy, the position no longer existed and more so a question of managerial prerogative—Commission on reviewing evidence and cases cited determined that Respondent employer had not sufficiently reviewed the situation and therefore the termination had been unfair—Granted—Municipal Road Boards, Parks and Racecourse Employees' Union *v.* Royal Agricultural Society (Inc.)—No. CR46 of 1992—Halliwell S.C.—14/4/92—Maintenance ..... 1189

Application to vary award to provide that Respondent not implement decisions to make changes without prior consultation with the Union and employees to be affected—Applicant Union also sought to include new Schedule in case of change involving deletion of classified positions—Respondent argued that claim was not an industrial matter, it sought to deny Respondent right to manage the enterprise and would set a precedent for other public sector awards—RCB reviewed concept of industrial matter, found that insertion of guidelines would add inflexibility to management of change and have potential to be used as a mechanism to delay reform and therefore no justification for claim—Dismissed—W.A.R.O.U. *v.* W.A.G.R.C.—No. R3 of 1992—Fielding C., Thompson/Munyard—29/5/92—Railways ..... 1371

CUMULATIVE DIGEST—*continued*

Page

MANAGERIAL PREROGATIVE—*continued*

[2]Question of law referred to Full Bench *re* whether a selection process agreed between the parties was contrary to Section 80Y of the I.R. Act as vacancies in promotion positions were not being advertised as they arose—Full Bench reviewed I.R. Act and found that the words were plain and that the existing process was ultra vires the Act—Commissioner expressed view that Section 80X and 80Y did not fetter managerial prerogative—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. C579A of 1991—Sharkey P., Fielding C., Negus C.—7/4/92—Emergency Services ..... 981

MANNING—

Application for an order that an employee be granted permanent status—Applicant Union argued Respondent had agreed to employ another full time employee and a representative had led the employee to believe that one of two would be appointed if the necessary qualifications were obtained—Respondent argued it had no need for a permanent employee and the representative was without authority—Parties agreed circumstances were different to the previous Appealed application—Commission found on evidence in favour of Respondent—Dismissed—CMEU *v.* FPA—No. 1354 of 1991—Parks C.—13/12/91—Port Authority ..... 145

Application to vary award *re* control room operations—Applicant employer claimed that only one operator was needed to remain in the control room during crib breaks as the current system was inefficient and unnecessary and contrary to Structural Efficiency Principles—Respondent argued substantial expansion of duties referred to prior agreement in which there would be two people present at all times and that work was essential to control of whole operation—Commission attended inspections of work area and on evidence found that Applicant had failed to discharge onus to convince the Commission that there has been a change to justify the outcome suggested by it—Discontinued—BHP Iron Ore Limited *v.* A.W.U.—No. 1363 of 1991—Gregor C.—16/4/92—Iron Ore ..... 1139

MATERNITY LEAVE—

Application for an order *re* employment classification be deemed to be that of permanent employee and entitlement to maternity leave—Applicant union argued that employee should be re-appointed at same level with Respondent on completion of maternity leave—Public Service Arbitrator found that as employee was a temporary officer, there was no provision in the award to recognise her leave entitlements—Dismissed—F.C.U. *v.* Fremantle Port Authority—No. P48 of 1991—Negus C.—26/3/92—Port Operations ..... 845

MEAL MONEY—

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

MISCONDUCT—

Conference referred *re* termination of a worker—Applicant union claimed dismissal was unfair—Respondent argued that termination of employment was justified in that warnings over misuse of a company vehicle had already been issued—Commission found in evidence that dismissal was not unfair or oppressive—Dismissed—Painters' and Decorators' Union *v.* Metro Sanding Co.—No. CR 730 of 1991—Beech C.—18/12/91 ..... 171

Conference referred *re* summary dismissal of employee for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement—Respondent argued employee had directly and personally abused his superiors and given the circumstances termination was justified—Commission on reviewing evidence and incidents after the dismissal determined that employees behaviour was unwarranted and displayed a disrespect for management—Determined that to order reinstatement would not be conducive to industrial harmony—Dismissed—A.E.E.F.E.U. *v.* Swan Portland Cement—No. CR 766 of 1992—Beech C.—10/2/92—Cement ..... 414

Conference referred *re* termination of a worker for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of wages and entitlements as employee was acting according to safety regulations—Respondent argued employee had caused unwarranted disruption to the site on numerous ocassions prior to incident which further justified summary dismissal—Commission found that whilst employee's industrial conduct left a lot to be desired this did not mitigate termination of employment and ordered reinstatement conditionally upon resignation as Shop Steward—Reasons given—Granted—B.L.F. *v.* Multiplex Constructions Pty Ltd—No. CR19 of 1992—Halliwell S.C.—28/1/92—Construction . 410

Conference referred *re* claim for reinstatement on the grounds of unfair dismissal—Applicant union argued that employee was an innocent party to the fight leading to the dismissal or at worst imprudent—Respondent argued it had a clear policy that fighting on the job would result in dismissal, that the worker had provoked the other and had breached the safety code—Commission reviewed authorities and found the onus at first instance was for the company to show that the summary dismissal was fair—Commission with respect to those concerned was unable to find on evidence that the employee was equally to blame for the incident and found that he essentially been passive and therefore the dismissal was harsh—Commission found no reason to consider the worker anything other than at least satisfactory prior to the incident and reinstatement *inter alia* did not affect the company policy—Commission further found taking all circumstances into account payment for only four weeks wages out of the time from termination was appropriate—Granted in Part—F.P.F.A.I.I.U. *v.* Wesfi Pty Ltd—No. CR 761 of 1991—Beech C.—21/2/92—Timber ..... 610

Application for reinstatement on the grounds of unfair dismissal—Applicant argued warnings that termination was likely had not been given—Respondent argued Applicant's performance had lost business and that annual leave had been arranged without management approval—Commission reviewed authorities and found condonation of misconduct followed interest of company and nothing unfair in that approach—Commission further found threat of dismissal could be inferred in counselling and that misconduct justifying summary dismissal was probably true—Dismissed—Preston J. *v.* Western International Travel Pty Ltd—No. 1296 of 1991—Salmon C.—19/2/92—Travel Agents ..... 586

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent denied that Applicant was dismissed and that the employee actually terminated the employment contract—Respondent further argued that due to misconduct by Applicant the company had suffered loss and damage which should be offset against monies owing to Applicant therefore cancelling claim—Commission on reviewing evidence found that Applicant had not discharged onus of establishing that he was in fact dismissed and therefore Application must fail—Commission divided application to hear claim for contractual entitlements at a later date—Dismissed in Part and Adjourned—Bates E.R. *v.* Victoria Park Holdings Pty Ltd Trading as Welch World Travel—No. 1464 of 1991—Kennedy C.—21/2/92—Travel ..... 573

Claim *re* contractual entitlements—Applicant sought payment for outstanding salary—Respondent argued that employee forfeited one week's pay as one week's notice to terminate the contract was not given—Commission preferred evidence of Applicant to submissions of Respondent from bar table and found that the Respondent had engaged in improper conduct and in these circumstances employee's decision to terminate contract was warranted—Granted—Andreatta P. *v.* Beni Magjarraj Trading as Nova Air Conditioning—No. 1652 of 1991—Beech C.—11/02/92—Air Conditioning ..... 571

Application for reinstatement on the grounds of unfair dismissal—Respondent terminated employee for allegedly physically assaulting, verbally threatening and sexually harassing an employee—Commission examined contradictory evidence and found that the dismissal was unjust and unfair—Lynn T. *v.* Royal Perth Hospital—No. 1236 of 1991—Halliwell S.C.—24/3/92—Health—Food Service Attendant ..... 853

CUMULATIVE DIGEST—*continued*

Page

MISCONDUCT—*continued*

Application for alleged denied contractual entitlements and order that dismissal was unfair—Applicant argued that the Order in a first application issued by the Commission did not reflect the Applicant's wish to withdraw the application and also its issuance was unknown—Respondent raised the preliminary point that the matter had already been before the Commission and finalised—Commission found no difference between the substance of the original and the instant application therefore discontinued the application under S.27(i)(a) as opposed to S.23—Brailey B. *v.* Mendex Pty Ltd Trading as Mair and Co Maylands—No. 1300 of 1992—Beech C.—16/3/92—Real Estate—Salesperson ..... 850

Application for reinstatement on the grounds of unfair dismissal, subsequently amended to include contractual entitlements—Applicant denied allegations of theft therefore summary dismissal was unfair and resulted in loss of benefits—Respondent argued that the Applicant had committed theft and that the contract of employment was regulated by an award therefore the Commission did not have jurisdiction—Commission found upon evidence that the dismissal was justified therefore the question of jurisdiction did not need to be addressed—Dismissed—Bayley M.E. *v.* Wanilla Nominees Pty Ltd Trading Jadana—No. 1768 of 1991—Parks C.—26/3/92 ..... 850

Appeal against decision of the Public Service Commissioner *re* termination of employee for theft—Appellant argued on the basis of mitigating circumstances and sought a reduction in the penalty to one of demotion to a lower classification—Respondent argued that under the Public Service Act that an offence of stealing as a servant should result in a total severance of the employment relationship therefore the discretion of imposing a lesser penalty of a fine or demotion is removed from the Public Service Commissioner—The Board found the decision of the Public Service Commissioner was not harsh nor unreasonable in the circumstances nor that it should be modified in anyway—Dismissed—Gesmundo P. *v.* Public Service Commission—PSAB8 of 1991—Negus C./King/Sivewright—20/3/92—Public Servant ..... 921

Conference referred *re* summary dismissal of an employee for alleged misconduct—Applicant employer claimed the termination had been justified as incident was an unprovoked assault and considering nature of employee's work in the community—Respondent union argued dismissal was harsh and unfair in the light that employee had been punished twice—Commission reviewed authorities and found that there had been no double jeopardy and that Applicant had not acted unfairly in its decision to terminate contract of service—Dismissed—BHP Minerals Limited *v.* A.W.U.—No. CR108 of 1992—Gregor C.—7/4/92—Mining ..... 1174

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed he was not warned or cautioned prior to dismissal about any of the incidents which in the view of Respondent made him an undesirable employee—Respondent argued employee had physically assaulted two other employees which amounted to serious misconduct and after weighing evidence had decided to terminate employment according to award and policy—Commission on reviewing evidence and cases cited declared that as employee had had little recollection of events and after investigations had divulged seriousness of incident, Respondent had not acted harshly or unfairly—Dismissed—A.W.U. *v.* Robe River Iron Associates—No. 1624 of 1991—Gregor C.—14/4/92—Mining ..... 1150

Conference referred *re* dismissal of employee *re* absence from work—Respondent Union argued that dismissal was unfair and sought declaration—Commission found payment in lieu of notice did not change the fact that the dismissal was summary, but cancelled it before hearing—Commission further found on evidence and from examining the internal investigation undertaken by Applicant Company, the dismissal was not unfair and application be dismissed—Ordered Accordingly—W.A. Newspapers Ltd *v.* A.M.W.S.U.—No. CR254 of 1991—Gregor C.—9/6/92—Printing ..... 1399

Conference referred *re* dispute over decision to terminate employee—Applicant Union claimed constructive summary dismissal was unfair as the removal of food which led to her termination was not a wilful act of dishonesty as she had not been informed of any policy relating to this, she was denied consultation with anyone and sought reinstatement without loss of entitlements—Respondent argued that there was a food control policy and that employee had admitted to the charge—Commission in applying test dicta namely St John's Case, found that employee had not been given opportunity to reasonably respond, that there was procedural unfairness in the constructive summary dismissal in that decision was based purely on the incident and therefore claim was established—Granted—F.M.W.U. *v.* Board of Management, Fremantle Hospital—No. CR22 of 1992—Gregor C.—31/3/92—Health ..... 1418

[2]Appeal against decision of the Commission (71 WAIG 2411) *re* dismissed applications for reinstatement on the grounds of unfair dismissal—Appellant argued *inter alia* Commission erred in finding that the Respondent had discharged the evidentiary onus of proof that misconduct had occurred and failed to determine central issue of fairness of the dismissals—Full Bench reviewed authorities and found there was ample evidence to find as the Commission did, there was no misuse of the advantage of seeing witnesses and observing their demeanour and no error in the exercise of the Commission's discretion—Dismissed—F.M.W.U. *v.* Board of Management, St John of God Hospital, Bunbury—Appeal No. 1352 of 1991—Sharkey P., Coleman C.C., Halliwell S.C.,—4/6/92—Health ..... 1274

Applications for reinstatement on the grounds of unfair dismissal without loss of entitlements—Respondent argued that decision to terminate was due to gross misconduct which had resulted in a repudiation of the contract of employment—Commission reviewed conflicting evidence, the complicated inconsistencies in management of organisation and the individual contracts—Commission found that whilst Applicants had not co-operated and there was an apparent reluctance to deal with Respondent's position, the employer had failed to discharge the onus of establishing that this constituted misconduct—Granted in Part—Lupton B.A. and Others *v.* Gawooleng Dawang Inc. Nos. 1798, 1799 and 1800 of 1991—Kennedy C.—30/3/92—Social Welfare ..... 1381

Conference referred *re* dispute over dismissal and withdrawal of accommodation—Applicant Union claimed employee had had no written warnings, his work conduct was beyond reproach and that dismissal was harsh and unjust and sought reinstatement with restoration of his accommodation—Respondent argued that as experienced employee he should have been aware of serious breach of safety, showed a disregard of duty and coupled with previous misconduct warranted summary dismissal—Commission reviewed authorities and found on evidence that there had been a serious breach of safety requirements and that Respondent had discharged the onus of establishing that termination was justified—Dismissed—A.W.U. *v.* Boral Contracting—No. CR99 of 1992—Gregor C.—15/5/92—Mining ..... 1402

Conference referred *re* strike action over termination of an employee—Applicant employer claimed that decision to terminate was warranted as employee had engaged in aggressive behaviour towards other employees over a reasonably extensive period—Respondent Union argued that employers failure to deal with Applicant pleas for assistance on work difficulties created a heavily stressful situation and sought reinstatement without loss of entitlements—Commission found that employee had shown a propensity to violent action in respect of his co-workers and that a full investigation had confirmed this therefore dismissal was justified—Dismissed—BHP Minerals Limited *v.* A.E.E.F.E.U.—No. CR211 of 1991—Gregor C.—26/5/92—Mining .... 1411

Conference referred *re* dispute over termination of employee for alleged prank—Applicant Union claimed there was a denial of natural justice, the penalty was disproportionate to the incident itself and sought reinstatement—Respondent argued that a full investigation had been conducted and that decision to terminate was warranted—Commission reviewed authorities and found on evidence misconduct had led to injury of fellow employee in which company had vicarious liability, incident report had been falsified and that action was somewhat premeditated—Commission further found that despite unblemished work record, dismissal was neither harsh nor unfair—Dismissed—A.W.U.—Newscrest Mining Limited—No. CR753 of 1991—Gregor C.—17/12/91—Mining ..... 407

NATURAL JUSTICE—

Conferences matter referred *re* unfair dismissal claim—Commission gave reasons for partly granting an adjournment sought by the Respondent for lodging further grounds in preliminary matter—Respondent argued by making a proposal to set up a business the employee was in breach of his duty of fidelity—Commission reviewed authorities, and found there was no conduct leading to an actual repugnance in the sense envisaged in the Blyth Chemicals decision—Granted—F.M.W.U. *v.* Margaret River tourist Bureau (Inc.)—No. CR706 of 1991—Beech C.—12/12/91 & 6/1/92—Tourism ..... 415

CUMULATIVE DIGEST—*continued*

Page

NATURAL JUSTICE—*continued*

[4]Applications for orders *re* compliance with union rules—President dealt with various applications for interim orders, interlocutory matters in a set of inter related applications—Applicant sought orders concerning the financial management, address, status of offices, and general business of the union—President dealt with application for leave to withdraw and other matters and found the interests of equity, good conscience and substantial merits of the case, the parties the Union Committee of Management and membership would be best effected by attempting to facilitate a comprehensive hearing of all the issues raised as soon as possible since they went to the ability of the union to operate correctly or even perhaps at all—President determined that it had jurisdiction to hear an application for directions, whether to consolidate one application with another, orders relating to the conduct of the union over an application to vary an award—President reviewed authorities and found that the right to make an application of bias was waived, there was no ostensible bias established and that necessity prevented the President from disqualifying himself—President dealt with an application to discharge interim orders made and found the balance of convenience favoured the Secretary being placed back in her proper role—President dealt with application for interim orders regarding a special general meeting—Ordered and Declared Accordingly—Carter L.B. *v.* Drake M.A. and Others—Nos. 1053, 1478, 1479, 1482, 1529 of 1991 and 127 of 1992—Sharkey P.—Various dates—Unions ..... 706

[1]Appeal against decision of the Commission (71 WAIG 582) *re* issuance of award—Appellant argued Commission erred in criticising its conduct in retiring from an industrial agreement thus having regard for irrelevant considerations, that there had been procedural unfairness, a denial of natural justice, that Section 26(3) of I.R. Act had been breached, that the Commission had miscarried in its exercise of its discretion and sought that the decision be quashed—The Hon. Minister, intervening, argued the Commission had dealt with the award as a whole, notwithstanding the assessment of a number of aspects, as it was entitled to do—Full Bench reviewed authorities and found *inter alia* the application was clearly an application for a new award, the Commission was entitled to place significant weight on the First Award Principle and was bound to give great significance to all existing rates and conditions of employment including those evidenced by an award or formal agreement and those more informally added as terms and conditions—Full Bench found the defacto principle was no more than part of the rationale of the application of the First Award Principle and the Commission's reliance on it was not in error—Full Bench found that a statement made by the Commission was not the decision under appeal and represented no fatal flaw—Full Bench found Comparative Wage Justice Principle achieved the same result as the First Award Principle and its application was therefore not in error—Full Bench found the retirement from the Agreement clearly became part of the equity, good conscious and substantial merits of the matter, the Commission was right to have regard to this and make findings in relation to it and that the submission that it was not an industrial matter was erroneous—Full Bench found there was no miscarriage of the discretion of the Commission established in accordance with the authorities in House *v.* King, there was no procedural unfairness or denial of natural justice in relation to the so called statement, in relation to Section 41 of the I.R. Act or any feature of the proceedings and there was no consideration of irrelevant matters—Dismissed—R.R.I.A. v- A.M.W.S.U. and Others—Appeal No. 436 of 1991—Sharkey P., Coleman C.C., Gregor C.—20/12/91—Iron Ore ..... 25

NEXUS—

Application to vary award *re* State Wage Case June 1991 Wage Increase, Second, Third and Fourth minimum rates adjustment—Commission found wage rates nexus with Federal Award reasonable and casual employment provision appropriate—Commission stood part-time provisions over for negotiation as philosophical objections were not satisfactory—Ordered Accordingly—T.W.U. *v.* Australian Glass Manufacturing Co Pty Ltd and Others—No. 1299 of 1991—Halliwell S.C.—24/1/92—Transport ..... 563

Application to vary awards *re* superannuation by consent save question of choices of funds to be available, exclusion of apprentices from fund and operative date—Parties sought to insert into awards, provision in same terms as determined by Australian Commission with minor changes—Commission determined that the variations sought on whole should issue bringing the awards into line with the National Award—Granted in Part—C.M.E.W.U. and Others *v.* Adsigns Pty Ltd and Others—Nos. 315, 346 and 347 of 1991—Beech C.—27/2/92—Construction ..... 504

OVERTIME—

Claim *re* contractual entitlements—Applicant claimed payment for outstanding accrued overtime—Respondent argued a different interpretation of the "normal hours of work" to that of Applicant—Commission found that Applicant had established merit of claim—Granted—Sedgwick K *v.* Larrikins Family Restaurant—No. 768 of 1991—George C.—6/2/92—Hospitality ..... 588

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

PART-TIME—

Application to vary award *re* State Wage Case June 1991 Wage Increase, Second, Third and Fourth minimum rates adjustment—Commission found wage rates nexus with Federal Award reasonable and casual employment provision appropriate—Commission stood part-time provisions over for negotiation as philosophical objections were not satisfactory—Ordered Accordingly—T.W.U. *v.* Australian Glass Manufacturing Co Pty Ltd and Others—No. 1299 of 1991—Halliwell S.C.—24/1/92—Transport ..... 563

Application to vary award to more accurately reflect current conditions of employment—Applicant Union sought to amend salaries provision for overtime, redeployment of officers and severance payment in case of redundancy—Respondent sought adjournment pending further discussions of above matters—Parties reached agreement on provision for part-time employment, hours of attendance, allowances and leave of absence—Commission was satisfied that changes were within the ambit of State Wage Principles and reflected standard Public Service conditions—Granted and Adjourned Sine Die—C.S.A. *v.* Joint House Committee of Parliament of W.A.—No. 343 of 1991—Fielding C.—22/5/92—Public Administration ..... 1330

PENALTY RATES—

Application to vary award *re* Holidays—Applicant employers sought to amend award to facilitate and reduce costs incurred as a result of public holidays falling on Saturday trading—Respondent union argued that claim was inconsistent with spirit and intent of Commissions defacto wage principle and that application was almost identical to a series of claims lodged by the Applicant in recent years with the object of reducing penalty rates in which the Commission had continually rejected—Commission reviewed evidence and taking into account equity, good conscience and the substantial merits of the case failed to be convinced that the Applicant had discharged its onus of proving there was a special case and that costs were not prohibitive enough to vary the award—Dismissed—Myer Stores Limited and Others *v.* S.D.A.—No. 221 of 1991—Salmon C.—31/3/92—Retail . 839

CUMULATIVE DIGEST—*continued*

Page

PRINCIPLES—

Application for a new award—Applicant submitted position of objector had changed since preliminary matter (70 WAIG 1351)—Respondents and CWAI intervening argued to apply construction conditions to factory operations would be unfair, inequitable and possibly excessive compared with other awards—Commission found in applying First Award Principle the major players in the industry applied construction rates and consented to the award without coercion—There was no flow on possibly—Commission however found that in some factories a few construction conditions were not appropriate—Granted in part—OPDU *v.* Gardner Brothers and Perrott (WA) Pty Ltd—No. A33 of 1987—Halliwell S.C.—7/5/91—Industrial Spraypainting and Sandblasting ..... 65

Application for a new minimum rates award by consent—Parties sought to replace another award insofar as it bound the Applicant employer and to increase rates in accordance with the 4%—2nd Tier Principle and the Structural Efficiency Principle 1989—Commission found award would result in considerable flexibly improvements and did not offend Wage Principles—Commission amended term of award—Award Varied—Burswood Resort (Management) Ltd *v.* WATAEA—No. A10 of 1991—Kennedy C.—6/12/91—Casinos ..... 58

Applications to vary awards by consent—Parties sought *inter alia* an increase of 2.5% in wage rates and certain work related allowances pursuant to State Wage Decision—PSA was satisfied that the criteria of the principles had been met and that the variations sought, despite some minor amendments, PSA found no reduction clause for income maintenance of low paid workers was contrary to Wage Principles should issue—Granted in Part—C.S.A. and Others *v.* Country High Schools Hostels and Authority—Nos. P22—31 of 1991—Negus C.—21/11/91—Public Administration ..... 244

Application to vary award by consent—Parties sought an increase of 2.5% in wage rates pursuant to State Wage Decision June 1991—Commission raised question of commitment and was satisfied that the Principle criteria had been met and variations sought should issue—Granted—A.W.U. *v.* James Hardie and Co Pty Ltd—No. 1562 of 1991—Beech C.—19/12/91—Fibre Cement Manufacture ..... 308

[3]Applications to vary Awards *re* Second S.E.P. increase, Broadbanding, First Minimum Rates Adjustment and 3% Allowance Adjustment as a Special Case—Respondent argued no wage increase other than S.E.P. was justified without a proper work value exercise—Respondent further argued claims to adjust shift loadings and wages of juniors were comparative conditions justice arguments and proscribed by the Principles—Commission found Respondents' arguments similar to original matter where they were not accepted and that SEP and MRA claims should be granted—Commission refused claim to *re* align junior wages under the Inequities Principle, found penalty rate claims were outside SEP and no special circumstances to grant retrospectivity—In Supplementary Reasons Commission gave reasons for issuance and addressed matters of payment of wages, accrual of annual leave, Part-time and Training Leave—Granted in Part—T.W.U. *v.* Central Districts Bakery and Others—No. 1037 and 1038 of 1990(R2)—Halliwell S.C., Salmon C., Gregor C.—14/11/91 and 21/1/92—Bakery ..... 223

Conference referred *re* abolition of rostered day off—Applicant Union claimed that employees had been pressured into signing consent forms, actions were contrary to prior agreement between the parties and sought that the signed documents be returned to the said employees—Respondent employer argued that company was following provisions outlined in the award to change the work cycle—Commission reviewed the meaning of equity and found on evidence the respondent had unfairly exercised its rights under the award and had acted against public interest by ignoring State Wages Policy—Granted—S.D.A.E.A. *v.* K-Mart Discount Stores—No. CR525 of 1991—Salmon C.—3/1/92—Retail ..... 423

[3]Proceedings instituted on Commission's Own Motion *re* consideration of October 1991 National Wage Decision pursuant to Section 51(2) of I.R. Act 1979—Thrust of NWD was to continue process of Structural Efficiency and establish an Enterprise Bargaining Principle to focus on improvements in efficiency and productivity at the work place level with future wage increases to be linked to those productivity improvements—All parties advocated that Commission should give effect to NWD but critical issue for Commission in Court Session was to accommodate requirements of Enterprise Bargaining within legislative scheme of I.R. Act—Chamber additionally argued that once Wage Fixing Principles had been adopted Section 51(2) gave them a statutory force which displaced Commission's discretionary powers contained in Section 26—CICS rejected this argument—CICS further found there were no good reasons for it not to give effect to NWD and considered Section 41 to be most appropriate avenue within Act to effect registration and enforcement of enterprise bargaining agreements—Ordered—Commission's Own Motion—No. 1752 of 1991—Commission in court Session—Coleman C.C., Halliwell S.C., Kennedy C., George C., Parks C.—31/1/92—State Wage Case ..... 191

Applications to vary awards by consent *re* wages pursuant to "special case" provisions—Commission initially determined that the "special case" consideration was warranted and that an interim salary increase was justified on the changes and work value grounds identified (71 WAIG 2538)—Commission subsequently found that the efficacy of the package remained intact; that progress was made in the implementation of changes; and that there was no digression from the original parameters and format of the agreement—Commission further made an order to divide applications which would allow for further stages of the package to be considered separately at a later date—Ordered Accordingly—W.A. Police Union of Workers *v.* Hon. Minister for Police—No. P10/1 of 1991 and No. 1294/1 of 1991—Kennedy C.—17/1/92—Emergency Services ..... 257

Application for a new award to cover operations of Applicant Employer by consent—Parties sought to replace conglomerate structure of awards with one award—Commission found the outcome of negotiations of the parties represented an excellent example of what can be achieved co-operatively, that the award represented part of an ongoing process of Structural Efficiency and did not offend the State Wages Principles—Commission granted retrospective date of operation—Granted—Cockburn Cement Ltd *v.* A.W.U. and Others—No. A14 of 1991—Beech C.—2/4/92—Cement Manufacture ..... 1054

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

[1]Appeal against decision of the Commission (71 WAIG 582) *re* issuance of award—Appellant argued Commission erred in criticising its conduct in retiring from an industrial agreement thus having regard for irrelevant considerations, that there had been procedural unfairness, a denial of natural justice, that Section 26(3) of I.R. Act had been breached, that the Commission had miscarried in its exercise of its discretion and sought that the decision be quashed—The Hon. Minister, intervening, argued the Commission had dealt with the award as a whole, notwithstanding the assessment of a number of aspects, as it was entitled to do—Full Bench reviewed authorities and found *inter alia* the application was clearly an application for a new award, the Commission was entitled to place significant weight on the First Award Principle and was bound to give great significance to all existing rates and conditions of employment including those evidenced by an award or formal agreement and those more informally added as terms and conditions—Full Bench found the defacto principle was no more than part of the rationale of the application of the First Award Principle and the Commission's reliance on it was not in error—Full Bench found that a statement made by the Commission was not the decision under appeal and represented no fatal flaw—Full Bench found Comparative Wage Justice Principle achieved the same result as the First Award Principle and its application was therefore not in error—Full Bench found the retirement from the Agreement clearly became part of the equity, good conscious and substantial merits of the matter, the Commission was right to have regard to this and make findings in relation to it and that the submission that it was not an industrial matter was erroneous—Full Bench found there was no miscarriage of the discretion of the Commission established in accordance with the authorities in House *v.* King, there was no procedural unfairness or denial of natural justice in relation to the so called statement, in relation to Section 41 of the I.R. Act or any feature of the proceedings and there was no consideration of irrelevant matters—Dismissed—R.R.I.A. v- A.M.W.S.U. and Others—Appeal No. 436 of 1991—Sharkey P., Coleman C.C., Gregor C.—20/12/91—Iron Ore ..... 25

CUMULATIVE DIGEST—*continued*

Page

PRINCIPALS—*continued*

[3]Application for a new award to replace an existing award—Commission had previously determined as a preliminary point that an award should issue—Employers argued award would cause a conflict of interest between foreman and members of the workforce in the same union, that there was a lack of perceived need for any change and finally there was a fear that the CMEU would institute a campaign of unionising foremen—CICS found as a preliminary point that the application had been advertised and the Commission was of the opinion that the changes which had occurred to the application since were not of a nature that required a further advertisement—CICS found those arguments against the issuance of the award had been presented and dealt within the earlier decision of the Commission—CICS further found that the application was to bring the award up to date with current conditions, to prevent the rectification of the situation would be such an interpretation of the principles that an injustice would result, it was a special case and fit within the anomalies principle—CICS proceeded to determine whether provisions fit within the State Wage Principles and issued the award subject to discussion as to the implementation of structural efficiency—Award Issued—C.M.E.U. and Another *v.* M.B.A. and others—No. A5 of 1987—Halliwell S.C., George C., Beech C.—29/10/87, 15/8/90, 6/12/91—Halliwell S.C.—29/10/87—Building ..... 1302

PROCEDURAL MATTERS—

Appeal against decision of Director of Industrial Training Division (DET) *re* refusal to cancel Apprenticeship agreement—Appellant Employer argued misconduct justified termination—Commission adopted previous decision relating to manner of proceedings for these appeals—Commission reviewed authorities and found, having regard for the penalty applied, that there was no reason to interfere with the decision—Dismissed—Brian Gardner Motors Pty Limited *v.* G. Walters—George C.—18/12/91—Automotive ..... 180

Claim *re* contractual entitlements—Applicant sought payment for outstanding salary—Respondent failed to appear—Commission found Applicant had established claim for monies due up to the date of his summary dismissal—Granted—Carlson D.C. *v.* Joseph Charles Learmonth Duffy Limited—No. 1631 of 1991—George C.—19/12/91—Financial Services ..... 148

Application for substituted service—Applicant argued that service of application would be "a compromise of conscience"—Commission in this instance found it appropriate to grant claim but stated that in all other respects, provisions of the Regulations would apply—Ordered Accordingly—Concept Products *v.* Forest Products, Furnishing and Allied Industries Union—No. 1821 of 1991—Beech C.—13/12/91—Furnishing ..... 177

Application to vary an order *re* inspection of documents—Preliminary Reason Applicant argued it had not had time at inspection of documents to record contents and sought copies—Respondent argued Commission had no power to order copy of documents to be produced—Commission reviewed authorities and found Regulation 80 could not write down the powers of the I.R. Act and that it would not be an onerous imposition on the Respondent—Granted—C.M.E.U. *v.* R.R.I.A.—No. 41 of 1992—Gregor C.—24/1/92—Iron Ore ..... 432

Application for allegedly denied contractual entitlements—Applicant failed to appear—Commission having regard for the record of the claim and the failure of the Applicant to appear at the hearing, the onus being on him, dismissed the matter for want of prosecution—Roussel R. *v.* Setlaw Pty Ltd—No. 1003 of 1991—Kennedy C.—15/1/92 ..... 391

Promotion Appeal—Senior Administrative Officer, Level 4, Faculty of Science and Technology Joondalup Campus—Edith Cowan University—Appellant demonstrated advantages over recommended Applicant in relation to financial management criteria and usefulness of her tertiary studies—Recommended Applicant demonstrated relevance of her tertiary studies to the job at hand and a high level of academic distinction—PAB found that Appellant was unable to discharge the onus of convincing the Board that she had a better claim to the promotion—Dismissed—Elam A. *v.* McFetridge D.L.—No. PAB 46 of 1991—Negus C.—28/1/92—Edith cowan University ..... 436

[2]Appeal against decision of Commission (71 WAIG 2869) *re* variation of award—Full Bench granted leave to intervene to committee members of Appellant Union, the Union and another Union—Respondent argued individual Appellants had no standing to file the appeal, hence it was incompetent or the Full Bench had no jurisdiction and sought that the Full Bench refrain from hearing the matter—Full Bench found separate application to refrain from hearing was incompetent—Full Bench reviewed Union rules and found on evidence nothing to suggest that the appeal was instituted by the Union with the necessary authority—Dismissed—F.L.A.I.E.U. *v.* Burswood (Management) Ltd—No. 1643 of 1991—Sharkey P., Halliwell S.C., Salmon C.—5/2/92—Racing and Gaming ..... 212

[4]Application for stay of order pending Appeal to Full Bench—President reviewed background of whole dispute including S.66 matters—President found application could not be treated as having been made by F.L.A.I.E.U. as resolutions of Committee of Management of that body had not been struck down as invalid—President however found individually named Applicants had sufficient interest in a stay of the order until serious issues regarding the basis of consent to the variation had been determined—President further found these serious issues were subsumed by the strength of the Applicants' interest—President further found balance of convenience favoured Applicants and their colleagues as employees subject to conditions of employment which were allegedly consented to on the basis of invalid resolutions of the Committee of Management—Granted in Part—F.L.A.I.E.U. and Others *v.* Burswood Resort (Management) Limited and Another—No. 1644 of 1991—Sharkey P.—6/12/91—Gaming ..... 231

Conferences matter referred *re* unfair dismissal claim—Commission gave reasons for partly granting an adjournment sought by the Respondent for lodging further grounds in preliminary matter—Respondent argued by making a proposal to set up a business the employee was in breach of his duty of fidelity—Commission reviewed authorities, and found there was no conduct leading to an actual repugnance in the sense envisaged in the Blyth Chemicals decision—Granted—F.M.W.U. *v.* Margaret River tourist Bureau (Inc.)—No. CR706 of 1991—Beech C.—12/12/91 & 6/1/92—Tourism ..... 415

Claim for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued that he had been dismissed because he was on worker's compensation—Respondent argued that the Applicant's services were terminated because of his attitude and his failure as a Manager to recognise his responsibilities to the Company—Commission, in light of all the evidence, found that there was no basis upon which it should interfere in the decision of the Respondent to terminate the services of the Applicant—Commission also found that there was no basis for allegation made by Applicant that the Respondent's witnesses had given false evidence and further the written material did not affect the outcome of the case—Dismissed—Kaigg W.J. *v.* Australian Wool Testing Authority Ltd—No. 633 of 1991—George C.—9/1/92—Wool ..... 386

[2]Appeal against decision of Commission (71 WAIG 2655) *re* redundancy—Appellant argued appeal had identical grounds as to jurisdiction as a matter before the Industrial Appeal Court and sought adjournment—Full Bench found both parties would suffer injustice if the matter was heard at the time—Granted—Gromark Packaging Pty Ltd *v.* F.M.W.U.—Appeal No. 1568 of 1991—Sharkey P., Negus C., George C.—31/1/92—Packaging ..... 215

[2]Appeal against decision of the Commission (71 WAIG 1984) *re* review of prohibition notice under Occupational Health, Safety and Welfare Act—Appellant argued Commission erred in taking into account its own knowledge of motor vehicles, failed to satisfy itself that there was a serious and imminent risk, and failed to give proper consideration to the term "practicable" and erred in not finding the "duty of care" was fulfilled—Full Bench reviewed authorities, interpreted the Occupational Health, Safety and Welfare Act, "serious and imminent risk", and found on review of the evidence that there was no miscarriage of the Commission's discretion—Dismissed—Wormald Security Australia Pty Ltd *v.* Peter Rohan, D.O.H.S.W—Appeal No. 1161 of 1991—Sharkey P., George C., Beech C.—10/3/92—Security ..... 477

[2]Appeal against decision of Commission (71 WAIG 2397) *re* denied contractual entitlements—Appellant argued Commission failed to make primary findings of fact that a decision had occurred and that the contract of service had terminated as a result of the Respondents' failure to comply with an implied duty—Appellant further argued the Commission misdirected itself as to burden of proof and the Appellant's defence—Full Bench reviewed authorities and found Commission's description of the burdens whilst not accurate, was not in error—The evidence for the Appellant was rejected in circumstances where demeanour was implicitly involved and there was no palpable error in so doing—Full Bench further found Commission was entitled to rely on correspondence of the Appellant—Dismissed—CFA Corporate Finance Associates Pty Ltd *v.* Yeoward M.I.—Appeal No. 1453 of 1991—Sharkey P., Negus C., Gregor C.—9/3/92—Finance ..... 474

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

Application to adjourn application to vary award *re* Classifications—Respondent argued it was contrary to the interest of the industry to have a separate parallel process for a small sector of workers when there was a comprehensive review being carried out under structural efficiency—Commission reviewed history of claim, critized the Respondent for the time taken to resolve issues and reluctantly granted the adjournment with liberty to apply as the best solution was for the matters to be resolved together—Granted—F.M.W.U. *v.* The Board of Management, Albany Regional Hospital and Others—No. 1058/89 Gregor C.—27/2/92—Health ..... 566

[2]Appeal against decision of Industrial Magistrate (71 WAIG 2161) *re* unproven breach of award—Appellant argued Industrial Magistrate had erred in giving weight to the employees evidence and that the lack of findings was inconsistent with determinations made—Full Bench reviewed authorities and found the Industrial Magistrate was unable to make a finding of fact as he was unable to accept the evidence of one lot of witnesses in preference to the others and that the Complainant had not therefore established any of the facts in dispute—Dismissed—F.C.U. *v.* Brocklebank Pty Ltd Trading as Kwinana Lodge Hotel—Appeal Nos. 1170, 1171 and 1172 of 1991—Sharkey P., Halliwell S.C., Negus C.—14/2/92—Hotels ..... 486

Claim *re* contractual entitlements—Applicant sought payment for outstanding salary—Respondent argued that employee forfeited one week's pay as one week's notice to terminate the contract was not given—Commission preferred evidence of Applicant to submissions of Respondent from bar table and found that the Respondent had engaged in improper conduct and in these circumstances employee's decision to terminate contract was warranted—Granted—Andreatta P. *v.* Beni Magjarraj Trading as Nova Air Conditioning—No. 1652 of 1991—Beech C.—11/02/92—Air Conditioning ..... 571

Applications to vary awards by consent *re* wages pursuant to "special case" provisions—Commission initially determined that the "special case" consideration was warranted and that an interim salary increase was justified on the changes and work value grounds identified (71 WAIG 2538)—Commission subsequently found that the efficacy of the package remained intact; that progress was made in the implementation of changes; and that there was no digression from the original parameters and format of the agreement—Commission further made an order to divide applications which would allow for further stages of the package to be considered separately at a later date—Ordered Accordingly—W.A. Police Union of Workers *v.* Hon. Minister for Police—No. P10/1 of 1991 and No. 1294/1 of 1991—Kennedy C.—17/1/92—Emergency Services ..... 257

[2]Appeals against decision of Industrial Magistrate *re* Breach of Award—Appellant argued Industrial Magistrate erred in fact and in law in finding Appellant was bound by Award—Full Bench found reasons were those given as recorded on transcript rather than extempore decision—Full Bench reviewed authorities, common object test and found grounds relating to "industry" whilst made out were not fatal—However Full Bench found Industrial Magistrate erred in purporting to convict the Appellant and vary decision accordingly—Upheld in Part—Burswood Executive Health Centre *v.* F.M.W.U.—No. 1145 of 1991—Sharkey P., Coleman C.C., Kennedy C.—19/3/92—Health & Fitness ..... 687

Application for reinstatement on the grounds of unfair dismissal, subsequently amended to include contractual entitlements—Applicant denied allegations of theft therefore summary dismissal was unfair and resulted in loss of benefits—Respondent argued that the Applicant had committed theft and that the contract of employment was regulated by an award therefore the Commission did not have jurisdiction—Commission found upon evidence that the dismissal was justified therefore the question of jurisdiction did not need to be addressed—Dismissed—Bayley M.E. *v.* Wanilla Nominees Pty Ltd Trading Jadana—No. 1768 of 1991—Parks C.—26/3/92 ..... 850

Application for reinstatement on the grounds of unfair dismissal and alleged denied contractual entitlements—Applicant only pursued contractual entitlements including payment in lieu of notices and holiday pay leave loading as the basis in the contract of service—Respondent did not appear—Commission decided to hear matter exparte due to Respondent's history of failures to appear—Simpson L.F. *v.* King Mining Corporation Ltd—No. 1575 of 1991—Gregor C.—24/2/92—Secretary ..... 868

Application for stay of order *re* shortened time for answers—Applicant submitted balance of convenience favoured a stay and that there was a serious issue to be tried—President determined that until matters dealt with before the Commission itself were exhausted, the balance of convenience did not lie with the Applicant—Dismissed—The Eagle Pty Ltd *v.* Sinclair P.—Sharkey P.—29/1/92—Media Entertainment ..... 697

Appeal against decision of Director of Industrial Training division (DET) *re* suspension of apprenticeship—Appellant Employer argued that due to number of absences and unsatisfactory attitude to work apprenticeship suspension was justified—Commission adopted previous decision relating to the manner of proceedings of these appeals—Commission reviewed Industrial Training Act 1975 and having considered all material before it found no grounds to interfere with decision—Dismissed—Christopher John Boon T/A Bernie's Panelworks *v.* Doulis R.R.—No. 636 of 1990—George C.—16/4/92—Motor Vehicle ..... 1213

[4]Applications for orders *re* compliance with union rules—President dealt with various applications for interim orders, interlocutory matters in a set of inter related applications—Applicant sought orders concerning the financial management, address, status of offices, and general business of the union—President dealt with application for leave to withdraw and other matters and found the interests of equity, good conscience and substantial merits of the case, the parties the Union Committee of Management and membership would be best effected by attempting to facilitate a comprehensive hearing of all the issues raised as soon as possible since they went to the ability of the union to operate correctly or even perhaps at all—President determined that it had jurisdiction to hear an application for directions, whether to consolidate one application with another, orders relating to the conduct of the union over an application to vary an award—President reviewed authorities and found that the right to make an application of bias was waived, there was no ostensible bias established and that necessity prevented the President from disqualifying himself—President dealt with an application to discharge interim orders made and found the balance of convenience favoured the Secretary being placed back in her proper role—President dealt with application for interim orders regarding a special general meeting—Ordered and Declared Accordingly—Carter L.B. *v.* Drake M.A. and Others—Nos. 1053, 1478, 1479, 1482, 1529 of 1991 and 127 of 1992—Sharkey P.—Various dates—Unions ..... 706

[3]Application for a new award to replace an existing award—Commission had previously determined as a preliminary point that an award should issue—Employers argued award would cause a conflict of interest between foreman and members of the workforce in the same union, that there was a lack of perceived need for any change and finally there was a fear that the CMEU would institute a campaign of unionising foremen—CICS found as a preliminary point that the application had been advertised and the Commission was of the opinion that the changes which had occurred to the application since were not of a nature that required a further advertisement—CICS found those arguments against the issuance of the award had been presented and dealt within the earlier decision of the Commission—CICS further found that the application was to bring the award up to date with current conditions, to prevent the rectification of the situation would be such an interpretation of the principles that an injustice would result, it was a special case and fit within the anomalies principle—CICS proceeded to determine whether provisions fit within the State Wage Principles and issued the award subject to discussion as to the implementation of structural efficiency—Award Issued—C.M.E.U. and Another *v.* M.B.A. and others—No. A5 of 1987—Halliwell S.C., George C., Beech C.—29/10/87, 15/8/90, 6/12/91—Halliwell S.C.—29/10/87—Building ..... 1302

[2]Appeals against decision Industrial Magistrate remitted from Industrial Appeal Court for further hearing (71 WAIG 2259) *re* breach of Award—Appellant argued Industrial Magistrate failed to make findings as to the amount actually paid and whether those amounts were as particularised or not more than those amounts—Respondent argued that to establish that the employee earned a certain amount per week did not falsify the particulars supported by her evidence—Full Bench found without more evidence as to what was received and due on a weekly basis it was not possible to find the figures alleged as underpayments on balance of probabilities—Upheld and Quashed—Como Investments Pty Ltd *v.* McCorry G.—Appeal No. 1133 of 1990—Sharkey P., Fielding C., George C.—5/5/92—Restaurants & Catering ..... 1282

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

[1]Appeal against decision of the Commission (71 WAIG 582) *re* issuance of award—Appellant argued Commission erred in criticising its conduct in retiring from an industrial agreement thus having regard for irrelevant considerations, that there had been procedural unfairness, a denial of natural justice, that Section 26(3) of I.R. Act had been breached, that the Commission had miscarried in its exercise of its discretion and sought that the decision be quashed—The Hon. Minister, intervening, argued the Commission had dealt with the award as a whole, notwithstanding the assessment of a number of aspects, as it was entitled to do—Full Bench reviewed authorities and found *inter alia* the application was clearly an application for a new award, the Commission was entitled to place significant weight on the First Award Principle and was bound to give great significance to all existing rates and conditions of employment including those evidenced by an award or formal agreement and those more informally added as terms and conditions—Full Bench found the defacto principle was no more than part of the rationale of the application of the First Award Principle and the Commission's reliance on it was not in error—Full Bench found that a statement made by the Commission was not the decision under appeal and represented no fatal flaw—Full Bench found Comparative Wage Justice Principle achieved the same result as the First Award Principle and its application was therefore not in error—Full Bench found the retirement from the Agreement clearly became part of the equity, good conscious and substantial merits of the matter, the Commission was right to have regard to this and make findings in relation to it and that the submission that it was not an industrial matter was erroneous—Full Bench found there was no miscarriage of the discretion of the Commission established in accordance with the authorities in House *v.* King, there was no procedural unfairness or denial of natural justice in relation to the so called statement, in relation to Section 41 of the I.R. Act or any feature of the proceedings and there was no consideration of irrelevant matters—Dismissed—R.R.I.A. v- A.M.W.S.U. and Others—Appeal No. 436 of 1991—Sharkey P., Coleman C.C., Gregor C.—20/12/91—Iron Ore ..... 25

[2]Appeal against decision of the Commission (71 WAIG 2411) *re* dismissed applications for reinstatement on the grounds of unfair dismissal—Appellant argued *inter alia* Commission erred in finding that the Respondent had discharged the evidentiary onus of proof that misconduct had occurred and failed to determine central issue of fairness of the dismissals—Full Bench reviewed authorities and found there was ample evidence to find as the Commission did, there was no misuse of the advantage of seeing witnesses and observing their demeanour and no error in the exercise of the Commission's discretion—Dismissed—F.M.W.U. *v.* Board of Management, St John of God Hospital, Bunbury—Appeal No. 1352 of 1991—Sharkey P., Coleman C.C., Halliwell S.C.,—4/6/92—Health ..... 1274

[2]Application to expedite hearing of an appeal against the decision of the Commission *re* dismissed application to vary award—Appellants argued if appeals were not heard before Anzac day then they might lose the benefits the appeal might bring—Full Bench refused appearance by Counsel—Full Bench reviewed authorities and found that it was necessary for the Appellant to establish that the interests of justice were served by the expedition occurring—Full Bench further found that the Appellant represented only some of the employers in the industry and that they would not lose their appeal rights if the claim is not granted—Full Bench granted substituted service—Dissenting Member gave reasons for finding in favour of Appellant—Ordered Accordingly—Stamco Pty Ltd and Others *v.* S.D.A.—No. 453 and 454 of 1992—Sharkey P., Fielding C., Parks C.—8/5/92—Retail ..... 1279

Application for shortened time for answers in an application *re* unfair dismissal—Applicant argued that Respondent had known of matter for sometime and did nor require full period of time to answer—Respondent argued that due to same issues being dealt with in a similar application 263 of 1992 proceedings should not continue until outcome of application was known—Commission found that Applicant's want for expedition was undermined by Respondent's claim—Dismissed—Fisher E. *v.* Totalisator Agency Board—No. 651 of 1992—Fielding C.—28/5/92—Racing and Gaming ..... 1425

Application for shortened time for answers in Application No. 1313 of 1991 for two "new Respondents"—Commission found unless and until a formal application was submitted to amend Application No. 313 in joining the new respondents the application for shortened time was not in question and could not continue further—Dismissed—Ward K. *v.* Bulk Materials (Coal Handling) Pty Ltd and Others—No. 648 of 1992—Fielding C.—3/6/92—Bulk Handling ..... 1425

Application to adjourn application to vary award *re* salary rate, provision for position of associate director (academic) in Government Technical and Further Education Institutions—Parties argued that due to delays in advertising and filling of position, withdrawal of appointed persons and incomplete nature of new agreed career structure and as neither party were able to put forward work value cases the hearing ought to be postponed 6 months or more—G.S.T.T. found due to inability to proceed with work value case discontinued the application, cancelled interim orders without precluding subsequent applications and commented similarly on the part matter of the interim orders—Order Accordingly—Hon. Minister for Education *v.* S.S.T.U.—No. T4(2) of 1990—Kennedy C./Reeves/McKinnon—9/6/92—Education ..... 1427

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed termination occurred prior to resignation date and due to *inter alia* misunderstanding of Commission's previous directive a delay occurred in pursuing claim further—Respondent argued that application should not continue due to length of time between termination and claim—Commission reviewed authorities and found on evidence in favour of Respondent—Discontinued—Wellington K.J. *v.* Narembeen District Memorial Hospital—No. 76 of 1992—Kennedy C.—14/4/92—Nursing ..... 1396

Application for reinstatement without loss of entitlements—Applicant claimed real reason for dismissal was that she had discussions with a Union official during working hours—Respondent argued that application should be dismissed due to inordinate delays in processing and hearing of matter and that decision to terminate contract was over employee's poor attitude to work despite several occasions of counselling—Commission found on evidence that Applicant had failed to discharge onus of establishing claim—Dismissed—Cossey T. *v.* Bayswater Nominees Pty Ltd T/A Forrest Place Cafe and Kiosk—No. 50 of 1992—Kennedy C.—5/5/92—Fast Foods ..... 1372

[1]Application to lift stay of execution of Interim Order *re* union resolution and award variation negotiations pending Appeal to IAC—IAC Judge found it should be slow to refuse the lifting of a stay where the simple lodging of an appeal can stifle interim or interlocutory relief given after a hearing when the main dispute is only a few weeks away—Granted—Carter L.B. and Others *v.* Green E.M. and Others—IAC No. 1 of 1992—Rowland J.—4/2/92—Unions ..... 210

PROMOTION APPEALS—

Leading Trackman—Picton (6304 Mobile)—Appellant claimed more practical experience and technical knowledge of work to be performed—Recommended Applicant however evidenced greater supervisory experience—Promotions Appeal Board considered greater emphasis was to be placed on leadership and management skills in selection of employee and found that the better claim for the position had not been established by the Appellant—Dismissed—Lilly S.J. *v.* Furlong D.M.—No. PAB 35 of 1991—Parks C.—13/11/91—Westrail ..... 177

Promotion Appeal—Steward/Stewardess Marketing Branch—East Perth—Westrail—Promotion Appeal Board found restriction to discount all experience or qualifications gained after the vacancy occurred strengthened Appellants claim and that Appellant had more general experience over a much longer period than one of the recommended Applicants—Upheld—Phillips S.L. & Luzi P.R. *v.* Gaunt S.K.—No. PAB 28 & 29 of 1989—Negus C.—16/09/91—Westrail ..... 436

Theatre Assistant, Level 2/3—Royal Perth Hospital—Promotion Appeal Board found Appellant had not performed well during selection interview however had made stronger case in terms of her work experience in the position—PAB found Recommended Applicant fulfilled essential selection criteria and relevant work history—PAB found that Appellant had discharged onus of establishing better claim to the position—Upheld—Zhu M.L. *v.* Steer K.L.—No. PAB12 of 1992—Negus C./Watterson/Tuttle—6/4/92—Royal Perth Hospital ..... 922

[2]Question of law referred to Full Bench *re* whether a selection process agreed between the parties was contrary to Section 80Y of the I.R. Act as vacancies in promotion positions were not being advertised as they arose—Full Bench reviewed I.R. Act and found that the words were plain and that the existing process was ultra vires the Act—Commissioner expressed view that Section 80X and 80Y did not fetter managerial prerogative—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. C579A of 1991—Sharkey P., Fielding C., Negus C.—7/4/92—Emergency Services ..... 981

CUMULATIVE DIGEST—*continued*

Page

PROMOTION APPEALS—*continued*

Administrative Officer Level 4—Faculty of Education, Mt Lawley Campus—Edith Cowan University—Appellant claimed that essential qualification requirement was set at a level which debased the status of advertised position and she had achieve significantly higher level of academic achievement therefore was of greater merit for position—Recommended Applicant demonstrated duties and responsibilities closely related to those of vacant item—PAB found that it had not been presented with any evidence beyond assertion which established an advantage in relation to essential selection criteria therefore appeal was not proven—Dismissed—Temov L. *v.* Northover M.J.M.—No. PAB45 of 1991—Negus C., Middleton/Bates—12/12/91—University ..... 437

PUBLIC HOLIDAYS—

Application to vary award *re* Holidays—Applicant employers sought to amend award to facilitate and reduce costs incurred as a result of public holidays falling on Saturday trading—Respondent union argued that claim was inconsistent with spirit and intent of Commissions defacto wage principle and that application was almost identical to a series of claims lodged by the Applicant in recent years with the object of reducing penalty rates in which the Commission had continually rejected—Commission reviewed evidence and taking into account equity, good conscience and the substantial merits of the case failed to be convinced that the Applicant had discharged its onus of proving there was a special case and that costs were not prohibitive enough to vary the award—Dismissed—Myer Stores Limited and Others *v.* S.D.A.—No. 221 of 1991—Salmon C.—31/3/92—Retail . 839

PUBLIC INTEREST—

Conference referred *re* abolition of rostered day off—Applicant Union claimed that employees had been pressured into signing consent forms, actions were contrary to prior agreement between the parties and sought that the signed documents be returned to the said employees—Respondent employer argued that company was following provisions outlined in the award to change the work cycle—Commission reviewed the meaning of equity and found on evidence the respondent had unfairly exercised its rights under the award and had acted against public interest by ignoring State Wages Policy—Granted—S.D.A.E.A. *v.* K-Mart Discount Stores—No. CR525 of 1991—Salmon C.—3/1/92—Retail ..... 423

Application to vary award *re* Holidays—Applicant employers sought to amend award to facilitate and reduce costs incurred as a result of public holidays falling on Saturday trading—Respondent union argued that claim was inconsistent with spirit and intent of Commissions defacto wage principle and that application was almost identical to a series of claims lodged by the Applicant in recent years with the object of reducing penalty rates in which the Commission had continually rejected—Commission reviewed evidence and taking into account equity, good conscience and the substantial merits of the case failed to be convinced that the Applicant had discharged its onus of proving there was a special case and that costs were not prohibitive enough to vary the award—Dismissed—Myer Stores Limited and Others *v.* S.D.A.—No. 221 of 1991—Salmon C.—31/3/92—Retail . 839

REDUNDANCY/RETRENCHMENT—

Conference referred *re* back payment of wages and extra payment in lieu of notice—Applicant union claimed employees had been assured both verbally and written of continued employment and had had no knowledge of impending redundancy—Respondent argued redundancies were necessary for economic viability—Commission whilst commending Respondent in assisting employees to find employment determined that an additional four weeks pay in lieu of notice was equitable—Granted in Part—T.W.U. *v.* Arnotts Mills & Ware—No. CR43 of 1992—Halliwell S.C.—15/4/92—Retail (Food) ..... 1190

Conference referred *re* dispute over retrenchment of 32 workers—Applicant argued unfair and discriminatory criteria were used to select retrenched employees, that clause 25 of award was breached and sought termination notices be rescinded—Respondent argued that formula and criterion used to determine retrenched employees was reasonably standard and acceptable—Commission reviewed authorities and found on evidence in favour of Applicant—Granted—A.W.U. and Another *v.* Newcrest Mining Limited—No. CR186 of 1992—Gregor C.—9/4/92—Mining ..... 1176

Claim *re* redundancy payments greater than provided—Applicant employees sought redundancy provisions in line with K-Mart agreement—Respondent argued that payments already made were fair by comparison with the Metal Trades (General) Award provisions and there was no provision in the Applicant's contracts of service upon which claims could be based—Commission reviewed authorities and found that Respondent had failed to notify employees of impending retrenchments and that employees were entitled to the benefit of the non-discrimination rule—Granted—Ryan N.W. and others *v.* Coles/Myer Ltd T/A Coles Supermarkets—Nos. 1264, 1276 and 1277 of 1991—Salmon C.—10/4/92—Retail Food ..... 1163

Conference referred *re* claim for reinstatement without loss of entitlements on the grounds of unfair dismissal—Applicant Union claimed that facts surrounding the dismissals demonstrated history of retaliatory measures taken against employees for involving the union in work related pay and condition matters—Respondent argued that the reason for termination was the need to restructure maintenance operation due to economic circumstances—Commission found that whilst the alleged victimisation of employees over union involvement was not discharged there had been no consultation with employees over changes and that the way in which services were terminated were unfair—However Commission declined to order reinstatement due to company restructuring—Ordered Accordingly—A.E.E.F.E.U. *v.* AMP Shopping Centres Pty Ltd—No. CR588 of 1991—3/4/92—Maintenance ..... 1406

Application for allegedly denied contractual entitlements—Applicant claimed that he was made redundant and sought nine months payment in lieu of notice—Respondent argued that Applicant's services were still required and contract had not been repudiated—Commission considering alternative position offered, found on evidence that Applicant's position was made redundant—Commission further found taking all circumstances into account that payment for 3 months wages was reasonable—Granted in Part—Sinclair P. *v.* The Eagle Pty Limited C/- Radio West—No. 1316 of 1991—Salmon C.—5/5/92—Entertainment/Media ..... 1393

REINSTATEMENT—

Conference referred *re* termination of employee for alleged unsatisfactory conduct involving an altercation with a fellow worker—Applicant claimed dismissal was unfair and sought reinstatement without loss of entitlements—Respondent argued applicant was lawfully terminated with notice and not summary in nature—Commission found applicant had not discharged the onus to establish that termination was harsh or oppressive and gave reasons therefore—Dismissed—Transport Workers Union *v.* BHP Iron Ore Limited—No. CR 704 of 1991—Halliwell S.C.—20/12/91—Mining ..... 173

Application for reinstatement on the grounds of unfair dismissal—Respondent raised preliminary point *re* dismissal of application as settlement had occurred at conference—Respondent further argued employee had had adequate time to prove herself and that the position held was no longer in existence and at speaking to the minutes sought reduction in amount of compensation for loss of earnings by employee—Commission reviewed conciliation proceedings and found from file note that the applicant had retained choice of seeking a hearing if negotiated settlement was not satisfactory—Commission found from evidence that dismissal was unfair and ordered reinstatement without loss of benefits—Ordered Accordingly—Malone T.N. *v.* Polygon Holdings t/a The Boulevard Alehouse—No. 690 of 1991—Negus C.—22/11/91—Hospitality ..... 151

Conferences matter referred *re* unfair dismissal claim—Commission gave reasons for partly granting an adjournment sought by the Respondent for lodging further grounds in preliminary matter—Respondent argued by making a proposal to set up a business the employee was in breach of his duty of fidelity—Commission reviewed authorities, and found there was no conduct leading to an actual repugnance in the sense envisaged in the Blyth Chemicals decision—Granted—F.M.W.U. *v.* Margaret River tourist Bureau (Inc.)—No. CR706 of 1991—Beech C.—12/12/91 & 6/1/92—Tourism ..... 415

CUMULATIVE DIGEST—*continued*

Page

REINSTATEMENT—*continued*

Conference referred *re* termination of a worker for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of wages and entitlements as employee was acting according to safety regulations—Respondent argued employee had caused unwarranted disruption to the site on numerous ocassions prior to incident which further justified summary dismissal—Commission found that whilst employee's industrial conduct left a lot to be desired this did not mitigate termination of employment and ordered reinstatement conditionally upon resignation as Shop Steward—Reasons given—Granted—B.L.F. *v.* Multiplex Constructions Pty Ltd—No. CR19 of 1992—Halliwell S.C.—28/1/92—Construction . 410

Conference referred *re* claim for reinstatement on the grounds of unfair dismissal—Applicant union argued that employee was an innocent party to the fight leading to the dismissal or at worst imprudent—Respondent argued it had a clear policy that fighting on the job would result in dismissal, that the worker had provoked the other and had breached the safety code—Commission reviewed authorities and found the onus at first instance was for the company to show that the summary dismissal was fair—Commission with respect to those concerned was unable to find on evidence that the employee was equally to blame for the incident and found that he essentially been passive and therefore the dismissal was harsh—Commission found no reason to consider the worker anything other than at least satisfactory prior to the incident and reinstatement *inter alia* did not affect the company policy—Commission further found taking all circumstances into account payment for only four weeks wages out of the time from termination was appropriate—Granted in Part—F.P.F.A.I.I.U. *v.* Wesfi Pty Ltd—No. CR 761 of 1991—Beech C.—21/2/92—Timber ..... 610

Conference referred *re* claim of unfair dismissal seeking reinstatement without loss of entitlements—Applicant claimed she had not been counselled or given warnings that her job was in jeopardy—Respondent argued dismissal was due to conduct and unsatisfactory work performance—Commission found on evidence that although employee did not perform to the satisfaction of Respondent, she was not warned or given opportunity to make amends—Granted—F.C.U. *v.* Rhomana Pty Ltd Trading as Siomar Battery Industries—No. CR721 of 1991—Parks C.—13/2/92—Battery Industries (Clerical) ..... 607

Conference referred *re* unfair dismissal seeking reinstatement without loss of entitlements—Applicant Union claimed that employee had not been counselled or given warnings indicating his job was in jeopardy and had not been given chance to reasonably respond—Respondent argued that employee's unsatisfactory work performance, behaviour and attitude to superiors and other employees had warranted termination—Commission on reviewing evidence found that it would not be conducive to industrial harmony to order reinstatement and determined that dismissal was not unfair—Dismissed—A.M.W.S.U. *v.* Youngs Holden—No. CR745 of 1991—George C.—18/2/92—Retail (Car) ..... 62

[1]Appeal against decision of Full Bench (71 WAIG 2024) dismissing Appeal against decision of Commission *re* alleged unfair dismissal—Employee subject of original proceedings was summarily dismissed for assaulting a patient—Section 90(2) of I.R. Act, 1979 limits right of appeal to Industrial Appeal Court to grounds that decision is erroneous in law—In this case the grounds of appeal assert that there was no credible evidence to support Respondent's allegation that subject employee had assaulted patient—Industrial Appeal Court found the original evidence before the Commission was capable of being accepted and was not inherently unlikely—Further, once there is evidence which is credible and is capable of belief, then error of law cannot be established—Dismissed—F.M.W.U. *v.* Board of Management Narambeen District Hospital—IAC Appeal No. 11 of 1991—Rowland J., Franklyn & Nicholson J.J.—25/2/92—Health ..... 471

Application for reinstatement on the grounds of unfair dismissal—Respondent terminated employee for allegedly physically assaulting, verbally threatening and sexually harassing an employee—Commission examined contradictory evidence and found that the dismissal was unjust and unfair—Lynn T. *v.* Royal Perth Hospital—No. 1236 of 1991—Halliwell S.C.—24/3/92—Health—Food Service Attendant ..... 853

Conference referred *re* summary dismissal of an employee for alleged misconduct—Applicant employer claimed the termination had been justified as incident was an unprovoked assault and considering nature of employee's work in the community—Respondent union argued dismissal was harsh and unfair in the light that employee had been punished twice—Commission reviewed authorities and found that there had been no double jeopardy and that Applicant had not acted unfairly in its decision to terminate contract of service—Dismissed—BHP Minerals Limited *v.* A.W.U.—No. CR108 of 1992—Gregor C.—7/4/92—Mining ..... 1174

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed he was not warned or cautioned prior to dismissal about any of the incidents which in the view of Respondent made him an undesirable employee—Respondent argued employee had physically assaulted two other employees which amounted to serious misconduct and after weighing evidence had decided to terminate employment according to award and policy—Commission on reviewing evidence and cases cited declared that as employee had had little recollection of events and after investigations had divulged seriousness of incident, Respondent had not acted harshly or unfairly—Dismissed—A.W.U. *v.* Robe River Iron Associates—No. 1624 of 1991—Gregor C.—14/4/92—Mining ..... 1150

Application for reinstatement on the grounds of unfair dismissal—Commission was asked to determine as a preliminary point whether application should proceed to further hearing due to lapse of time between date of termination and filing application—Applicant claimed his state of affairs at the time justified the delay—Respondent argued Commission should as a matter of equity apply doctrine of Laches—Commission determined that whilst the Act did not prescribe any time, the Applicant was sufficiently capable of conducting his affairs and therefore further found it not necessary to determine question of jurisdiction—Dismissed—Burden M.D. *v.* National Permanent Management Services Pty Ltd—No. 1587 of 1991—Parks C.—3/4/92—Financial Services ..... 1157

Conference referred *re* dispute over decision to terminate employee—Applicant Union claimed constructive summary dismissal was unfair as the removal of food which led to her termination was not a wilful act of dishonesty as she had not been informed of any policy relating to this, she was denied consultation with anyone and sought reinstatement without loss of entitlements—Respondent argued that there was a food control policy and that employee had admitted to the charge—Commission in applying test dicta namely St John's Case, found that employee had not been given opportunity to reasonably respond, that there was procedural unfairness in the constructive summary dismissal in that decision was based purely on the incident and therefore claim was established—Granted—F.M.W.U. *v.* Board of Management, Fremantle Hospital—No. CR22 of 1992—Gregor C.—31/3/92—Health ..... 1418

Application for reinstatement on grounds of unfair dismissal—Applicant argued that no warnings prior to termination had been given and that reason for termination was failure to attend workplace to turn on security alarm—Respondent argued that failure to set security alarm was a factor leading to termination but dismissal resulted from unsatisfactory service by the Applicant and that she had been transferred to give her another opportunity—Respondent also argued that warnings were given over time—Commission found on evidence that no warnings had been given to Applicant prior to termination, that dismissal was unfair and granted reinstatement subject to a review after a two month trial period—Granted in Part—Candelaria A.M. *v.* Avel Pty Ltd T/A Timezone—No. 384 of 1992—Beech C.—21/5/92—Entertainment ..... 1367

Application for reinstatement on grounds of unfair dismissal—Applicant claimed dismissal was unfair due to position being terminated but later being refilled by new employee—Respondent argued that application should not continue due to the prosecution not being done with due expedition—Commission reviewed authorities and found from indicia that jurisdiction was limited to question of the Applicant's actual dismissal and that dismissal was unchallenged by Applicant until he found who had filled his position—Dismissed—Carlyon G. *v.* Singer Australia—No. 1772 of 1991—Negus C. 18/5/92—Retail ..... 1376

Application for reinstatement on the grounds of unfair dismissal—Respondent claimed lost confidence and trust in employee which justified summary dismissal—Commission determined in preliminary reasons that employee had not set out to deceive employer, had been wrongly accused of dishonesty to achieve financial gain and found in favour of Applicant—Commission was further informed subsequent to hearing that she intended to live outside of the state and therefore Commission did not have jurisdiction to award damages in the light that reinstatement could not be effected—Dismissed—Briggs M.C. *v.* Eva's Garden Cafe—No. 839 of 1991—Parks C.—9/4/92—Fast Foods ..... 1364

CUMULATIVE DIGEST—*continued*

Page

REINSTATEMENT—*continued*

Application for reinstatement without loss of entitlements—Applicant claimed real reason for dismissal was that she had discussions with a Union official during working hours—Respondent argued that application should be dismissed due to inordinate delays in processing and hearing of matter and that decision to terminate contract was over employee's poor attitude to work despite several occasions of counselling—Commission found on evidence that Applicant had failed to discharge onus of establishing claim—Dismissed—Cossey T. *v.* Bayswater Nominees Pty Ltd T/A Forrest Place Cafe and Kiosk—No. 50 of 1992—Kennedy C.—5/5/92—Fast Foods ..... 1372

Applications for reinstatement on the grounds of unfair dismissal without loss of entitlements—Respondent argued that decision to terminate was due to gross misconduct which had resulted in a repudiation of the contract of employment—Commission reviewed conflicting evidence, the complicated inconsistencies in management of organisation and the individual contracts—Commission found that whilst Applicants had not co-operated and there was an apparent reluctance to deal with Respondent's position, the employer had failed to discharge the onus of establishing that this constituted misconduct—Granted in Part—Lupton B.A. and Others *v.* Gawooleng Dawang Inc. Nos. 1798, 1799 and 1800 of 1991—Kennedy C.—30/3/92—Social Welfare ..... 1381

Conference referred *re* strike action over termination of an employee—Applicant employer claimed that decision to terminate was warranted as employee had engaged in aggressive behaviour towards other employees over a reasonably extensive period—Respondent Union argued that employers failure to deal with Applicant pleas for assistance on work difficulties created a heavily stressful situation and sought reinstatement without loss of entitlements—Commission found that employee had shown a propensity to violent action in respect of his co-workers and that a full investigation had confirmed this therefore dismissal was justified—Dismissed—BHP Minerals Limited *v.* A.E.E.F.E.U.—No. CR211 of 1991—Gregor C.—26/5/92—Mining .... 1411

Conference referred *re* claim for reinstatement without loss of entitlements on the grounds of unfair dismissal—Applicant Union claimed that facts surrounding the dismissals demonstrated history of retaliatory measures taken against employees for involving the union in work related pay and condition matters—Respondent argued that the reason for termination was the need to restructure maintenance operation due to economic circumstances—Commission found that whilst the alleged victimisation of employees over union involvement was not discharged there had been no consultation with employees over changes and that the way in which services were terminated were unfair—However Commission declined to order reinstatement due to company restructuring—Ordered Accordingly—A.E.E.F.E.U. *v.* AMP Shopping Centres Pty Ltd—No. CR588 of 1991—3/4/92—Maintenance ..... 1406

Conference referred *re* dispute over dismissal and withdrawal of accommodation—Applicant Union claimed employee had had no written warnings, his work conduct was beyond reproach and that dismissal was harsh and unjust and sought reinstatement with restoration of his accommodation—Respondent argued that as experienced employee he should have been aware of serious breach of safety, showed a disregard of duty and coupled with previous misconduct warranted summary dismissal—Commission reviewed authorities and found on evidence that there had been a serious breach of safety requirements and that Respondent had discharged the onus of establishing that termination was justified—Dismissed—A.W.U. *v.* Boral Contracting—No. CR99 of 1992—Gregor C.—15/5/92—Mining ..... 1402

[4]Applications for stay of orders *re* reinstatement of employees pending appeal to Full Bench—President reviewed authorities and distinguished West Australian cases from New South Wales cases—President found the balance of convenience favoured the Applicant at that time since the likelihood of serious conflict in a small organisation was plain and the effect of these problems on the Applicant, the Respondent and the Community was likely to be serious—Granted—Gawooleng Dawang Inc *v.* Lupton B.A. and Others—Nos. 551, 552 and 553 of 1992—Sharkey P.—26/5/92—Welfare ..... 1310

Conference referred *re* dispute over termination of employee for alleged prank—Applicant Union claimed there was a denial of natural justice, the penalty was disproportionate to the incident itself and sought reinstatement—Respondent argued that a full investigation had been conducted and that decision to terminate was warranted—Commission reviewed authorities and found on evidence misconduct had led to injury of fellow employee in which company had vicarious liability, incident report had been falsified and that action was somewhat premeditated—Commission further found that despite unblemished work record, dismissal was neither harsh nor unfair—Dismissed—A.W.U.—Newscrest Mining Limited—No. CR753 of 1991—Gregor C.—17/12/91—Mining ..... 407

REST PERIODS—

Conference referred *re* claim for allowances—Applicant Unions claimed that work performed by employees was eligible for allowances—Commission reviewed authorities, found an order should issue and gave reasons therefore—Granted—M.E.W. and Others *v.* John Holland Pty Ltd and Others—Nos. CR755 of 1991 & CR7 of 1992—George C.—26/3/92 ..... 879

SAFETY—

Conference referred *re* claim for lost time over safety issue—Respondent argued Employees had not followed safety dispute procedures—Commission reviewed authorities and found no evidence to conclude that the employees with a legitimate claim under the Occupational Health Safety and Welfare Act did not have their entitlements maintained—However Commission found respondent partly responsible for the Industrial Action and having regard to S.26 of the I.R. Act ordered some payment for lost time—Granted in part—AMWSU *v.* CBI Construction Pty Ltd—No. CR 607 of 1991—George C.—11/12/91—Construction ..... 158

Conference referred *re* termination of a worker for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of wages and entitlements as employee was acting according to safety regulations—Respondent argued employee had caused unwarranted disruption to the site on numerous ocassions prior to incident which further justified summary dismissal—Commission found that whilst employee's industrial conduct left a lot to be desired this did not mitigate termination of employment and ordered reinstatement conditionally upon resignation as Shop Steward—Reasons given—Granted—B.L.F. *v.* Multiplex Constructions Pty Ltd—No. CR19 of 1992—Halliwell S.C.—28/1/92—Construction . 410

[1]Appeal against decision of Full Bench (71 WAIG 903) *re* dismissal of appeal against order that employer pay for working time lost during strike action—Industrial Appeal Court reviewed evidence and authorities and found that it was incumbent upon the Full Bench to consider whether there was any evidence to support the finding of the Commission that there were "genuine and reasonably health concerns about safety" not in terms of general apprehension of safety—I.A.C. found as there was no evidence to support such a finding then there was no need to examine further grounds of appeal—There was further no compliance with award provisions as to dispute resolution or safety code procedures—Upheld—Hamersley Iron Pty Ltd *v.* C.M.E.U.—IAC Appeal No. 4 of 1991—Rowland J, Franklyn & Nicholson JJ—17/12/91—Iron Ore ..... 461

[2]Appeal against decision of the Commission (71 WAIG 1984) *re* review of prohibition notice under Occupational Health, Safety and Welfare Act—Appellant argued Commission erred in taking into account its own knowledge of motor vehicles, failed to satisfy itself that there was a serious and imminent risk, and failed to give proper consideration to the term "practicable" and erred in not finding the "duty of care" was fulfilled—Full Bench reviewed authorities, interpreted the Occupational Health, Safety and Welfare Act, "serious and imminent risk", and found on review of the evidence that there was no miscarriage of the Commission's discretion—Dismissed—Wormald Security Australia Pty Ltd *v.* Peter Rohan, D.O.H.S.W—Appeal No. 1161 of 1991—Sharkey P., George C., Beech C.—10/3/92—Security ..... 477

Application for orders *re* validity of election of Occupational Health and Safety representative—1st Respondent claimed that election of Health and Safety representative were invalid due to breach of relevant sections of the OHSW Act—2nd Respondent argued that correct procedures as outlined in a working party document, made up by Chamber of Commerce and Industry Health Care Management Committee and representatives from F.M.W.U., Salaried Officers Association and Australian Nursing Federation were followed—Commission found that agreed election procedure did not comply with OHSW Act and no injustice was created as a result of proper application to Section 29 of the OHSW Act—Commission further commented on the Commission's arbitral role on Application by Commissioner for Occupational Health, Safety and Welfare—Ordered and Declared Accordingly—Commissioner for Occupational Health, Safety and Welfare *v.* F.M.W.U. and Another—No. OHSW 4 of 1991—Gregor C.—25/3/92—Nursing ..... 932

CUMULATIVE DIGEST—*continued*

Page

SAFETY—*continued*

Application for review of Prohibition Notice *re* extension of time for lodging of Reference—Commission determined that ability to extend time was a matter for the discretion of the Commissioner for Occupational Health, Safety and Welfare, that as this had been declined the review notice lodged was invalid and therefore the Commission did not have jurisdiction to hear matter—Struck Out For Want Of Jurisdiction—Brookbridge Horizons Pty Ltd *v.* Inspector A. Svenson, Department of Occupational Health, Safety and Welfare—No. OHSW 1 of 1992—Beech C.—13/4/92 ..... 1212

Conference *re* work stoppage over inadequate first aid facilities and deduction of wages—Applicant union requested interim order requiring Respondent to pay one hour's pay to employees prepared to sign authorisation for employer to deduct appropriate amount following determination of matter—Respondent argued that employees had engaged in industrial action and that if the claim was granted, a division would be created on site with employees covered by Federal award—Commission reviewed evidence and determined that several considerations had to be answered, that the claim would not be appropriate in these circumstances and listed matter for further hearing and determination—B.T.A. *v.* B.M.A.—No. C194 of 1992—Beech C.—7/4/92—Construction ..... 1173

Conference referred *re* dispute over deduction of wages for two days lost—Applicant union claimed that dispute arose over lack of amenities due to Respondent's non-compliance with industry standards in relation to electrical tagging and as a safety issue, wages should not be deducted—Respondent argued that interruption to power was part of an industrial campaign which occurred in several sites that day—Commission found that whilst Respondent was not in breach of any regulation regarding tagging there was concern over potential electrical safety hazard and that there was an entitlement to payment for some of the workforce for some of the time—Granted in Part—B.T.A. *v.* B.M.A.—No. CR23 of 1992—Beech C. 9/4/92—Construction ..... 1183

Conference referred *re* threat to withhold payment—Applicant claimed that cessation of work during alterations on site safety shed at CSIRO site did not warrant non payment for that time and sought order for payments—Respondent argues that changes had been made as soon as issue was raised, although no health risk was apparent and that cessation of work should not have occurred—Commission found on evidence that rectification work was appropriate and employee had a legitimate expectation that there be proper treatment of injured workers—Granted—B.T.A. *v.* B.M.A.—No. CR194 of 1992—Beech C.—23/4/92—Building ..... 1181

Application for interpretation of an award *re* at what point in time does an employee become entitled to payment for lost time due to inclement weather—Applicant employer claimed that credited hours should be reduced from when employees stopped work—Respondent Union argued that it should be reduced from the time that employees physically leave the site—Commission analysed clause, found that entitlement to payment was for ordinary time lost through inclement weather when an employee had ceased work whether or not the employee remains or leaves the site—Declared Accordingly—F.C.C. and Another *v.* B.T.A.—No. 1326 of 1991—Beech C.—11/5/92—Construction ..... 1358

Conference referred *re* dispute over dismissal and withdrawal of accommodation—Applicant Union claimed employee had had no written warnings, his work conduct was beyond reproach and that dismissal was harsh and unjust and sought reinstatement with restoration of his accommodation—Respondent argued that as experienced employee he should have been aware of serious breach of safety, showed a disregard of duty and coupled with previous misconduct warranted summary dismissal—Commission reviewed authorities and found on evidence that there had been a serious breach of safety requirements and that Respondent had discharged the onus of establishing that termination was justified—Dismissed—A.W.U. *v.* Boral Contracting—No. CR99 of 1992—Gregor C.—15/5/92—Mining ..... 1402

Application for payment for lost time over alleged safety issue—Commission determined as a preliminary point whether Industrial Magistrate or Commission had jurisdiction to hear matter, compared the OHSW Act with the IR Act and found it had power to deal with claim—Applicant Union claimed that employees refused to work in vicinity of "exclusion zone" as there were strong grounds to believe they would be exposed to risk of imminent and serious injury—Respondent argued that it had received advice from experts and that at the time of the dispute the stack did not present a problem—Commission reviewed authorities and found on evidence that exposure to perceived risk was immediate and probable, that the company had not fully informed the workforce, therefore displayed an indifference to the safety of the employees—Granted—A.W.U. *v.* Swan Portland Cement Limited—No. OHSW 6 of 1991—Beech C.—7/2/92—Cement ..... 1203

SHIFT WORK—

Conference referred *re* dispute over new contract of employment—Applicant union claimed employee should be paid wage rates consistent with former position including shift allowance—Commission found that whilst it had sympathy with employee's financial position the Respondent employers offer was not unfair provided that all available shifts be offered to employee when they occurred but declined to grant 15% shift allowance penalty—Ordered Accordingly—M.W.U. *v.* Board of Management, Attadale Private Hospital—No. CR 626 of 1991—Halliwell S.C.—13/2/92—Health ..... 627

SICK LEAVE—

Conference referred *re* termination of employee for alleged absenteeism—Applicant Union claimed dismissal was unfair, that employee was not given opportunity to adequately respond and sought reinstatement without loss of accrued rights and entitlements—Respondent argued that repeated warnings both verbally and written were given to the employee over continued absences and unsatisfactory performance at work and therefore termination was justified—Commission found on evidence in favour of Respondent—Dismissed—F.M.W.U. *v.* Hon. Minister for Health—No. CR700 of 1991—Gregor C.—21/11/91—Health ..... 420

STAY OF PROCEEDINGS—

[4]Application for stay of order pending Appeal to Full Bench—President reviewed background of whole dispute including S.66 matters—President found application could not be treated as having been made by F.L.A.I.E.U. as resolutions of Committee of Management of that body had not been struck down as invalid—President however found individually named Applicants had sufficient interest in a stay of the order until serious issues regarding the basis of consent to the variation had been determined—President further found these serious issues were subsumed by the strength of the Applicants' interest—President further found balance of convenience favoured Applicants and their colleagues as employees subject to conditions of employment which were allegedly consented to on the basis of invalid resolutions of the Committee of Management—Granted in Part—F.L.A.I.E.U. and Others *v.* Burswood Resort (Management) Limited and Another—No. 1644 of 1991—Sharkey P.—6/12/91—Gaming ..... 231

[4]Application for stay of order *re* contractual entitlements pending appeal to Full Bench—Applicant argued delays in processing application had been beyond the Applicant's control and that the Company was without funds—President reviewed history of matter and found balance of convenience favoured the Respondent and that he should not be restrained from pursuing his remedies by execution or otherwise where pursuable—Dismissed—CFA Corporate Finance Associates Pty Ltd *v.* Yeoward M.I.—No. 1 of 1992—Sharkey P.—18/2/92—Finance ..... 494

[4]Applications for stay of part of an Order *re* transfer of an employee pending appeal to Full Bench—President found the balance of convenience did not favour either side due to the interim nature of the Order and the scope to vary or make further orders—Moreover it was for the Applicant to show that the balance of convenience favoured it—Dismissed—Australian Municipal, Transport, Energy, Water, Ports, Community and Information Services Union *v.* S.E.C.W.A. and Another—No. 256 of 1992—Sharkey P.—17/3/92—Energy Supply ..... 692

[1]Application by Respondents for lifting of stay on proceedings before President pending hearing of appeal—Appeal is against President's rejection of Appellant's application that he should disqualify himself for bias—Industrial Appeal Court reviewed authorities *re* distinction between stay of order and stay of proceedings—IAC was not convinced that lodging of appeal in this case had effect of staying proceedings but as both parties believed it does IAC dealt with it on that basis—Appellants had also sought writ of prohibition from Supreme Court to restrain the President from hearing matters on grounds of bias which was refused—IAC endorsed Respondents Application that proceedings be not stayed to enable real issues to be tried—Granted—Carter L.B. and Others *v.* Drake M.A. and Others—IAC Appeal No. 3 of 1992—Rowland J.—9/3/92—Unions ..... 683

CUMULATIVE DIGEST—*continued*

Page

STAY OF PROCEEDINGS—*continued*

Application for stay of order *re* contractual entitlements pending appeal to Full Bench—President found balance of convenience favoured Applicant and ordered that the monies in question were to be lodged in an account pending determination of matter—Ordered Accordingly—Conti Sheffield Real Estate *v.* Brailey D.—No. 289 of 1992—Sharkey P.—1/4/92—Real Estate ..... 694

Application for stay of order *re* shortened time for answers—Applicant submitted balance of convenience favoured a stay and that there was a serious issue to be tried—President determined that until matters dealt with before the Commission itself were exhausted, the balance of convenience did not lie with the Applicant—Dismissed—The Eagle Pty Ltd *v.* Sinclair P.—Sharkey P.—29/1/92—Media Entertainment ..... 697

[4]Application for Stay of Order *re* effect of consent and return signed agreements to alter 19 day work cycle pending appeal to Full Bench—President found there was a serious issue to be tried insofar as the grounds of appeal related to the question of enforcement of an award—President found little inconvenience in drawing up new rosters and no inconvenience in returning signed agreements as there would be no assumed difficulty in compliance with the agreement if found valid—Dismissed—Coles/Myer Ltd T/A K-Mart Discount Stores *v.* S.D.A.—No. 202 of 1992—Sharkey P.—18/3/92—Retail ..... 696

[1]Application to lift stay of proceedings pending appeal to Industrial Appeal Court of Interim Order of the President *re* conduct of Union's business—Industrial Appeal Court Judge found, having regard to the automatic nature of the stay, that the balance of convenience and interests of justice did not justify granting a lift of the stay other than to allow the President to continue proceedings to final determination—Granted in Part—Carter L.B. *v.* Drake M.A. and Others—IAC Appeal No. 2 of 1992—Walsh J.—17/3/92—Unions ..... 979

[1]Application to lift stay of execution of Interim Order *re* union resolution and award variation negotiations pending Appeal to IAC—IAC Judge found it should be slow to refuse the lifting of a stay where the simple lodging of an appeal can stifle interim or interlocutory relief given after a hearing when the main dispute is only a few weeks away—Granted—Carter L.B. and Others *v.* Green E.M. and Others—IAC No. 1 of 1992—Rowland J.—4/2/92—Unions ..... 210

[4]Applications for stay of orders *re* reinstatement of employees pending appeal to Full Bench—President reviewed authorities and distinguished West Australian cases from New South Wales cases—President found the balance of convenience favoured the Applicant at that time since the likelihood of serious conflict in a small organisation was plain and the effect of these problems on the Applicant, the Respondent and the Community was likely to be serious—Granted—Gawooleng Dawang Inc *v.* Lupton B.A. and Others—Nos. 551, 552 and 553 of 1992—Sharkey P.—26/5/92—Welfare ..... 1310

SUPERANNUATION—

Application for exemption from providing superannuation payment to award preferred fund—Applicant argued arrangements had been made to pay into another fund in good faith prior to the award provisions being enacted—Commission reviewed decisions, including appeals on previous cases and found that the ideological battle had been settled by CICS in nominating a single fund and that there were no good reasons for granting the exemption—Further applications would be dealt with on the basis of the evidence presented—Dismissed—Kani Pty Ltd t/a The Body Shop and S.D.A.—Part of No. 1158 of 1989—Negus C.—8/10/91—Retail ..... 375

Application to vary awards *re* superannuation by consent save question of choices of funds to be available, exclusion of apprentices from fund and operative date—Parties sought to insert into awards, provision in same terms as determined by Australian Commission with minor changes—Commission determined that the variations sought on whole should issue bringing the awards into line with the National Award—Granted in Part—C.M.E.W.U. and Others *v.* Adsigns Pty Ltd and Others—Nos. 315, 346 and 347 of 1991—Beech C.—27/2/92—Construction ..... 504

Application to vary award *re* Memorandum of Agreement (Employee Superannuation)—Applicant sought to amend provision to require a report be made not on a quarterly basis but half yearly—Commission was satisfied that variation sought should issue—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 262 of 1992—Fielding C.—19/3/92—Iron Ore ..... 831

Application to vary award *re* Definitions and insertion of provision for occupational superannuation—Commission found definition change was formal to account for change to Commonwealth Pension title and was satisfied that the superannuation variations sought should issue—Granted—Disabled Workers Union *v.* Good Samaritan Industries and Others—No. 178 of 1992—Fielding C.—23/4/92—Health ..... 1134

TERMINATION—

Conference referred *re* termination of employee for alleged unsatisfactory conduct involving an altercation with a fellow worker—Applicant claimed dismissal was unfair and sought reinstatement without loss of entitlements—Respondent argued applicant was lawfully terminated with notice and not summary in nature—Commission found applicant had not discharged the onus to establish that termination was harsh or oppressive and gave reasons therefore—Dismissed—Transport Workers Union *v.* BHP Iron Ore Limited—No. CR 704 of 1991—Halliwell S.C.—20/12/91—Mining ..... 173

Conference referred *re* termination of a worker—Applicant union claimed dismissal was unfair—Respondent argued that termination of employment was justified in that warnings over misuse of a company vehicle had already been issued—Commission found in evidence that dismissal was not unfair or oppressive—Dismissed—Painters' and Decorators' Union *v.* Metro Sanding Co.—No. CR 730 of 1991—Beech C.—18/12/91 ..... 171

Application for reinstatement on the grounds of unfair dismissal—Respondent raised preliminary point *re* dismissal of application as settlement had occurred at conference—Respondent further argued employee had had adequate time to prove herself and that the position held was no longer in existence and at speaking to the minutes sought reduction in amount of compensation for loss of earnings by employee—Commission reviewed conciliation proceedings and found from file note that the applicant had retained choice of seeking a hearing if negotiated settlement was not satisfactory—Commission found from evidence that dismissal was unfair and ordered reinstatement without loss of benefits—Ordered Accordingly—Malone T.N. *v.* Polygon Holdings t/a The Boulevard Alehouse—No. 690 of 1991—Negus C.—22/11/91—Hospitality ..... 151

Conference referred *re* continued employment and/or termination of so called "temporary" employees—Commission in previous hearing determined letters of appointment invalid and that employees in terms of the award were permanent—Respondent argued that employees were validly temporary and that to terminate at end of contract would be deemed lawful—Commission reviewed evidence and the award and determined that employees were entitled to the positions held and that to terminate their services on the grounds given would be industrially unfair—Declared Accordingly—A.W.U. *v.* Newcrest Mining Limited—No. CR739 of 1991—Gregor C.—22/1/92—Mining ..... 402

Claim *re* contractual entitlements—Applicant sought payment for outstanding benefits arising from contract of employment—Respondent argued Applicant was not its employee and there was no jurisdiction—Alternatively that the Applicant was in debt to the Respondent—Commission reviewed authorities and found that the relationship between the parties was one of employer and employee and that the Applicant was entitled to a sum of remuneration subject to various deductions—Granted in Part—Geikie G.N. *v.* Orchard Holdings—No. 717 of 1991—Parks C.—9/8/91—Fishing ..... 380

Conference referred *re* termination of employee for alleged absenteeism—Applicant Union claimed dismissal was unfair, that employee was not given opportunity to adequately respond and sought reinstatement without loss of accrued rights and entitlements—Respondent argued that repeated warnings both verbally and written were given to the employee over continued absences and unsatisfactory performance at work and therefore termination was justified—Commission found on evidence in favour of Respondent—Dismissed—F.M.W.U. *v.* Hon. Minister for Health—No. CR700 of 1991—Gregor C.—21/11/91—Health ..... 420

Conferences matter referred *re* unfair dismissal claim—Commission gave reasons for partly granting an adjournment sought by the Respondent for lodging further grounds in preliminary matter—Respondent argued by making a proposal to set up a business the employee was in breach of his duty of fidelity—Commission reviewed authorities, and found there was no conduct leading to an actual repugnance in the sense envisaged in the Blyth Chemicals decision—Granted—F.M.W.U. *v.* Margaret River tourist Bureau (Inc.)—No. CR706 of 1991—Beech C.—12/12/91 & 6/1/92—Tourism ..... 415

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Claim for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued that he had been dismissed because he was on worker's compensation—Respondent argued that the Applicant's services were terminated because of his attitude and his failure as a Manager to recognise his responsibilities to the Company—Commission, in light of all the evidence, found that there was no basis upon which it should interfere in the decision of the Respondent to terminate the services of the Applicant—Commission also found that there was no basis for allegation made by Applicant that the Respondent's witnesses had given false evidence and further the written material did not affect the outcome of the case—Dismissed—Kaigg W.J. *v.* Australian Wool Testing Authority Ltd—No. 633 of 1991—George C.—9/1/92—Wool ..... 386

Conference referred *re* termination of a worker for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of wages and entitlements as employee was acting according to safety regulations—Respondent argued employee had caused unwarranted disruption to the site on numerous ocassions prior to incident which further justified summary dismissal—Commission found that whilst employee's industrial conduct left a lot to be desired this did not mitigate termination of employment and ordered reinstatement conditionally upon resignation as Shop Steward—Reasons given—Granted—B.L.F. *v.* Multiplex Constructions Pty Ltd—No. CR19 of 1992—Halliwell S.C.—28/1/92—Construction . 410

Conference referred *re* summary dismissal of employee for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement—Respondent argued employee had directly and personally abused his superiors and given the circumstances termination was justified—Commission on reviewing evidence and incidents after the dismissal determined that employees behaviour was unwarranted and displayed a disrespect for management—Determined that to order reinstatement would not be conducive to industrial harmony—Dismissed—A.E.E.F.E.U. *v.* Swan Portland Cement—No. CR 766 of 1992—Beech C.—10/2/92—Cement ..... 414

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent argued that Commission did not have jurisdiction to deal with the matter as the employee was covered by a Federal Award—Commission found it had no authority to hear application due to Federal Award and direct inconsistency between State and Federal Law save any benefit which did not arise out of the award—Dismissed in Part and adjourned sine die—Newbound P.J. *v.* Western United Insurance Brokers Pty Ltd—No. 1382 of 1991—Parks C.—17/1/92 ..... 389

Conference referred *re* claim for reinstatement on the grounds of unfair dismissal—Applicant union argued that employee was an innocent party to the fight leading to the dismissal or at worst imprudent—Respondent argued it had a clear policy that fighting on the job would result in dismissal, that the worker had provoked the other and had breached the safety code—Commission reviewed authorities and found the onus at first instance was for the company to show that the summary dismissal was fair—Commission with respect to those concerned was unable to find on evidence that the employee was equally to blame for the incident and found that he essentially been passive and therefore the dismissal was harsh—Commission found no reason to consider the worker anything other than at least satisfactory prior to the incident and reinstatement *inter alia* did not affect the company policy—Commission further found taking all circumstances into account payment for only four weeks wages out of the time from termination was appropriate—Granted in Part—F.P.F.A.I.I.U. *v.* Wesfi Pty Ltd—No. CR 761 of 1991—Beech C.—21/2/92—Timber ..... 610

Conference referred *re* claim of unfair dismissal seeking reinstatement without loss of entitlements—Applicant claimed she had not been counselled or given warnings that her job was in jeopardy—Respondent argued dismissal was due to conduct and unsatisfactory work performance—Commission found on evidence that although employee did not perform to the satisfaction of Respondent, she was not warned or given opportunity to make amends—Granted—F.C.U. *v.* Rhomana Pty Ltd Trading as Siomar Battery Industries—No. CR721 of 1991—Parks C.—13/2/92—Battery Industries (Clerical) ..... 607

Application for reinstatement on the grounds of unfair dismissal—Applicant argued warnings that termination was likely had not been given—Respondent argued Applicant's performance had lost business and that annual leave had been arranged without management approval—Commission reviewed authorities and found condonation of misconduct followed interest of company and nothing unfair in that approach—Commission further found threat of dismissal could be inferred in counselling and that misconduct justifying summary dismissal was probably true—Dismissed—Preston J. *v.* Western International Travel Pty Ltd—No. 1296 of 1991—Salmon C.—19/2/92—Travel Agents ..... 586

Claim *re* unfair dismissal—Applicant claimed that she had not been sufficiently counselled or warned about her work performance—Respondent argued that employee was engaged on a trial period in which her employment relationship would be reviewed and that decision to terminate was due to Applicant's unsuitability to the position—Commission reviewed evidence and found that whilst it was wrong for Respondent to advertise Applicant's position before termination, the reasons given for the dismissal had substance and were not unfair—Dismissed—Smailes L.E. *v.* Telgo Pty Ltd Trading as Farmer Jacks—Beechboro—No. 1791 of 1991—Beech C.—28/2/92—Retail (Food) ..... 590

Application for allegedly denied contractual entitlements—Respondent argued that employee had not completed whole season and therefore was not entitled to bonus payments—Commission determined that as the contractual requirements were not met the claim must fail—Dismissed—Collier J. *v.* Mecca Holdings Pty Ltd and Reuben Holdings Pty Ltd Trading as Casuarina Valley Orchard—No. 1907 of 1991—Halliwell S.C.—5/3/92 ..... 581

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Applicant claimed she had not been given an indication that her employment was in jeopardy—Respondent argued dissatisfaction with employee's work performance and abilities in deciding to terminate contract of employment—Commission determined that whilst there was some shortcomings in the Applicants carrying out of duties, it was not of such a nature that amounted to a repudiation of employment and ordered reinstatement with social security benefits to be offset against compensation—Granted—Webb S.A. *v.* Jarvis Nominees Pty Ltd Trading as Irenes Park Tavern—No. 1456 of 1991—Parks C—10/2/92—Hospitality ..... 591

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that Applicant had been negligent in carrying out her duties, money was missing from her float and that she had displayed a bad attitude to customers—Commission on reviewing evidence preferred Respondents view and declared that dismissal was not unfair—Dismissed—T.A.E.A. *v.* Avel Pty Ltd Trading as Timezone—No. CR 282B of 1991—Halliwell S.C.—27/2/92—Entertainment ..... 630

Conference referred *re* unfair dismissal seeking reinstatement without loss of entitlements—Applicant Union claimed that employee had not been counselled or given warnings indicating his job was in jeopardy and had not been given chance to reasonably respond—Respondent argued that employee's unsatisfactory work performance, behaviour and attitude to superiors and other employees had warranted termination—Commission on reviewing evidence found that it would not be conducive to industrial harmony to order reinstatement and determined that dismissal was not unfair—Dismissed—A.M.W.S.U. *v.* Youngs Holden—No. CR745 of 1991—George C.—18/2/92—Retail (Car) ..... 62

Claim *re* unfair dismissal seeking reinstatement without loss of entitlements—Respondent denied that Applicant was dismissed and that the employee actually terminated the employment contract—Respondent further argued that due to misconduct by Applicant the company had suffered loss and damage which should be offset against monies owing to Applicant therefore cancelling claim—Commission on reviewing evidence found that Applicant had not discharged onus of establishing that he was in fact dismissed and therefore Application must fail—Commission divided application to hear claim for contractual entitlements at a later date—Dismissed in Part and Adjourned—Bates E.R. *v.* Victoria Park Holdings Pty Ltd Trading as Welch World Travel—No. 1464 of 1991—Kennedy C.—21/2/92—Travel ..... 573

Application for reinstatement on the grounds of unfair dismissal, subsequently amended to include contractual entitlements—Applicant denied allegations of theft therefore summary dismissal was unfair and resulted in loss of benefits—Respondent argued that the Applicant had committed theft and that the contract of employment was regulated by an award therefore the Commission did not have jurisdiction—Commission found upon evidence that the dismissal was justified therefore the question of jurisdiction did not need to be addressed—Dismissed—Bayley M.E. *v.* Wanilla Nominees Pty Ltd Trading Jadana—No. 1768 of 1991—Parks C.—26/3/92 ..... 850

Application for reinstatement on the grounds of unfair dismissal—Respondent terminated employee for allegedly physically assaulting, verbally threatening and sexually harassing an employee—Commission examined contradictory evidence and found that the dismissal was unjust and unfair—Lynn T. *v.* Royal Perth Hospital—No. 1236 of 1991—Halliwell S.C.—24/3/92—Health—Food Service Attendant ..... 853

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for reinstatement on the grounds of unfair dismissal—Respondent argued poor work performance in terms of mishandling replies to queries and work output—Commission found on evidence that the constructive dismissal was not unfair or repressive that intervention by the Commission could be justified—Dismissal—Schafferius P. *v.* Nimrod computer Services—No. 962 of 1991—George C.—25/3/92—Computer Services—Engineer ..... 864

Application for alleged denied contractual entitlements and order that dismissal was unfair—Applicant argued that the Order in a first application issued by the Commission did not reflect the Applicant's wish to withdraw the application and also its issuance was unknown—Respondent raised the preliminary point that the matter had already been before the Commission and finalised—Commission found no difference between the substance of the original and the instant application therefore discontinued the application under S.27(i)(a) as opposed to S.23—Brailey B. *v.* Mendex Pty Ltd Trading as Mair and Co Maylands—No. 1300 of 1992—Beech C.—16/3/92—Real Estate—Salesperson ..... 850

Application for reinstatement on the grounds of unfair dismissal and alleged denied contractual entitlements—Applicant only pursued contractual entitlements including payment in lieu of notices and holiday pay leave loading as the basis in the contract of service—Respondent did not appear—Commission decided to hear matter exparte due to Respondent's history of failures to appear—Simpson L.F. *v.* King Mining Corporation Ltd—No. 1575 of 1991—Gregor C.—24/2/92—Secretary ..... 868

Appeal against decision of the Public Service Commissioner *re* termination of employee for theft—Appellant argued on the basis of mitigating circumstances and sought a reduction in the penalty to one of demotion to a lower classification—Respondent argued that under the Public Service Act that an offence of stealing as a servant should result in a total severance of the employment relationship therefore the discretion of imposing a lesser penalty of a fine or demotion is removed from the Public Service Commissioner—The Board found the decision of the Public Service Commissioner was not harsh nor unreasonable in the circumstances nor that it should be modified in anyway—Dismissed—Gesmundo P. *v.* Public Service Commission—PSAB8 of 1991—Negus C./King/Sivewright—20/3/92—Public Servant ..... 921

Conference *re* claim for reinstatement on the grounds of unfair dismissal—Applicant argued delay due to police investigation—Respondent argued that the delay rendered the application no longer an industrial matter—Commission examined the N.S.W. Case and distinguished it from the instant matter and further found that the Applicant did not offer a satisfactory explanation for the delay—Dismissed—S.D.A. *v.* Calahan T/A Bi Lo Midland—No. CR777 of 1991—Salmon C.—16/3/92—Shop Assistant ..... 884

Application for reinstatement on the grounds of unfair dismissal and allegedly denied contractual entitlements—Respondent argued poor work performance—Commission found upon evidence that the Applicant was not unfairly dismissed and no reason to imply a greater period of notice on damages in lieu than that afforded on termination—Dismissed—Woods I. *v.* Farmer Furniture Pty Ltd—No. 207 of 1992—Parks C.—30/2/92—Manufacturing—Manager ..... 870

[1]Appeal against decision of Full Bench (71 WAIG 2024) dismissing Appeal against decision of Commission *re* alleged unfair dismissal—Employee subject of original proceedings was summarily dismissed for assaulting a patient—Section 90(2) of I.R. Act, 1979 limits right of appeal to Industrial Appeal Court to grounds that decision is erroneous in law—In this case the grounds of appeal assert that there was no credible evidence to support Respondent's allegation that subject employee had assaulted patient—Industrial Appeal Court found the original evidence before the Commission was capable of being accepted and was not inherently unlikely—Further, once there is evidence which is credible and is capable of belief, then error of law cannot be established—Dismissed—F.M.W.U. *v.* Board of Management Narambeen District Hospital—IAC Appeal No. 11 of 1991—Rowland J., Franklyn & Nicholson J.J.—25/2/92—Health ..... 471

[2]Appeal against decision of Commission (71 WAIG 2616) *re* dismissed claim for reinstatement and contractual entitlements—Respondent argued there was no unfair dismissal because there was no dismissal and that the real dispute was over quantum of pay owing—Full Bench assessed evidence and determined that it was not possible to say Commission at first instance did not take proper advantage of or misused its advantage in seeing the parties—Full Bench further found the Commission's finding that there was a unilateral termination of the contract which did not constitute a dismissal was not exceptional—Dismissed—Gould J. *v.* Wensley Nominees Pty Ltd C/- Bus Stop Coffee Lounge—Sharkey P., Negus C., Kennedy C.—19/3/92—Retail Food ..... 684

Conference referred *re* summary dismissal of an employee for alleged misconduct—Applicant employer claimed the termination had been justified as incident was an unprovoked assault and considering nature of employee's work in the community—Respondent union argued dismissal was harsh and unfair in the light that employee had been punished twice—Commission reviewed authorities and found that there had been no double jeopardy and that Applicant had not acted unfairly in its decision to terminate contract of service—Dismissed—BHP Minerals Limited *v.* A.W.U.—No. CR108 of 1992—Gregor C.—7/4/92—Mining ..... 1174

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed he was not warned or cautioned prior to dismissal about any of the incidents which in the view of Respondent made him an undesirable employee—Respondent argued employee had physically assaulted two other employees which amounted to serious misconduct and after weighing evidence had decided to terminate employment according to award and policy—Commission on reviewing evidence and cases cited declared that as employee had had little recollection of events and after investigations had divulged seriousness of incident, Respondent had not acted harshly or unfairly—Dismissed—A.W.U. *v.* Robe River Iron Associates—No. 1624 of 1991—Gregor C.—14/4/92—Mining ..... 1150

Claim *re* unfair dismissal—Applicant claimed he had not provided full medical history as he had received an opinion from his doctors recommending this employment opportunity in view of his inability to perform manual type occupations—Respondent argued that employee had deliberately set out to deceive the Respondent which in terms of his application form amounted to fraud which justified termination—Commission reviewed cases cited and evidence found that whilst having sympathy for Applicant's position, the Respondent had been mislead in a material manner pertinent to the work situation and therefore dismissal was not harsh or unfair—Dismissed—Baxter E.D. *v.* Burswood Resort Management Limited—No. 1381 of 1991—George C.—14/4/92—Casino ..... 1153

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant claimed that he was not given the opportunity to respond to his termination of employment—Respondent argued that it was a matter of redundancy, the position no longer existed and more so a question of managerial prerogative—Commission on reviewing evidence and cases cited determined that Respondent employer had not sufficiently reviewed the situation and therefore the termination had been unfair—Granted—Municipal Road Boards, Parks and Racecourse Employees' Union *v.* Royal Agricultural Society (Inc.)—No. CR46 of 1992—Halliwell S.C.—14/4/92—Maintenance ..... 1189

Application for reinstatement on the grounds of unfair dismissal—Commission was asked to determine as a preliminary point whether application should proceed to further hearing due to lapse of time between date of termination and filing application—Applicant claimed his state of affairs at the time justified the delay—Respondent argued Commission should as a matter of equity apply doctrine of Laches—Commission determined that whilst the Act did not prescribe any time, the Applicant was sufficiently capable of conducting his affairs and therefore further found it not necessary to determine question of jurisdiction—Dismissed—Burden M.D. *v.* National Permanent Management Services Pty Ltd—No. 1587 of 1991—Parks C.—3/4/92—Financial Services ..... 1157

Conference referred *re* back payment of wages and extra payment in lieu of notice—Applicant union claimed employees had been assured both verbally and written of continued employment and had had no knowledge of impending redundancy—Respondent argued redundancies were necessary for economic viability—Commission whilst commending Respondent in assisting employees to find employment determined that an additional four weeks pay in lieu of notice was equitable—Granted in Part—T.W.U. *v.* Arnotts Mills & Ware—No. CR43 of 1992—Halliwell S.C.—15/4/92—Retail (Food) ..... 1190

Conference referred *re* dismissal of employee *re* absence from work—Respondent Union argued that dismissal was unfair and sought declaration—Commission found payment in lieu of notice did not change the fact that the dismissal was summary, but cancelled it before hearing—Commission further found on evidence and from examining the internal investigation undertaken by Applicant Company, the dismissal was not unfair and application be dismissed—Ordered Accordingly—W.A. Newspapers Ltd *v.* A.M.W.S.U.—No. CR254 of 1991—Gregor C.—9/6/92—Printing ..... 1399

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Conference referred *re* dispute over decision to terminate employee—Applicant Union claimed constructive summary dismissal was unfair as the removal of food which led to her termination was not a wilful act of dishonesty as she had not been informed of any policy relating to this, she was denied consultation with anyone and sought reinstatement without loss of entitlements—Respondent argued that there was a food control policy and that employee had admitted to the charge—Commission in applying test dicta namely St John's Case, found that employee had not been given opportunity to reasonably respond, that there was procedural unfairness in the constructive summary dismissal in that decision was based purely on the incident and therefore claim was established—Granted—F.M.W.U. *v.* Board of Management, Fremantle Hospital—No. CR22 of 1992—Gregor C.—31/3/92—Health ..... 1418

[2]Appeal against decision of the Commission (71 WAIG 2411) *re* dismissed applications for reinstatement on the grounds of unfair dismissal—Appellant argued *inter alia* Commission erred in finding that the Respondent had discharged the evidentiary onus of proof that misconduct had occurred and failed to determine central issue of fairness of the dismissals—Full Bench reviewed authorities and found there was ample evidence to find as the Commission did, there was no misuse of the advantage of seeing witnesses and observing their demeanour and no error in the exercise of the Commission's discretion—Dismissed—F.M.W.U. *v.* Board of Management, St John of God Hospital, Bunbury—Appeal No. 1352 of 1991—Sharkey P., Coleman C.C., Halliwell S.C.,—4/6/92—Health ..... 1274

[1]Appeal against decision of Full Bench (71 WAIG 764) *re* claim of unfair dismissal—Appellant argued Full Bench erred in law when it held that the true construction of the Federal award applicable to the Appellant's employment rendered invalid Section 29 of the I.R. Act 1979 and that the reasoning in Gersdorf's Case was wrong—IAC reviewed authorities and found there was a line of cases including decisions of courts of the highest authority in which like views had been expressed regarding similar awards and legislation and that the considerations applying to the appeal were identical to those resolved in Gersdorf's Case—Dismissed—Martindale I.E. *v.* British Petroleum Refinery—IAC Appeal No. 17 of 1991—Rowland J., Walsh J., Ipp J.—4/5/92—Petroleum ..... 1263

Application for reinstatement on grounds of unfair dismissal—Applicant argued that no warnings prior to termination had been given and that reason for termination was failure to attend workplace to turn on security alarm—Respondent argued that failure to set security alarm was a factor leading to termination but dismissal resulted from unsatisfactory service by the Applicant and that she had been transferred to give her another opportunity—Respondent also argued that warnings were given over time—Commission found on evidence that no warnings had been given to Applicant prior to termination, that dismissal was unfair and granted reinstatement subject to a review after a two month trial period—Granted in Part—Candelaria A.M. *v.* Avel Pty Ltd T/A Timezone—No. 384 of 1992—Beech C.—21/5/92—Entertainment ..... 1367

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed termination occurred prior to resignation date and due to *inter alia* misunderstanding of Commission's previous directive a delay occurred in pursuing claim further—Respondent argued that application should not continue due to length of time between termination and claim—Commission reviewed authorities and found on evidence in favour of Respondent—Discontinued—Wellington K.J. *v.* Narembeen District Memorial Hospital—No. 76 of 1992—Kennedy C.—14/4/92—Nursing ..... 1396

Application for reinstatement on the grounds of unfair dismissal—Respondent claimed lost confidence and trust in employee which justified summary dismissal—Commission determined in preliminary reasons that employee had not set out to deceive employer, had been wrongly accused of dishonesty to achieve financial gain and found in favour of Applicant—Commission was further informed subsequent to hearing that she intended to live outside of the state and therefore Commission did not have jurisdiction to award damages in the light that reinstatement could not be effected—Dismissed—Briggs M.C. *v.* Eva's Garden Cafe—No. 839 of 1991—Parks C.—9/4/92—Fast Foods ..... 1364

Application for reinstatement without loss of entitlements—Applicant claimed real reason for dismissal was that she had discussions with a Union official during working hours—Respondent argued that application should be dismissed due to inordinate delays in processing and hearing of matter and that decision to terminate contract was over employee's poor attitude to work despite several occasions of counselling—Commission found on evidence that Applicant had failed to discharge onus of establishing claim—Dismissed—Cossey T. *v.* Bayswater Nominees Pty Ltd T/A Forrest Place Cafe and Kiosk—No. 50 of 1992—Kennedy C.—5/5/92—Fast Foods ..... 1372

Applications for reinstatement on the grounds of unfair dismissal without loss of entitlements—Respondent argued that decision to terminate was due to gross misconduct which had resulted in a repudiation of the contract of employment—Commission reviewed conflicting evidence, the complicated inconsistencies in management of organisation and the individual contracts—Commission found that whilst Applicants had not co-operated and there was an apparent reluctance to deal with Respondent's position, the employer had failed to discharge the onus of establishing that this constituted misconduct—Granted in Part—Lupton B.A. and Others *v.* Gawooleng Dawang Inc. Nos. 1798, 1799 and 1800 of 1991—Kennedy C.—30/3/92—Social Welfare ..... 1381

Conference referred *re* strike action over termination of an employee—Applicant employer claimed that decision to terminate was warranted as employee had engaged in aggressive behaviour towards other employees over a reasonably extensive period—Respondent Union argued that employers failure to deal with Applicant pleas for assistance on work difficulties created a heavily stressful situation and sought reinstatement without loss of entitlements—Commission found that employee had shown a propensity to violent action in respect of his co-workers and that a full investigation had confirmed this therefore dismissal was justified—Dismissed—BHP Minerals Limited *v.* A.E.E.F.E.U.—No. CR211 of 1991—Gregor C.—26/5/92—Mining .... 1411

Conference referred *re* claim for reinstatement without loss of entitlements on the grounds of unfair dismissal—Applicant Union claimed that facts surrounding the dismissals demonstrated history of retaliatory measures taken against employees for involving the union in work related pay and condition matters—Respondent argued that the reason for termination was the need to restructure maintenance operation due to economic circumstances—Commission found that whilst the alleged victimisation of employees over union involvement was not discharged there had been no consultation with employees over changes and that the way in which services were terminated were unfair—However Commission declined to order reinstatement due to company restructuring—Ordered Accordingly—A.E.E.F.E.U. *v.* AMP Shopping Centres Pty Ltd—No. CR588 of 1991—3/4/92—Maintenance ..... 1406

Conference referred *re* dispute over dismissal and withdrawal of accommodation—Applicant Union claimed employee had had no written warnings, his work conduct was beyond reproach and that dismissal was harsh and unjust and sought reinstatement with restoration of his accommodation—Respondent argued that as experienced employee he should have been aware of serious breach of safety, showed a disregard of duty and coupled with previous misconduct warranted summary dismissal—Commission reviewed authorities and found on evidence that there had been a serious breach of safety requirements and that Respondent had discharged the onus of establishing that termination was justified—Dismissed—A.W.U. *v.* Boral Contracting—No. CR99 of 1992—Gregor C.—15/5/92—Mining ..... 1402

Conference referred *re* dispute over termination of employee for alleged prank—Applicant Union claimed there was a denial of natural justice, the penalty was disproportionate to the incident itself and sought reinstatement—Respondent argued that a full investigation had been conducted and that decision to terminate was warranted—Commission reviewed authorities and found on evidence misconduct had led to injury of fellow employee in which company had vicarious liability, incident report had been falsified and that action was somewhat premeditated—Commission further found that despite unblemished work record, dismissal was neither harsh nor unfair—Dismissed—A.W.U.—Newscrest Mining Limited—No. CR753 of 1991—Gregor C.—17/12/91—Mining ..... 407

CUMULATIVE DIGEST—*continued*

Page

TRANSFER—

Conference referred *re* transfer and disciplinary action of an employee—Respondent union argued there had been a conspiracy on behalf of the employers—Applicant employer argued transfer was agreed prior to secondment and also on the basis of poor performance—Commission stated reasons for dispensing with matter in shortest possible way pursuant to section 35 (1) of the I.R. Act—Commission reviewed authorities, definition of equity and found on evidence employee was not entirely loyal to actual employer and his investigation was warranted—Commission found employee was capable of performing work satisfactorily at existing classification level but at another location—Granted in part—Dept. of Conservation and Land Management *v.* FMWU—No. CR 951 of 1990—Salmon C.—4/12/91—National Parks ..... 168

[4]Applications for stay of part of an Order *re* transfer of an employee pending appeal to Full Bench—President found the balance of convenience did not favour either side due to the interim nature of the Order and the scope to vary or make further orders—Moreover it was for the Applicant to show that the balance of convenience favoured it—Dismissed—Australian Municipal, Transport, Energy, Water, Ports, Community and Information Services Union *v.* S.E.C.W.A. and Another—No. 256 of 1992—Sharkey P.—17/3/92—Energy Supply ..... 692

TRAVELLING—

Application to vary award *re* Hours of Duty, Overtime, Transfers, Travelling on Brigade Business and Relieving—Parties sought to remedy deficiencies in the expression in the award of obligations and entitlements—Union argued only against changes to Relieving Clause saying it should be tackled administratively—Commission later determined that Applicant employer had not discharged onus to make a finding that the Respondent had breached an agreement made—Commission found however where the is no expense from utilisation of accommodation then no entitlement arose—Ordered Accordingly—W.A.F.B.B. *v.* W.A.F.B.E.U.—No. 797 of 1991—Kennedy C.—14/11/91 and 29/1/92—Emergency Services ..... 309

UNIONS—

[4]Application for interim orders *re* communication link up to allow 2 union Executive Members to participate in a meeting—Applicant argued it had been done in the past—President found on the basis of equity, good conscience and substantial merits that any standing order or rules be suspended to permit one person to participate—However in the normal course of events the other would have apologised due to illness—Granted in Part—K. Farrell *v.* E.J. Harken, President SSTU and Another—No. 1823 of 1991—Sharkey P.—30/1/92—Unions ..... 231

[4]Application for stay of order pending Appeal to Full Bench—President reviewed background of whole dispute including S.66 matters—President found application could not be treated as having been made by F.L.A.I.E.U. as resolutions of Committee of Management of that body had not been struck down as invalid—President however found individually named Applicants had sufficient interest in a stay of the order until serious issues regarding the basis of consent to the variation had been determined—President further found these serious issues were subsumed by the strength of the Applicants' interest—President further found balance of convenience favoured Applicants and their colleagues as employees subject to conditions of employment which were allegedly consented to on the basis of invalid resolutions of the Committee of Management—Granted in Part—F.L.A.I.E.U. and Others *v.* Burswood Resort (Management) Limited and Another—No. 1644 of 1991—Sharkey P.—6/12/91—Gaming ..... 231

[2]Application to alter Union Rule *re* eligibility for membership—Various Unions objected on the basis of competition and demarcation due to conflict of constitutional coverage—Objectors further argued alteration sought went beyond covering the three to ten employees claimed by the Applicant—Full Bench found it was not satisfied that there would not be overlapping and that Section 55(5) prevented the Full Bench authorising the Registration of an alteration unless it was satisfied there was good reason consistent with Section 6 of the I.R. Act—Dismissed—F.P.F.A.I.I.U. *v.* A.M.W.S.U. and Others (Objectors)—No. 1009 of 1991—Sharkey P., Coleman C.C., Beech C.—10/3/92—Unions ..... 489

[4]Applications for interim Order *re* prohibition of placing matters on agenda for the union annual conference and declaration reminding persons not to publish criticism of the Applicant exercising her statutory rights under Section 66—President found nothing in a resolution of the Respondent Union requiring such orders and commented on persons seeking the Registrar's advice on conducting union business—Dismissed—Dornan B.A. *v.* The Executive SSTU and Others—No. 1505 of 1991—Sharkey P.—10/10/91—Unions ..... 767

[2]Applications for alteration of Union Rules *re* Name and Eligibility for Membership—Objection withdrawn after amendment to application—Full Bench reviewed authorities and used expressio unius rule to find that the new name clearly indicated that the organisation was of employees—Granted—W.A.F.B.E.U.—No. 1256 of 1991—Sharkey P., Kennedy C., Parks C.—11/2/92—Emergency Services ..... 984

[4]Applications for interpretation of Union Rules *re* whether one person can hold two offices—Applicant argued election of Respondent to office of Secretary/Treasurer rendered the office of President vacant—Respondent argued claim was vexatious and that there was nothing explicit in the Rules requiring her to vacate the position—President reviewed Union Rules, authorities, in particular Mellor *v.* Horn and found the Respondent had implicitly resigned from one office as the two offices were incompatible—President further found there was a casual vacancy in the office of President which was required to be filled by election if the Committee of Management decided—In Supplementary Reasons the President dealt with further submissions and gave reasons for ordering that an election be held—Granted—Carter L.B. *v.* Drake M.A.—No. 965 of 1991—Sharkey P.—30/8/91 and 8/10/91—Unions ..... 698

[4]Application for orders *re* observance of Union Rules issued by consent—President issued Reasons to express view that Registrar would not correctly exercise his discretion under Section 69(1) to conduct an election and would not have power to do so in the face of orders or an inquiry by the President pursuant to Section 66—Ordered Accordingly—Power A.G. *v.* P.G.E.U. and Another—Nos. 1866 & 1867 of 1991 and 339 of 1992—Sharkey P.—23/3/92—Unions ..... 769

Application to vary award *re* recognition of conscience—Applicant argued Unions were not of God and on the basis of the Constitution, sought exemption from dealing with the Respondent Union under the award—Respondent Union argued granting application would affect scope of award and the matter was broad such as to require an application pursuant to Section 50 of the Act—Commission reviewed authorities, including that relating to the Constitution, I.R. Act and found that though the Applicant's belief was sincere it was not to be persuaded that the legitimate recognition of registered organisations and their role by Parliament should be put to one side—Dismissed—Concept Products *v.* F.P.F.A.I.U.—No. 1820 of 1991—Beech C.—13/4/92—Furniture ..... 1137

[2]Applications for alteration of organisation Rules *re* Name and Membership—Applicant sought to recognise eligibility of members of an unregistered organisation—Full Bench found new name did not clearly indicate whether the organisation was of employers or employees but was not in power to remedy defect in the application—Granted in Part—Bread Manufacturers' Association of Western Australia—No. 1609 of 1991—Sharkey P., Gregor C., Parks C.—21/2/92—Unions ..... 983

CUMULATIVE DIGEST—*continued*

Page

UNIONS—*continued*

[4]Application for orders *re* breach of union rules—Applicant argued that articles and use of union resources for the production and distribution of electoral material were designed to give the Respondent an electoral advantage over the Applicant, was a gross abuse of union resources, breached the rules of the Union and sought *inter alia* orders for the election to be declared void and a new election be called—President allowed Counsel to appear for the Union President as intervener and the Union—Respondent argued matter of advertisement in publication was not within the President's jurisdiction and that he was not the proper Respondent—President reviewed I.R. Act, Union Rules, matters of self incrimination of witnesses, the definition of irregularity, whether the President was bound by the decisions of the High Court, the relationship between the publication editor, the Union Secretary and the Union President, allegations made in the article and found that there was jurisdiction and power to make orders under Section 66 of the I.R. Act based on the findings of irregularity on proven breaches of the rules—President found it was the misuse of resources by one party when they were not available to be so used by the other parties which was at the seat of the irregularity under the rules—President reviewed further authorities and found the equity, good conscious and substantial merits of the cases as well as the interests of the union and its members were best served by declaring null and void the election and ordering a new election—In Supplementary Reasons President dealt with submissions as to vacating the senior officers position and consequential orders—President found that as the election was null and void, offices were vacant and ordered senior officers be deemed to hold office until completion of election with the Union President's power limited—In further Supplementary Reasons President dealt with further consequential matters including an emergency committee meeting and appeal rights—President gave reasons for various interim orders—Ordered Accordingly—Dornan B.A. and Others *v.* Harken E.J., President SSTU and Another—No. 1607 of 1991—Sharkey P.—31/3/92, 13/4/92, 16/4/92 and Others—Unions ..... 1008

[4]Applications for orders *re* compliance with union rules—President dealt with various applications for interim orders, interlocutory matters in a set of inter related applications—Applicant sought orders concerning the financial management, address, status of offices, and general business of the union—President dealt with application for leave to withdraw and other matters and found the interests of equity, good conscience and substantial merits of the case, the parties the Union Committee of Management and membership would be best effected by attempting to facilitate a comprehensive hearing of all the issues raised as soon as possible since they went to the ability of the union to operate correctly or even perhaps at all—President determined that it had jurisdiction to hear an application for directions, whether to consolidate one application with another, orders relating to the conduct of the union over an application to vary an award—President reviewed authorities and found that the right to make an application of bias was waived, there was no ostensible bias established and that necessity prevented the President from disqualifying himself—President dealt with an application to discharge interim orders made and found the balance of convenience favoured the Secretary being placed back in her proper role—President dealt with application for interim orders regarding a special general meeting—Ordered and Declared Accordingly—Carter L.B. *v.* Drake M.A. and Others—Nos. 1053, 1478, 1479, 1482, 1529 of 1991 and 127 of 1992—Sharkey P.—Various dates—Unions ..... 706

[4]Applications for interim orders in an application for orders *re* observance of union rules—Applicant argued Respondent had failed to carry out his duties as President as instructed by the Executive Committee of the Union particularly in relationship to the dismissal of the General Secretary and sought interim orders that the Union President generally observe the rules of the union—First Respondent argued interim orders would, *inter alia*, prejudice the position of the General Secretary, escalate industrial action and sought interim orders that an emergency conference be deferred to make possible fulfillment of the union rules—Second Provisional Respondent argued conference was called to deal with an emergency in the union and it would disadvantage the union if it had to wait several months—President allowed provisional leave for the union to be represented as Second Respondent—President stated principles were whether there was a serious issue to be tried and whether the balance of convenience favoured the Applicant for the particular order—President found on evidence a collision between the President and the Emergency Committee and at times the President and the Executive, that affairs had deteriorated and that the conference the supreme authority of the SSTU should speak—The interests of the parties, as well as the union and its members, required it—President further determined question of interim orders to do with Union President's compliance with instruction of the Committee of the Union, the refusal to act on the General Secretary's termination, news flash to members, expenditure of monies and gave reasons therefore—At Speaking to Minutes President addressed matter of the date of conference and gave reasons for refusing to hear further submissions in relation to matters—Subsequently Applicant applied to vary interim orders *re* time limits on speakers at conference and carrying out resolutions of Executive by person other than Union President—President found on evidence sufficient material to ensure that the orders should be varied—Ordered Accordingly—Farrell K.M. *v.* Harken E.J.—No. 578 of 1992—Sharkey P.—13/5/92, 21/5/92, 27/5/92—Unions ..... 1312

[3]Application for a new award to replace an existing award—Commission had previously determined as a preliminary point that an award should issue—Employers argued award would cause a conflict of interest between foreman and members of the workforce in the same union, that there was a lack of perceived need for any change and finally there was a fear that the CMEU would institute a campaign of unionising foremen—CICS found as a preliminary point that the application had been advertised and the Commission was of the opinion that the changes which had occurred to the application since were not of a nature that required a further advertisement—CICS found those arguments against the issuance of the award had been presented and dealt within the earlier decision of the Commission—CICS further found that the application was to bring the award up to date with current conditions, to prevent the rectification of the situation would be such an interpretation of the principles that an injustice would result, it was a special case and fit within the anomalies principle—CICS proceeded to determine whether provisions fit within the State Wage Principles and issued the award subject to discussion as to the implementation of structural efficiency—Award Issued—C.M.E.U. and Another *v.* M.B.A. and others—No. A5 of 1987—Halliwell S.C., George C., Beech C.—29/10/87, 15/8/90, 6/12/91—Halliwell S.C.—29/10/87—Building ..... 1302

[2]Application for alteration of union rules *re inter alia* name and constitution—Applicant Union sought to bring name into line with Federal Body and to include in Eligibility Rule members of a cancelled union—Employer was not granted leave to intervene—Most objectors withdrew objections after amendment to application—ADSTE intervened on the basis that it involved its constitutional rule and proposed merger with the Applicant—Full Bench found that application generally complied with the provisions of the I.R. Act—However, Full Bench was not persuaded that a potential amalgamation was sufficient to justify the alteration being authorised to the constitution in the face of direct overlapping—Granted in Part—A.M.W.S.U.—No. 1322 of 1991—Sharkey P., George C., Beech C.—20/5/92—Unions ..... 1290

[2]Application for a declaration that Union's Rules relating to qualification for membership and prescribed offices are the same as for the Federal Counterpart Body and alteration of Rules—Applicant argued Full Bench should take a broad approach when comparing rules and that it was not intended to be an arithmetic exercise—Full Bench reviewed I.R. Act, Union Rules and found qualifications for membership were not substantially or fundamentally the same, as Section 71(2), the I.R. Act was not satisfied then the application with respect to offices could not be granted and the rule change was a matter for the Registrar—Dismissed—A.P.E.—No. 1583 of 1991—Sharkey P., Halliwell S.C. , Negus C.—4/6/92—Unions ..... 1295

[1]Application to lift stay of proceedings pending appeal to Industrial Appeal Court of Interim Order of the President *re* conduct of Union's business—Industrial Appeal Court Judge found, having regard to the automatic nature of the stay, that the balance of convenience and interests of justice did not justify granting a lift of the stay other than to allow the President to continue proceedings to final determination—Granted in Part—Carter L.B. *v.* Drake M.A. and Others—IAC Appeal No. 2 of 1992—Walsh J.—17/3/92—Unions ..... 979

[4]Application for order *re* breach of Union Rules—Applicant argued Respondent Union had erred in granting full membership status to the second respondent pursuant to the Union eligibility rule and sought order revoking it and conference delegate status—Applicant further argued second respondent was ineligible to occupy position of Secretary—Respondent argued that having become a member he remained a member on the authority of judgements of the Federal Court—President reviewed authorities, Union Rules, I.R. Act and found the second respondent had ceased to be a member of the Union on termination of employment and hence was ineligible to hold office—Second Respondent was however not ineligible to hold position of General Secretary—In Supplementary Reasons President heard submissions arising out of original reasons relating to changes to Rules regarding references to the General Secretary, TLC delegate and the term "officer"—President found submissions had merit—Ordered Accordingly—Dornan B.A. *v.* S.S.T.U. and Another—No. 1515 of 1991—Sharkey P.—10/10/91—Unions ..... 997

CUMULATIVE DIGEST—*continued*

Page

UNIONS—*continued*

Application for cancellation of registration of an organisation—Applicant declared that members no longer wished to be covered industrially by their own registered organisation but sought membership of the AMWSU—Full Bench found on the equity, good conscience and substantial merits of the case and that as membership was under required amount prescribed in the I.R. Act found in favour of cancellation—Granted—Registrar *v.* RAC Patrolmen's Association—No. 1758 of 1991—Sharkey P., George C., Beech C.—20/5/92—Unions ..... 1294

Application for registration of new organisation resulting from proposed amalgamation of two registered organisations—Leave to intervene was sought by representative employers from the coal industry—Full Bench did not permit intervention of employers as there was not likely to be any adverse effect upon their rights or interests—Full Bench was satisfied that provisions of I.R. Act had been complied with—Ordered Accordingly—Collieries Staff Association and Collie District Deputies' Union—No. 1574 of 1991—Sharkey P., Fielding C., Parks C.—5/3/92—Coal ..... 989

[1]Appeal against decision of President (72 WAIG 698) *re* interpretation of Union Rules over filling of a vacant union office—IAC reviewed rules and found overall thrust was that if a vacancy was to be filled it was to be filled by an election and that was consistent with the Reasons of the President in Mellor *v.* Horn—Dismissed—Carter L.B. *v.* Drake M.A.—Appeal No. 19 of 1991—Rowland J., Ipp J., Owen J.—11/5/92—Unions ..... 1266

VICTIMISATION—

Conference referred *re* transfer and disciplinary action of an employee—Respondent union argued there had been a conspiracy on behalf of the employers—Applicant employer argued transfer was agreed prior to secondment and also on the basis of poor performance—Commission stated reasons for dispensing with matter in shortest possible way pursuant to section 35 (1) of the I.R. Act—Commission reviewed authorities, definition of equity and found on evidence employee was not entirely loyal to actual employer and his investigation was warranted—Commission found employee was capable of performing work satisfactorily at existing classification level but at another location—Granted in part—Dept. of Conservation and Land Management *v.* FMWU—No. CR 951 of 1990—Salmon C.—4/12/91—National Parks ..... 168

WAGES—

Conference referred *re* claim for lost time over safety issue—Respondent argued Employees had not followed safety dispute procedures—Commission reviewed authorities and found no evidence to conclude that the employees with a legitimate claim under the Occupational Health Safety and Welfare Act did not have their entitlements maintained—However Commission found respondent partly responsible for the Industrial Action and having regard to S.26 of the I.R. Act ordered some payment for lost time—Granted in part—AMWSU *v.* CBI Construction Pty Ltd—No. CR 607 of 1991—George C.—11/12/91—Construction ..... 158

Application for a new award—Applicant submitted position of objector had changed since preliminary matter ( WAIG )—Respondents and CWAI intervening argued to apply construction conditions to factory operations would be unfair, inequitable and possibly excessive compared with other awards—Commission found in applying First Award Principle the major players in the industry applied construction rates and consented to the award without coercion—There was no flow on possibly—Commission however found that in some factories a few construction conditions were not appropriate—Granted in part—OPDU *v.* Gardner Brothers and Perrott (WA) Pty Ltd—No. A33 of 1987—Halliwell S.C.—7/5/91—Industrial Spraypainting and Sandblasting ..... 65

Application for a new minimum rates award by consent—Parties sought to replace another award insofar as it bound the Applicant employer and to increase rates in accordance with the 4%—2nd Tier Principle and the Structural Efficiency Principle 1989—Commission found award would result in considerable flexibly improvements and did not offend Wage Principles—Commission amended term of award—Award Varied—Burswood Resort (Management) Ltd *v.* WATAEA—No. A10 of 1991—Kennedy C.—6/12/91—Casinos ..... 58

Applications to vary awards by consent—Parties sought *inter alia* an increase of 2.5% in wage rates and certain work related allowances pursuant to State Wage Decision—PSA was satisfied that the criteria of the principles had been met and that the variations sought, despite some minor amendments, PSA found no reduction clause for income maintenance of low paid workers was contrary to Wage Principles should issue—Granted in Part—C.S.A. and Others *v.* Country High Schools Hostels and Authority—Nos. P22—31 of 1991—Negus C.—21/11/91—Public Administration ..... 244

Application to vary award by consent—Parties sought an increase of 2.5% in wage rates pursuant to State Wage Decision June 1991—Commission raised question of commitment and was satisfied that the Principle criteria had been met and variations sought should issue—Granted—A.W.U. *v.* James Hardie and Co Pty Ltd—No. 1562 of 1991—Beech C.—19/12/91—Fibre Cement Manufacture ..... 308

[3]Applications to vary Awards *re* Second S.E.P. increase, Broadbanding, First Minimum Rates Adjustment and 3% Allowance Adjustment as a Special Case—Respondent argued no wage increase other than S.E.P. was justified without a proper work value exercise—Respondent further argued claims to adjust shift loadings and wages of juniors were comparative conditions justice arguments and proscribed by the Principles—Commission found Respondents' arguments similar to original matter where they were not accepted and that SEP and MRA claims should be granted—Commission refused claim to *re* align junior wages under the Inequities Principle, found penalty rate claims were outside SEP and no special circumstances to grant retrospectivity—In Supplementary Reasons Commission gave reasons for issuance and addressed matters of payment of wages, accrual of annual leave, Part-time and Training Leave—Granted in Part—T.W.U. *v.* Central Districts Bakery and Others—No. 1037 and 1038 of 1990(R2)—Halliwell S.C., Salmon C., Gregor C.—14/11/91 and 21/1/92—Bakery ..... 223

Applications to vary award *re* 1st and 2nd SEP and 2.5% Wage Adjustments and Minimum Rates Adjustments—Commission decided matters of Annual Leave, Sick Leave, Contract of Service, Probationary Clause, Apparel, Shortages and Change Money and Training Leave—Commission reduced time between operative dates in deference to a reduced initial increase in wages by employers—Ordered Accordingly—T.W.U. *v.* Portius Pty Ltd t/a Flash Foods Canteen and Others—No. 1713 of 1991 (R2) and 1714 of 1991—Halliwell S.C.—17/1/92—Transport (Mobile Food Vendors) ..... 361

[3]Proceedings instituted on Commission's Own Motion *re* consideration of October 1991 National Wage Decision pursuant to Section 51(2) of I.R. Act 1979—Thrust of NWD was to continue process of Structural Efficiency and establish an Enterprise Bargaining Principle to focus on improvements in efficiency and productivity at the work place level with future wage increases to be linked to those productivity improvements—All parties advocated that Commission should give effect to NWD but critical issue for Commission in Court Session was to accommodate requirements of Enterprise Bargaining within legislative scheme of I.R. Act—Chamber additionally argued that once Wage Fixing Principles had been adopted Section 51(2) gave them a statutory force which displaced Commission's discretionary powers contained in Section 26—CICS rejected this argument—CICS further found there were no good reasons for it not to give effect to NWD and considered Section 41 to be most appropriate avenue within Act to effect registration and enforcement of enterprise bargaining agreements—Ordered—Commission's Own Motion—No. 1752 of 1991—Commission in court Session—Coleman C.C., Halliwell S.C., Kennedy C., George C., Parks C.—31/1/92—State Wage Case ..... 191

Application to vary award *re* State Wage Case June 1991 Wage Increase, Second, Third and Fourth minimum rates adjustment—Commission found wage rates nexus with Federal Award reasonable and casual employment provision appropriate—Commission stood part-time provisions over for negotiation as philosophical objections were not satisfactory—Ordered Accordingly—T.W.U. *v.* Australian Glass Manufacturing Co Pty Ltd and Others—No. 1299 of 1991—Halliwell S.C.—24/1/92—Transport ..... 563

Application to vary award *re* Structural Efficiency Wage Increase 1991 by consent—Commission found, after the correction of an oversight by inserting a subclause into the Contract of Service clause, that the tests as laid down in January 1992 State Wage Case were being met—Granted—W.A.C.A.T.U. *v.* Fullin Tailoring and Others—No. 1303 of 1991—Kennedy C.—27/2/92—Clothing ..... 511

CUMULATIVE DIGEST—*continued*

Page

WAGES—*continued*

Application to adjourn application to vary award *re* Classifications—Respondent argued it was contrary to the interest of the industry to have a separate parallel process for a small sector of workers when there was a comprehensive review being carried out under structural efficiency—Commission reviewed history of claim, critized the Respondent for the time taken to resolve issues and reluctantly granted the adjournment with liberty to apply as the best solution was for the matters to be resolved together—Granted—F.M.W.U. *v.* The Board of Management, Albany Regional Hospital and Others—No. 1058/89 Gregor C.—27/2/92—Health ..... 566

Applications to vary awards by consent *re* wages pursuant to "special case" provisions—Commission initially determined that the "special case" consideration was warranted and that an interim salary increase was justified on the changes and work value grounds identified (71 WAIG 2538)—Commission subsequently found that the efficacy of the package remained intact; that progress was made in the implementation of changes; and that there was no digression from the original parameters and format of the agreement—Commission further made an order to divide applications which would allow for further stages of the package to be considered separately at a later date—Ordered Accordingly—W.A. Police Union of Workers *v.* Hon. Minister for Police—No. P10/1 of 1991 and No. 1294/1 of 1991—Kennedy C.—17/1/92—Emergency Services ..... 257

Application to vary award *re* Second Structural Efficiency Wage Adjustment by consent—Parties sought to vary *inter alia* contract of service, overtime, public holiday rates and meal allowance provisions—Commission found that having regard for the Principle the variations sought should issue—Granted—Perth Theatre Trust *v.* T.A.E.A.—No. 1960 of 1991 (R2)—Kennedy C.—18/12/92—Entertainment ..... 561

Application to replace an order *re* conditions of employment to include new wage rates and classification as a special case, by consent—Parties argued that although classification structure and titles had not altered the skills duties and responsibilities had changed so radically as to enable new classifications to be identified and sought the same operative date from which the second S.E.P. adjustment was approved—Commission found strict test of Work Value Principle had been met and warranted a new of pay rate rather than an allowance—Commission further found increase to security control officer allowance was appropriate and addressed wages structure—Granted—F.M.W.U. *v.* Wormald Security—No. 184 of 1990 (R2)B—George C.—9/4/92—Security ..... 1100

Application to vary award *re* new cross-trade classification and pay rate—Parties sought a determination of the dispute regarding the percentage pay relationship between the new classification and a base tradesman—Commission found that the matter was primarily a work value case, which involved value judgement based on comparative criteria—Commission reviewed authorities, award comparison, changing emphasis on negotiations and found no case for the percentage wage relationship as claimed on the grounds of employee expectations—Ordered Accordingly—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 1502 of 1990—Salmon C.—20/3/92—Electricity Supply ..... 1128

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

Applications to vary awards by consent *re* salary rate increases, provision for position of advanced skills teacher and establishment of rights and obligations for parties to consult on industrial matters—Parties sought to give effect to an agreement reached following extensive negotiations to reflect teaching conditions in other States—Commission determined that applications constituted a "special case" and provided for a further adoption of an approach developing nationally—Commission accepted parties changes to meet the concerns expressed over specification of time release for teachers to be designated as "Key Teachers"—Granted—S.S.T.U. *v.* Hon. Minister for Education and Another—Nos. T3 and T7 of 1991—Kennedy C., Reeves/McKinnon—28/1/92—Education ..... 924

Application to adjourn application to vary award *re* salary rate, provision for position of associate director (academic) in Government Technical and Further Education Institutions—Parties argued that due to delays in advertising and filling of position, withdrawal of appointed persons and incomplete nature of new agreed career structure and as neither party were able to put forward work value cases the hearing ought to be postponed 6 months or more—G.S.T.T. found due to inability to proceed with work value case discontinued the application, cancelled interim orders without precluding subsequent applications and commented similarly on the part matter of the interim orders—Order Accordingly—Hon. Minister for Education *v.* S.S.T.U.—No. T4(2) of 1990—Kennedy C./Reeves/McKinnon—9/6/92—Education ..... 1427

Application for interpretation of an award *re* at what point in time does an employee become entitled to payment for lost time due to inclement weather—Applicant employer claimed that credited hours should be reduced from when employees stopped work—Respondent Union argued that it should be reduced from the time that employees physically leave the site—Commission analysed clause, found that entitlement to payment was for ordinary time lost through inclement weather when an employee had ceased work whether or not the employee remains or leaves the site—Declared Accordingly—F.C.C. and Another *v.* B.T.A.—No. 1326 of 1991—Beech C.—11/5/92—Construction ..... 1358

Application for an order to effectively vary award in order that an abattoir might continue to operate and provide a source of employment—Commission found as enterprise agreement complied with the State Wage Principles and commented on the avenues for future applications—Granted—M.I.E.U. *v.* Derby Meat Processing Company Ltd—No. 598 of 1992—Fielding C.—25/5/92—Meat ..... 1344

WORK VALUE—

[3]Applications to vary Awards *re* Second S.E.P. increase, Broadbanding, First Minimum Rates Adjustment and 3% Allowance Adjustment as a Special Case—Respondent argued no wage increase other than S.E.P. was justified without a proper work value exercise—Respondent further argued claims to adjust shift loadings and wages of juniors were comparative conditions justice arguments and proscribed by the Principles—Commission found Respondents' arguments similar to original matter where they were not accepted and that SEP and MRA claims should be granted—Commission refused claim to *re* align junior wages under the Inequities Principle, found penalty rate claims were outside SEP and no special circumstances to grant retrospectivity—In Supplementary Reasons Commission gave reasons for issuance and addressed matters of payment of wages, accrual of annual leave, Part-time and Training Leave—Granted in Part—T.W.U. *v.* Central Districts Bakery and Others—No. 1037 and 1038 of 1990(R2)—Halliwell S.C., Salmon C., Gregor C.—14/11/91 and 21/1/92—Bakery ..... 223

Applications to vary awards by consent *re* wages pursuant to "special case" provisions—Commission initially determined that the "special case" consideration was warranted and that an interim salary increase was justified on the changes and work value grounds identified (71 WAIG 2538)—Commission subsequently found that the efficacy of the package remained intact; that progress was made in the implementation of changes; and that there was no digression from the original parameters and format of the agreement—Commission further made an order to divide applications which would allow for further stages of the package to be considered separately at a later date—Ordered Accordingly—W.A. Police Union of Workers *v.* Hon. Minister for Police—No. P10/1 of 1991 and No. 1294/1 of 1991—Kennedy C.—17/1/92—Emergency Services ..... 257

Conference referred *re* claim for field allowance—Applicant Union claimed that extreme conditions under which work was to be performed in the field and the change in the method of work justified an allowance—Respondent argued that there had not been a significant net addition to work value before any allowance could be paid under the allowances Principle—Commission found on evidence and from inspections that the work which was subject to application was different in circumstances to that which was compensated for in the award and thus in line with the Principles—Granted—A.M.W.S.U. *v.* Newcrest Mining Limited—No. CR728 of 1991—Gregor C.—12/3/92—Mining ..... 875

CUMULATIVE DIGEST—*continued*

Page

WORK VALUE—*continued*

Application to replace an order *re* conditions of employment to include new wage rates and classification as a special case, by consent—Parties argued that although classification structure and titles had not altered the skills duties and responsibilities had changed so radically as to enable new classifications to be identified and sought the same operative date from which the second S.E.P. adjustment was approved—Commission found strict test of Work Value Principle had been met and warranted a new of pay rate rather than an allowance—Commission further found increase to security control officer allowance was appropriate and addressed wages structure—Granted—F.M.W.U. *v.* Wormald Security—No. 184 of 1990 (R2)B—George C.—9/4/92—Security ..... 1100

Application to vary award *re* new cross-trade classification and pay rate—Parties sought a determination of the dispute regarding the percentage pay relationship between the new classification and a base tradesman—Commission found that the matter was primarily a work value case, which involved value judgement based on comparative criteria—Commission reviewed authorities, award comparison, changing emphasis on negotiations and found no case for the percentage wage relationship as claimed on the grounds of employee expectations—Ordered Accordingly—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 1502 of 1990—Salmon C.—20/3/92—Electricity Supply ..... 1128

Application to vary award *re* wages, related allowances and overtime by 4.4% as a special case, by consent—Applicant argued January 1992 State Wage Case made it clear that the matter could not proceed under the Enterprise Bargaining Principle and the relevant principles were Special Case and Work Value Principles—Commission reviewed changes in work methods and technology, the significant reduction in costs and found the application was permissible under the principles—However, Commission refused claim with respect to Meal Allowances as the Principles on existing allowances did not allow increases on the basis proposed—Granted in Part—A.W.U. and Others *v.* CSR Limited—No. 1729 of 1991—George C.—10/4/92—Sugar Refining ..... 1132

Conference referred *re* claim for an all-purpose allowance—Applicant union claimed that changes that had occurred in the system of work of employees and the changing technology warranted the payment of an allowance—Respondent argued that the carpenter locksmith worked in a narrower field and were less trained than a tradesperson locksmith—Commission found on evidence that although the nature of the work was changing the Applicant was not able to show under strict test of the Wage Fixing Principles that the application should be granted—Dismissed—C.M.E.U. *v.* B.M.A.—No. CR490 of 1991—Beech C.—12/3/92—Building ..... 878

Conference referred *re* dispute over renumeration for various professional groups in Public Teaching Hospitals—Applicant Employers submitted a schedule of proposed salary classifications employed by them in administrative and supervisory role—Respondent claimed that the classifications awarded should be at a higher levels on the respective scales—The Public Service Arbitrator extensively reviewed the classifications structure and strongly supported the creation of personal classifications as an appropriate recognition for those officers who earn international accolades—The PSA found on evidence that the new Level 11 classification was not warranted for any of the Medical Laboratory Technologist positions and determined specific operative dates which were calculated in accordance with the dictates of S.26(i)(a) of the Industrial Relations Act—In Supplementary Reasons PSA addressed broadbanded salary scales—Granted in Part—The Board of Management, RPH and Others *v.* H.S.O.A.—No. PSA CR57 of 1990—Negus C.—28/11/91—Health ..... 614, 1187